A Two Tiered and Categorical Approach to the Nondelegation Doctrine

by Michael B. Rappaport[1]

Introduction

In this essay, I offer a new approach to the strict nondelegation doctrine – one rooted in the original meaning of the Constitution. Under this new approach, the Constitution adopts a two tiered nondelegation doctrine. In some areas, the Constitution allows the delegation of significant policymaking discretion to the executive while in other areas it imposes a strict categorical prohibition on such delegations. Significantly, this approach would provide a relatively determinate way of deciding whether Congress has delegated legislative power to the executive.

By contrast, the leading existing approach to a strict nondelegation doctrine suffers from a serious problem of indeterminacy. The existing approach draws a distinction between deciding "important subjects" and "matters of less interest." Congress must decide the important subjects on its own, but is allowed to assign to the executive decisions as to matters of less interest, such

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as filling in the details of a statutory scheme.[2] Unfortunately, this distinction is pretty indeterminate.[3]

My approach would replace this test of delegation with a two-step inquiry. The first step classifies governmental activities into one of two categories – either a lenient tier or a strict tier. In my view, the Constitution allows for significant delegation of policymaking discretion in a variety of traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property. In these areas, the Constitution imposes a lenient test as to delegation – either one that places no limits or weaker limits on the delegation of policymaking discretion. By contrast, in other areas – which can be roughly summarized as rules that regulate citizens as to their private rights in the domestic sphere – the Constitution imposes a strict prohibition on such delegation. Thus, it is only to this second class of activities that the Constitution imposes a strict restriction on the delegation of policymaking discretion.

If one concludes that an activity involves matters covered by the strict tier, then one moves to the second step of the inquiry by applying the strict prohibition on delegation. Under this prohibition, the executive is categorically forbidden from exercising any policymaking discretion. A law confers policymaking discretion when it allows the executive to make a decision based on what the agency considers good policy. By contrast, a law does not confer such discretion when it does not authorize an agency to make a decision based on policy. Among the tasks that do not involve policymaking discretion are the interpretation of the law, the making of a factual determination, and the application of the law to the facts.

The definitions of these tasks that do not involve policymaking discretion are important. The executive interprets the law when it applies the traditional statutory interpretive methods to determine the meaning of the law – methods that do not involve policymaking. The executive makes a factual determination when it attempts to ascertain a fact without reference to policy considerations. Thus, there is a fundamental distinction between policymaking on the one hand and law interpretation, fact finding, and applying the law to the facts on the other.

The test for whether an executive is provided any policymaking discretion is more determinate than the test that distinguishes between important subjects and matters of less interest. Under my proposed test for the strict tier, the main questions are whether the action involves determining the content of a legal directive and whether the action involves a factual determination. While these issues can raise questions at the margin, they are similar to traditional legal issues and are more determinate than the important subjects test, which requires judges to determine whether a decision involves a sufficiently important subject.

This essay, it should be noted, is more of an exploration of a position than a fully developed argument in favor it. A fully developed argument would require far more space than I

[2] Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825); Gary Lawson, Delegation and Original Meaning, 88 U. Va. L. Rev. 327 (2002) [hereinafter Lawson, Delegation].

[3] To be clear, I do not reject the important subjects approach because it is indeterminate. An originalist must take the original meaning as he finds it. See generally Steven G. Calabresi & Gary Lawson, The Rule of Law as the Law of Law, 90 N. Dame L. Rev. 483 (2014). Rather, I believe that the categorical approach is a superior account of the original meaning.

have at my disposal here and more research into the relevant issues. Yet, I believe the approach here is interesting enough to justify this preliminary exploration. This exploration, if promising, may hopefully serve as a guide to further work in the area.

While this essay explores the Constitution's original meaning, it does not attempt to derive its conclusion by fully canvassing the originalist source materials. Instead, it is based largely on existing originalist scholarship on the delegation prohibition, including my own prior work on the subject, that I believe offers a significant view of the original meaning.[4]

Nor in this essay do I attempt to argue that this approach would be normatively desirable. But I do believe that the delegation prohibition would represent a significant restriction on delegation to the executive and therefore would serve the goals that the nondelegation doctrine is normally thought to serve. If one believes the nondelegation doctrine is normatively desirable, then one should also believe that this approach is normatively desirable.

Since my approach makes many new claims about the delegation prohibition in a short space, it may be helpful to the reader to emphasize some of the claims that I make.

1. I argue for a two tiered approach to the nondelegation doctrine, with significant delegations of policymaking discretion allowed in many areas, but not for laws that involve the coercion of private rights in the domestic sphere. This two tiered approach imposes a strict prohibition on delegation as to a core of private rights while also being consistent with traditional government practice.

2. The approach argues for a categorical prohibition on delegation as to matters covered by the strict tier. It rejects the indeterminate important subjects test.

3. The categorical prohibition defines the delegation of legislative power as the conferral of policymaking discretion. This prohibition does not extend to genuine law interpretation, fact finding, or law application.

4. The categorical approach argues that law interpretation is a broader category than is often thought to be the case. While statutes will often present close questions, traditional methods of law interpretation that do not employ policymaking discretion involve the attempt to determine Congress's directions and therefore do not delegate legislative power.

The essay proceeds as follows. Part I of the essay describes the two tiered approach to the nondelegation doctrine. It explains why there are two tiers, how those tiers derive from the constitutional text, and how one assigns subjects to the different tiers. Part II explores the strict tier of the nondelegation doctrine. It explains how that tier imposes a categorical test of

[4] Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York, 76 Tul. L. Rev. 265 (2001); Lawson, Delegation, supra; Phillip Hamburger, Is Administrative Law Unlawful? (2014); Ilan Wurman, Nondelegation at the Founding, 130 Yale L. J (2020) (forthcoming); Aaron Gordon, Nondelegation, 12 N.Y.U J. L. & Lib. 718 (2020); see also Caleb Nelson, Adjudication in the Political Branches, 107 Colum. L. Rev. 559 (2007).

delegation by distinguishing between law interpretation and fact-finding on the one hand from policymaking on the other. It then applies this test to various Supreme Court cases. Part III then addresses an important matter that has a significant effect on the categorial test – the judicial reviewability of executive determinations.

I. A Two Tiered Approach to the Nondelegation Doctrine

There are two basic approaches to the constitutional issue of delegation. Under the strict approach, Congress must fully set the policy in the statute and the executive may only enforce that policy. Under the lenient approach, Congress either sets the policy in the statute or confers significant authority on the executive to set policy. There is no requirement that Congress make all of the policy decisions.[5]

Under the strict approach, legislative power and executive power have narrow meanings. Legislative power is the power to determine the policy that governs an area. Executive power is the power to implement the policy established by the legislature in the statute. If the legislature does not fully establish the policy in a statute, then it will not be exercising the full legislative power, but will have unconstitutionally sought to transfer that legislative power to the executive. Correspondingly, if the executive has been given authority to make a policy determination, it will not be exercising executive power, because that power does not allow it to make policy determinations. The executive will be exercising legislative power.

Under the lenient approach, legislative and executive power have broader meanings. The legislative power is the power to fully set the policy or to set some of the policy and to confer significant policymaking authority on the executive. The executive power is the power to implement a statute either by following the legislature's directions without exercising any policy discretion or by following the policy in the statute and by making the policy decisions that the statute authorizes the executive to make.[6]

Both of these interpretations of legislative and executive power are plausible. Thus, the constitutional language on this issue appears to be ambiguous. While one might see the choice between these two interpretations as a global one – with the Constitution adopting the narrow or

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[5] My formulation here of the lenient approach is intentionally vague – "confers *significant authority* on the executive to set policy" – so as to cover different versions of the lenient approach. The lenient approach includes both a version that would allow unlimited delegation and a version that would allow substantial but not unlimited delegation of policymaking authority. I do not attempt here to answer which of the different versions of the lenient approach is correctly applied to the lenient tier.

By contrast, my formulation here of the strict approach is more restrictive. My formulation only covers the categorical prohibition on delegation. Thus, it excludes the important subjects approach of Lawson which allows Congress to delegate policymaking details to the executive. See Lawson, Delegation, supra, at 489. For those who adopt the important subjects approach, it is easy to reformulate the strict approach in those terms.

[6] The meaning of legislative and executive power under the lenient approach will turn on the version of the lenient approach that is adopted. These terms will have one meaning if the lenient approach allows the legislature to confer unlimited discretion on the executive. By contrast, these terms will have a different meaning if the lenient approach merely allows the legislature to confer a limited amount of policymaking discretion on the executive. As noted above, see supra note 3, I do not address here how much policymaking discretion the lenient approach allows Congress to confer on the executive.

broad interpretation in all areas – this is not true. In my view, the correct approach is that the narrow meaning applies in some areas whereas the broad meaning applies in others. Under that interpretation, there is a two tiered nondelegation doctrine, with a strict prohibition on delegation in some areas and a lenient one in other areas.

This two tiered approach can be derived from the language of the Constitution. While the ordinary language meaning of legislative and executive power might include both the narrow and broad meanings, one might understand the legal meaning of the terms as reflecting the legal practice at the time of the Constitution. If it turned out that, under the late 18th century Anglo-American legal regime, the legislature conferred significant policymaking discretion on the executive in certain areas and did not do so in other areas, then the correct meaning of legislative and executive power might be thought to reflect this pattern.[7] The meaning of legislative and executive power might be based on how the legal institutions to which they referred exercised their powers. Thus, this pattern – allowing the executive to be given significant policymaking discretion in some areas but not in others – might be incorporated into the Constitution.

This pattern of discretion might be reinforced by considerations of structure and purpose, such as the values that appear to have motivated the relevant provisions that govern legislative and executive power.[8] If the areas where policymaking discretion was allowed to the executive were generally supported by structure and purpose, that might lend greater confidence to the view that the Constitution adopted this pattern. Where the historical evidence is unclear or mixed, one might also resolve this uncertainty by reference to structure and purpose.

In an earlier article, I developed this approach and argued that the lenient tier of the nondelegation doctrine applied to appropriation laws.[9] I also argued that the lenient tier might extend to various areas, including foreign and military affairs, foreign commerce, the management of government property, internal administration of government agencies and the courts, and prosecutorial discretion.

To illustrate the nature of the argument, consider the case for permitting discretion to be conferred under appropriation laws. It turns out that there is a long history of the executive under English and American appropriation laws receiving broad discretion to determine the extent and the direction of spending.[10] Appropriation laws were often lump sum and permissive.[11]

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[7] John O. McGinnis & Michael B. Rappaport, The Constitution and the Language of the Law, 59 Wm. & Mary L. Rev. 1321, 1342 (2018) [hereinafter McGinnis & Rappaport, Language of the Law].

[8] John O. McGinnis and Michael B. Rappaport, The Power of Interpretation: Minimizing the Construction Zone, Notre Dame L. Rev. (forthcoming 2020).

[9] Rappaport, supra, at 303-44.

[10] Rappaport, supra, at 320-40.

[11] Lump sum appropriation laws authorize the executive to spend a sum on various purposes at its discretion. Lump sum appropriations are contrasted with itemized appropriations, which require the executive to spend a sum on a specific purpose. Permissive appropriation laws authorize the executive to spend up to a specific amount, but allow the executive to spend a lower amount at its discretion. Permissive appropriations are to be contrasted with mandatory appropriations, which require the executive to spend the entire appropriated amount. Rappaport, supra, at 317-18.

To take just a single example, the first appropriation law for the entire federal government under the United States Constitution divided the authorized spending into four broad categories and limited the executive merely to not exceeding the amount in each category.[12]

Moreover, structure and purpose support allowing this discretion. It would have been extremely difficult for Congress to specify in detail, each year, how the mass of federal spending was supposed to be spent. Moreover, it was less necessary for Congress to legislate specifically in this area, because most appropriation laws were for one year. Thus, if the President were to abuse his discretion, the legislature could alter the appropriation laws to fix the problem in the next year.[13]

Another structural reason for placing appropriation laws under the lenient tier involves federalism. One reason for the strict nondelegation doctrine is that it protects federalism. If federal rules can only be enacted through bicameralism and presentment, then they will be harder to enact and fewer of them will displace state law. But this protection of state law is less necessary in areas where the states lack authority or are not well equipped to act.[14] Thus, in areas such as federal appropriation laws, where the states lack authority, structure supports applying the lenient tier.

A second area where the lenient tier applies is foreign and military affairs. In these areas, the executive historically was allowed more discretion than he enjoyed under ordinary domestic laws.[15] In part, this was due to traditional beliefs about the advantages of executive action in these areas. While some of this discretion may have been the result of the President being able to exercise power without statutory authorization, not all of it can be explained on that basis and therefore represents an important historical basis for treating such matters under the lenient tier.[16] The Constitution's federal structure also supports placing foreign and military affairs in the lenient tier, because states are normally thought to have limited authority and ability as to foreign and military affairs.

A third area where the lenient tier applies is legislation in the territories. Both before and after the United States Constitution was enacted, Congress delegated policymaking discretion to territorial governments. This structure represented a partial continuation of the structure of American colonial governments, which were largely operated by the King and local legislatures rather than Parliament.[17] Given the great value that the American colonists placed on their colonial legislatures, it would have been odd for them to have outlawed arrangements that permitted significant local decisionmaking. These delegations also gain support from other structural arguments. Treating legislation in the territories under the lenient tier derives support from both the structure of federalism, because the states do not have authority to legislate in the territories, and from the treatment of foreign affairs (and foreign commerce), because the

[12] Act of Sept. 29, 1789, ch. 23, sec. 1, 1 Stat. 95, 95 (expired).
[13] Rappaport, supra, at 343.
[14] Rappaport, supra, at 344.
[15] Rappaport, supra, at 353.
[16] See, e.g., Gordon, supra, at 782-86.
[17] Robert Middlekauff, The Glorious Cause: The American Revolution, 1763-1789 (2005).

territories in some ways were similar to foreign nations, as they were outside the core of the United States.[18]

My previous article did not attempt to make a comprehensive list of the areas where the lenient tier might apply. The most important addition that I would make to areas covered by the lenient tier involves the distinction between private and public rights. While the strict tier applies to the regulation of private rights, the lenient tier extends to public rights.[19]

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[18] There are other areas that fall under the lenient tier, but which I do not develop here. One area involves rules that govern the internal administration of the executive and the courts. There is a significant amount of evidence that agencies and courts exercised discretion in this area. Rappaport, supra, at 354-55. And there is substantial support based on structure and purpose for placing it under the lenient tier. For example, allowing delegation of policymaking discretion as to the internal administration of federal agencies and courts is consistent with the constitutional structure of federalism, since states are not equipped to pass laws in these areas. See also Gordon, supra, at 782.

Another area covered by the lenient tier involves foreign commerce, especially laws regulating actions taken outside the United States. See Nelson, supra, at 580 ("[F]ederal statutes permitting the importation of goods from abroad were thought to create mere privileges rather than core private rights; so long as property remained outside the United States, no one had a vested right to import it"); Rappaport, supra, at 353-54; Hamburger, supra, at 88. This exception is also supported by the fact that states were not thought to be well equipped to act as to foreign commerce and the fact that such regulations generally applied to foreigners outside the United States.

Yet another area covered by the lenient tier involves the treatment of government property. Access to such property is not a right, but falls under the disposal of government resources. See Nelson, supra, at 577; Aditya Bamzai, Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law, 133 Harv. L. Rev. 164, 178 (2019); Rappaport, supra, at 354; Gary Lawson, Who Legislates?, 1995 Pub. Int. L. Rev. 147, 154-55.

[19] It is sometimes argued that the English practice is not relevant to interpreting the Constitution, because the Constitution adopted a different system than the English one. Cf. Rappaport, supra at 322, n. 178 (discussing view of Justice Thomas). I disagree with such a wholesale rejection of English practice. The Constitution adopted many features of the English system. And even when the Framers chose to depart from the English system, they often used English concepts to describe how they were departing from the English system. See Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L. J. 231, 252-262 (2001) (Framers used the term executive power as it was understood in 18th Century England and Europe, even though they transferred some of these executive powers to the Congress).

One area where I believe English law remained relevant to the United States Constitution, despite differences between the two systems, involves the delegation of policymaking discretion. In my view, when deciding whether Congress can delegate discretion under the Constitution, it is relevant to consider English law (as well as the law in the American colonies and the independent states). Such English practice is relevant to executive discretion as to spending, regulation of foreign commerce, and foreign and military affairs, to mention just a few areas. See supra at XX.

It is sometimes argued that the constitutional text rejects the English practice. For example, while the King of England may have enjoyed some independent authority to regulate foreign commerce (without receiving a delegation of statutory authority from Parliament), the Constitution transferred that regulatory authority to Congress. And therefore, it is argued, the President cannot be delegated discretion as to foreign commerce. But cf supra note XX (arguing that the regulation of foreign commerce falls under the lenient tier). Similar arguments are made regarding discretion as to spending and as to foreign and military affairs.

But these arguments do not necessarily hold. That the Constitution transferred to Congress the King's power to regulate foreign commerce *based on his own authority* does not necessarily mean that it eliminated the President's ability to *receive a delegation of policymaking discretion* as to foreign commerce. The traditional discretion of the executive to exercise discretion in this area might have been continued under the Constitution. Put differently, transferring the power to regulate foreign commerce to the legislature did not necessarily cause the Constitution to adopt the narrow understanding of executive and legislative power as to foreign commerce.

To determine whether the narrow or broad interpretation was adopted, one would look to both structure and purpose arguments as well as early practice under the Constitution. Structure and purpose might be thought to

The distinction between private and public rights was a significant one in early American law. In an important article, Caleb Nelson uses this distinction to argue for a two tiered approach to the judicial power.[20] In Nelson's view, while public rights can be adjudicated finally by administrative agencies, private rights can only be adjudicated by independent courts. In my view, the same structure applies to the exercise of policymaking discretion. While the legislature can delegate significant policymaking discretion to the executive for public rights, it cannot do so for private rights.

In the early years of the republic, private rights were understood to include the right of personal security (life, body, and reputation), the right of personal liberty (freedom from imprisonment), and the right of private property (free use, enjoyment, and disposal of one's acquisitions).[21] By contrast, public rights were legal interests that belonged to the public as a whole. These public rights included:

> (1) proprietary rights held by government on behalf of the people, such as the title to public lands or the ownership of funds in the public treasury; (2) servitudes that every member of the body politic could use but that the law treated as being collectively held, such as rights to sail on public waters or to use public roads; and (3) less tangible rights to compliance with the laws established by public authority "for the government and tranquillity of the whole." [22]

Two important matters that fall under public rights are government spending programs and government employment.[23]

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support executive discretion as to foreign commerce if it was generally believed that it was especially difficult for the legislature to govern the area of foreign commerce without conferring discretion on the executive. See also supra XX (arguing that discretion as to foreign commerce is supported by federalism since foreign commerce is not a core function of states). Early historical practice, through congressional enactments delegating discretion as to foreign commerce, might also point in the same direction. See infra XX. If structure and purpose and early historical practice point in the same direction, that supplies a strong argument that Congress can delegate policymaking discretion to the executive as to foreign commerce, even though the Constitution gave the independent power to regulate foreign commerce solely to the Congress.

[20] Nelson, supra, at 561-90.

[21] Nelson describes private rights as follows:

> As elaborated by William Blackstone, whose Commentaries grounded the legal education of Founding-era Americans and remained enormously important throughout the nineteenth century, the foundational documents of British law recognized three major groupings of core private rights: (1) the "right of personal security," which encompassed "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation"; (2) the "right of personal liberty," which entailed freedom from "imprisonment or restraint, unless by due course of law"; and (3) the "right of private property," which involved "the free use, enjoyment, and disposal of all [one's] acquisitions, without any control or diminution, save only by the laws of the land."

Nelson, supra, at 567 (footnotes omitted).

[22] See Nelson, supra, at 567.

[23] See Nelson, supra, at 571, 611-12.

Nelson's judicial power argument has strong similarities to the two tier argument that I make about the nondelegation doctrine. He relies on a historical pattern of behavior near the time of the Constitution's enactment that assigned private rights to courts but public rights to executive agencies.

He also provides a strong argument based on structure and purpose. Private rights were thought to be the most important rights that people enjoyed. The protection of these Lockean or natural rights was the primary reason why government was established.[24] These rights belonged to the individual and therefore the government was supposed to use an impartial judiciary to protect them. By contrast, public rights involved the interests of the overall public. The government was thought to have special responsibilities for protecting and managing these interests. The government could therefore decide to employ either the political branches or the judiciary as it judged best.[25]

This two tiered approach to judicial power has obvious similarities with the two tiered approach to prohibiting the delegation of legislative power – similarities that suggest that the distinction between private and public rights might also extend to the latter issue. First, the two approaches involve directly analogous issues: the delegation of judicial power to the executive and the delegation of legislative power to the executive. Second, these two approaches both extend a strict separation of powers to a subset of cases, with the two tiered approach to judicial power requiring private rights to be adjudicated by Article III judges and the two tiered nondelegation doctrine requiring matters within the strict tier to a strong separation of powers that only permits Congress to make policy.

Structure and purpose arguments also support extending the distinction between private and public rights to the two tiered approach to delegation of legislative power. Since private rights are more important to individuals, these rights justify the greater protections that a strict delegation prohibition imposes. These restrictions ensure that policy decisions are made by democratically accountable legislatures and are subjected to a bicameral process that provides additional protection. By contrast, public rights were not thought to require as strong protection as private rights. Moreover, since private rights do not impose as strong management responsibilities on government as public rights do, the greater restrictions on legislating regulations of private rights are not as burdensome.[26]

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[24] See Nelson, supra, at 622.

[25] Nelson's article is clearer about the requirement of judicial decision as to facts than as to law. See Nelson, supra, at 563. In my view, there is for the most part a single approach for judicial resolution of facts and law questions as to private rights. If the courts are required to decide fact questions *de novo*, it is not at all clear why they should not also be required to decide law questions *de novo*.

One possible response to my approach is that legal questions can be given to agencies as a delegation of legislative power but factual questions cannot. But, for my purposes, this answer begs the question. If one believed that there was a lenient nondelegation doctrine, then one might draw a distinction between fact-finding and law interpretation as to what issues had to be decided by courts. But if one did not have strong evidence that the nondelegation doctrine was lenient as to private rights, then it is not clear why one would draw that distinction. Instead, one would treat the two issues that courts traditionally decided – interpretation of law and findings of fact – in the same manner.

[26] Early interpretations of the Constitution also support the two tiered approach and applying the strict tier to private rights. In criticizing the Aliens Act in 1800, James Madison wrote that the delegation prohibition applied "*especially* [to] a law which personal liberty is invaded, property deprived of its value to the owner, and life itself

While these purpose and structure arguments are suggestive, correctly placing public rights into the lenient tier ultimately depends on the pattern of behavior at the time of the Constitution's enactment. If such rights were regularly subjected to rules involving significant policymaking discretion by the executive, then that would be strong evidence, when combined with the purpose and structure arguments, for concluding that public rights are subject to the lenient tier. Although I do not review the evidence here, there is significant evidence that public rights were subject to the lenient tier.[27]

For my purposes here, it is neither necessary nor possible to attempt to resolve these questions. Instead, I will assume that the strict delegation prohibition applies only to the regulation of private rights in the domestic sphere. By contrast, the lenient tier covers a variety of areas, including public rights, such as entitlement programs, and the other areas I mention here, including appropriation laws, foreign and military affairs, and territorial legislation.

The two tiered approach is important for at least two reasons. First, it suggests that the alleged counterexamples to the existence of a strict delegation prohibition may not be real counterexamples. If these counterexamples come from the lenient tier, they would not constitute counterexamples for the two tiered view. Kenneth Culp Davis as well as Nicholas Bagley and Julian Mortenson have argued against the strict nondelegation doctrine on the ground that early congressional statutes delegated significant discretion.[28] But my earlier article as well as other works have argued that many of these delegations can be justified as falling within the lenient tier of the delegation prohibition.[29]

Second, the two tiered approach is also important because it suggests that a categorical delegation prohibition may not be as impractical or burdensome as such a strict prohibition is often thought to be. Most, if not all, areas where it is especially difficult for the executive to operate without policymaking discretion fall within the lenient tier.[30] By contrast, many of the

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indirectly exposed to danger." 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 559–60 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) (James Madison) (emphasis added).

[27] For early examples under the delegation, see Act of Sept. 29, 1789, 1 Stat. 95 (delegating policymaking authority concerning military pensions); Act of Apr. 30, 1790, 1 Stat. 119, 121 (delegating policymaking authority concerning military disability benefits); Act of July 22, 1790, 1 Stat. 137. (delegating policymaking authority concerning trade with the Indians, which falls under the public rights category of foreign commerce/foreign affairs); Act of Aug. 4, 1790, 1 Stat. 138, 139 (authorizing the President to borrow $12 million to pay off foreign debt, leaving him discretion as to prioritization among lenders); Act of Aug. 12, 1790, 1 Stat. 186 (authorizing commission to exercise discretion to purchase domestic debt back from the public); see also Act of Apr. 10, 1790, 1 Stat. 109, 110 (delegating discretion to the executive as to the granting of patents). While Justice Thomas treats patents as public rights under the category of franchises, Justice Gorsuch maintains they are private rights. Compare Oil States Energy Servs. v. Greene's Energy Grp., 138 S. Ct. 1365, 1373–75 (2018), with id. at 1382–84 (Gorsuch, J., dissenting).

[28] See generally Kenneth Culp Davis, Discretionary Justice (5th ed. 1976); Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. (forthcoming 2021).

[29] See Rappaport, supra, at 310 (arguing that six early delegations cited by Kenneth Culp Davis were largely explained away by the two tiered approach); see Rogers, supra, at XX.

[30] Many of the areas within the lenient tier involve the management of government resources, such as the operation of government agencies and management of government property. Making the large number of managerial decisions in this area requires far more discretion than legislating regulations that govern private rights. See Friedrich A. Hayek, Law, Legislation & Liberty. Volume I: Rules and Order (1973).

areas where it is easiest to operate without policymaking discretion are covered by the strict tier.[31]

II. The Strict Tier of the Nondelegation Doctrine: A Categorical Prohibition

Having discussed the two tiered character of the nondelegation doctrine, I now turn to the crucial strict tier. Under this tier, there is a categorical prohibition on the delegation of legislative power – understood as policymaking discretion – to the executive. Thus, any statute involving matters in this tier that confers policymaking discretion on the executive will be unconstitutional.

The analysis here relies on a distinction between three different types of activities: legal interpretations, factual determinations, and policy determinations. When the executive or judiciary interprets the law based on traditional statutory interpretive methods, its decision is determined entirely by the meaning of the statute. Similarly, when the executive or judiciary makes a factual determination, its decision is based entirely on the facts of the matter. In both cases, the executive or judiciary's decision is uniquely determined by the law or the facts and therefore does not involve policymaking discretion.[32] By contrast, when the executive or judiciary takes an action pursuant to statutory authority that is not uniquely determined by the law or the facts, it is given discretion to make a choice based on policymaking.

This Part is divided into several sections. First, I discuss the textual and historical basis for the categorical approach. Second, I explore the distinction between legal interpretation and policymaking, illustrating it with some examples and then applying it to some important Supreme Court cases. I then explore the distinction between fact finding and policymaking.

A. The Interpretive Support for the Categorical Approach

The categorical approach to the nondelegation doctrine has significant support in the Constitution's original meaning. This support derives from the text, history, structure, purpose, and early interpretations. In arguing for the categorical approach, I am largely comparing it to the leading alternative approach to a strong nondelegation doctrine – the important subjects approach. Overall, the support for the categorical approach is stronger than that for the important subjects approach.

It should be acknowledged at the outset that there is no explicit statement of the entirety of the categorical standard. But there is substantial evidence for different parts of the approach from various sources. First, the categorical prohibition represents an extremely plausible interpretation of the legislative power for a strict approach that attempts to prohibit the

[31] While it is not often presented this way, the two tiered theory may be the leading view among academic defenders of a strict nondelegation doctrine. Different versions of the two tiered theory appear to be accepted by various advocates of a strict nondelegation doctrine. See Hamburger, supra, at XX; David Schoenbrod, Power Without Responsibility: How Congress Abuses the People through Delegation 186 (1993); Ron Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 186 (2017); Rogers, supra, at XX; see also Bamzai, supra, at 178; Wurman, supra, at 39.

[32] For the same reasons, when the executive applies the law to the facts, its decision does not involve policymaking discretion.

delegation of such power to the executive. Legislatures exercise policymaking discretion to decide what laws to enact for the polity. The categorical approach prohibits the conferral of such policymaking discretion on the executive.

By contrast, the interpretation of statutes based on traditional interpretive rules would not have been thought of as exclusive legislative power, but instead as a traditional judicial and executive power. This activity is not based on policy decisions but instead involves determining the meaning of the statute. Courts and executives had long exercised this power at the time of the Constitution's enactment.

A similar argument applies to fact finding. The finding of facts is not an exclusive activity of the legislature, but a traditional activity of courts and executives. Once again, this activity is not based on policy, but instead involves determining what the facts are. Courts and executives had long exercised this power when the Constitution was enacted.

This argument as to fact finding also derives support from the early case of the *Cargo of the Brig Aurora v. United States*.[33] In that case, Congress had passed a law restricting trade with Great Britain and France, but had provided that the trade prohibition should not continue in effect if the President declared by proclamation that the country had ceased to violate the neutral commerce of the United States. In response to a constitutional challenge that the statute had delegated legislative power, the Supreme Court responded in a single sentence that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally as their judgment should direct."[34] In other words, since the statute merely asked the President to make a factual finding as to whether a country was respecting the U.S.'s neutral commerce, there was no delegation problem. Thus, the Court did not view executive fact-finding as delegation of legislative power.

This understanding of exclusive legislative power also fits well with the purpose and structure of the relevant constitutional provisions. The purpose of having a strict approach to the delegation of legislative power is to protect against the conferral of lawmaking discretion to the executive. It makes sense to apply this protection to policymaking discretion, since the executive can use such discretion to determine the content of the rules. By contrast, in the case of legal interpretation and fact finding, the executive is limited by an objective standard – determining meaning or finding facts. In these cases, the executive does not enjoy discretion to determine the content of the law and therefore it is much less necessary for the legislature to make the decision.

Finally, this standard for the delegation of legislative power is much more judicially manageable than the important subjects standard. One of the most serious charges against a strict nondelegation doctrine is that it does not provide a judicially manageable test.[35] While judicial manageability is not a requirement of legal provisions, it is a legitimate interpretive rule to prefer judicially manageable interpretations on the ground that the constitutional enactors would have intended judicially enforced provisions to be judicially manageable.

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[33] 11 U.S. (7 Cranch) 382 (1813).
[34] Id. at 388.
[35] See Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, concurring).

Under the important subjects standard, interpreters face the recurring problem of determining whether the legislature answered the important questions.[36] Answering this question is problematic, because there is no clear definition of what is an important question and each statute will require addressing it in a new context. By contrast, reading the nondelegation doctrine as a bar against conferring policymaking greatly reduces this uncertainty. One mainly asks whether the authority conferred on the executive is the power to interpret the statute or to find facts. The courts regularly answer these type of questions when interpreting the Constitution.

The categorical approach to the nondelegation doctrine also draws support from James Madison. In 1800, Madison wrote during the Alien and Sedition Act controversy that a law might confer powers on the executive that were of a legislative nature and therefore would be unconstitutional.[37] Madison explained how the Congress could avoid an unconstitutional delegation:

> *Details to a certain degree, are essential to the nature and character of a law . . .*
>
> To determine, then, whether the appropriate powers of the distinct departments are united by the act authorising the executive to remove aliens, it must be enquired whether it contains such *details, definitions, and rules, as appertain to the true character of a law; especially a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger*.[38]

Madison's statement shows strong support for the categorical approach over the important subjects approach. To begin with, he makes clear that details are needed in laws. Madison's account indicates that Congress is not entitled simply to delegate details to be filled up by the executive. Instead, details will often be "essential to the nature and character of a law." What is more, Madison states that "details, definitions, and rules" are "especially" needed when the law regulates private rights.

It is true that Madison does not state that a law must explicitly address every detail. But that does not mean that Madison believed that laws could leave to the executive policymaking discretion to address details. Instead, Madison's statement is best understood as suggesting that ordinary law interpretation will often supply answers to details that the law does not specifically address. While some details need to be mentioned, others do not have to be addressed because "the details, definitions, and rules" supplied by the law allow interpreters using the traditional interpretive rules to answer those matters without making policy.

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[36] The indeterminate character of the important subjects test is acknowledged by one of its leading defenders:

> we end up with a test for delegations that says, in essence, Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them. As constitutional tests go, this one certainly sounds pretty lame – not to mention absurdly self referential. It is no surprise that a rule-of-law devotee like Justice Scalia flees from it as a vampire flees garlic.

Lawson, Delegation, supra, at 361.

[37] 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 559–60 (Jonathan Elliot ed., Washington, D.C., 2d ed. 1836) (James Madison) (emphasis added).

[38] Id. (emphasis added).

These various arguments – based on an extremely plausible understanding of the text, purpose and structure, early statements, early cases, and judicial manageability – provide a strong case for the categorical approach to the delegation prohibition.

The strongest argument against the categorical approach derives from Chief Justice Marshall's *Wayman v. Southard* opinion, which is the basis for the important subjects approach. In that opinion, Chief Justice Marshall wrote "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[39] Advocates of the important subjects approach read this to mean that important subjects must be legislated but less important subjects or details can be left to the executive. But despite my very high opinion of Chief Justice Marshall and the advocates of the important subjects approach, there are reasons for questioning the correctness of this view.

First, this opinion was written in 1825 and therefore was issued 37 years after the Constitution was written. It cannot be viewed as a contemporary exposition of the Constitution. Second, since the case was decided on other grounds, Chief Justice Marshall's analysis here must be viewed as dicta. Such dicta has long been thought to be subject to less respect than rulings that are necessary to the decision.

Third, despite first appearances, Chief Justice Marshall's analysis here may actually be consistent with the categorical, two tiered approach to the nondelegation doctrine. Marshall draws a distinction between "important subjects, which must be entirely regulated by the legislature" and those of "less interest," which need not be. But there is nothing in Marshall's opinion that is clearly inconsistent with reading it as indicating that all laws that involve matters governed by the strict tier are *important subjects* that must be entirely legislated by the Congress. Under that interpretation, *Wayman* would be consistent with the categorical approach to delegations as to matters covered by the strict tier.[40]

There are strong reasons why one might view laws that regulate private rights in the domestic sphere as involving important subjects that must be entirely legislated by Congress. Most significantly, private rights were deemed to be the most important rights when the Constitution was enacted and therefore their regulation might have involved the most important subjects. While Marshall does discuss various examples of rules that the judiciary can be authorized to enact, these rules may fall under the lenient tier, depending on the view of the two tiers that one takes.[41]

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[39] Wayman v. Southard, 23 U.S. (10 Wheat) 1, 43 (1825).

[40] Under this interpretation of Marshall's statement, the courts would still have to determine, for laws that do not regulate private rights, whether Congress had legislated as to the important subjects, leaving to the executive or judiciary only the filling in of the details.

[41] In the opinion, Marshall discusses a variety of subjects concerning "the regulation of the conduct of the officer of the court in giving effect to its judgments." Wayman, 23 U.S., at 45. He writes that "it is undoubtedly proper for the legislature to prescribe the manner in which these ministerial offices shall be performed," but he then notes "that there is some difficulty in discerning the exact limits within which the legislature" may rely on the courts to determine the rules governing this behavior. Id. at 45-46. These tasks of "giving effect to [the court's] judgments" would mainly, if not entirely, fall under the lenient tier under an approach like mine that treats regulation of the

B. Distinguishing Between Law Interpretation and Policymaking

Under the categorical approach, the executive cannot engage in any policymaking. But it can engage in law interpretation and fact-finding. This section explores the distinction between law interpretation and policymaking.

Under law interpretation, the executive merely determines the meaning of the law, doing so by reference to the traditional interpretive rules that do not involve policymaking. These interpretive rules focused mainly on determining the meaning of the intent of the law enactors, as expressed in the language of the statute. While some of the interpretive rules did protect certain values, such as the rule of lenity, these values were established by prior law and did not involve policymaking by the judges when they interpreted the statute.[42] The main values that the interpretive rules followed were the values that the law enactors were perceived as furthering, such as the purposes of the statute or the values widely held when the statute was enacted.[43]

It should be emphasized that law interpretation does not allow *Chevron* deference. First, the traditional interpretive rules did not include *Chevron* deference.[44] Second, *Chevron* deference is commonly understood as a delegation of policymaking authority to the executive. But such delegations are unconstitutional under the categorical approach.

Finally, it is sometimes thought, based on legal realism, that executive or judicial interpretation inevitably involves policymaking. But an exploration of the original meaning does not appropriately rely on a jurisprudence that developed more than a century after the Constitution's enactment. Traditional legal interpretation was not supposed to follow the values of the judge and such interpretation was not thought to involve judicial policymaking.

This section first illustrates legal interpretation with some examples and then applies the analysis to some important nondelegation cases.

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procedure or internal operations of the courts as falling under the lenient tier. See also Gordon, supra, at 782. Another way to classify these subjects under the lenient tier is to view them as inherent aspects of the judicial power. See Robert J. Pushaw Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 Iowa L. Rev. 735 (2001).

[42] Applying the rule of lenity no more involves policymaking than does interpreting the Judiciary Act of 1789, which also served certain values. In both cases, the values were established by the law. It is true that the statutory interpretive rules were largely common law rules, but that does not make the following of such established law an instance of policymaking.

[43] This essay does not offer an extended discription of the traditional interpretive rules. See McGinnis &. Rappaport, Language of the Law, supra at 1369; See John O. McGinnis & Michael B. Rappaport, Unifying Original Intent and Original Public Meaning, 113 Nw. L. Rev. 1371 (2019). Those rules generally sought the intent of the law enactors, not through legislative history, but through the meaning of the statutory language in context, and sought to resolve uncertainties through a variety of factors such as purpose, structure, the more common meaning, and other canons, such as the rule of lenity, the rule against implied repeals, and the absurdity rule. These rules did not permit the judge to consider his own policy views. Instead, to the extent it looked to values, it did so in order to further the intent of the law enactors by considering the purpose of the law and the societal values at the time of the enactment.

[44] See Aditya Bamzai, The Origins of Judicial Deference to Executive Interpretation, 126 Yale L.J. 908, 918, 987 (2017).

1. Some Initial Examples

Consider first a statute that Congress enacts to authorize a rule governing the sale of motor vehicles. Congress provides that the Department of Transportation shall pass a rule requiring each motor vehicle sold to have a motor vehicle safety feature if that feature would result in a reduction of the lives lost from motor vehicle accidents by 2 percent and has a cost of not more than the average cost of motor vehicle safety features that are presently required. Viewing the matter loosely, it might seem as if the statute delegates legislative power to the agency. But that is not true. Given the interpretive principles discussed above and putting to the side for the moment the factual holdings required to implement this rule, there is no delegation of policymaking discretion to the executive.

The agency here merely engages in law interpretation. It is true that, when implementing the statutory provision, the agency might have to make various decisions about the meaning of the provision. But those decisions would merely apply the traditional statutory interpretive rules, which do not require policymaking.

For example, when interpreting the statute, the agency and then the court might have to decide a range of legal questions, including what is a motor vehicle (does a vespa count?), what is motor vehicle safety feature (do side cameras count?), what is a motor vehicle accident (do accidents to pedestrians count?), and the average cost of existing motor vehicle safety features (does this refer to the average cost to the seller or to the buyers of the vehicle?). But so long as these questions are decided using traditional interpretive rules, which seek Congress's intent as expressed in the text of the statute, there is no policymaking discretion.

It is true that some of these interpretations may involve close cases. That will require the agency and the reviewing court to consider matters such as the purpose and structure of the statute and to make judgment calls as to which is the stronger interpretation. But so long as the decision is made based on legal, rather than policy, considerations, the decision will not involve policymaking discretion.[45]

Now consider a different statute. Under this statute, the Department of Transportation is given the authority to adopt motor vehicle safety features that are in the public interest. Even in a world of no *Chevron* deference and a constitutional prohibition on delegation, it is hard to argue that this statute does anything other than delegate policymaking discretion to the agency.

It is, after all, not clear what the public interest means. Consequently, such standards have historically been interpreted as delegations to the agency to determine what it thought the public interest was. An agency could argue for a notion of the public interest that involved cost benefit analysis, the pursuit of the common good, or various other goals. Congress would have done little to have indicated which of these notions of the public interest had been adopted.

It is true, of course, that under a legal regime in which delegation was unconstitutional, the agency and the reviewing court, applying the avoidance canon, should seek an interpretation that would avoid a delegation of policymaking. But in the normal situation involving a public

[45] See McGinnis & Rappaport, Language of the Law, supra, at 1344.

interest standard, that goal would be a bridge too far. In special circumstances, however, it might be possible to give a public interest standard a more determinate meaning. For example, if a specific area of the law had explicitly followed a dominant principle, such as cost benefit analysis, then a court might understand Congress's reference to the public interest as adopting cost benefit analysis.[46] But in the absence of such special circumstances, the best interpretation of public interest would be that Congress had unconstitutionally delegated policymaking discretion.

Finally, consider an example adapted from the famous *State Farm* case.[47] Under this statute, Congress authorizes the Department of Transportation to adopt motor vehicle safety standards that promote the needs of vehicle safety. Like the previous statute involving motor vehicle safety features that are in the public interest, the most straightforward interpretation of this statute is to confer policymaking discretion on the agency (as the *State Farm* Court held). After all, it is not clear how much of a reduction in accidents, at what cost, is necessary to promote the needs of vehicle safety.

Yet, this statutory standard is somewhat more constrained than the public interest standard. Assuming that the statute was enacted under a regime that categorically prohibited delegation and that applied a canon that required avoiding unconstitutional interpretations, a court might interpret this language to not delegate discretion to the executive. A court could interpret "the needs of motor vehicle safety" to require the adoption of all safety features that lead to a reduction in automobile accidents per mile driven.

Statutes like this can raise difficult questions for courts. A court must decide whether a statute that does not have an obvious constitutional meaning should be given a constitutional meaning or should be held to be unconstitutional. In this situation, the court will have to weigh the evidence in favor of each possibility. On the one hand, the court must decide how far it must stray from the most likely meaning to reach a constitutional meaning. On the other hand, the court must decide how strong the canon that requires avoiding an unconstitutional interpretation is.

In the case of the statute that authorized the agency "to adopt motor vehicle safety features that are in the public interest," I concluded that a constitutional interpretation of this statutory language likely requires too far of a departure from the ordinary meaning of the language. By contrast, in the case of the statute that authorized the agency "to adopt motor vehicle safety standards that promote the needs of vehicle safety," I concluded that the constitutional meaning was sufficiently close to the obvious meaning of the language that it could be found to have that constitutional meaning.

While there may be some close questions for the categorical approach, it seems clear that it will be more determinate than the alternative "important subjects" approach. Under the

[46] Terms that seem abstract can often, when examined in context, turn out to have a more specific meaning. See, e.g., Laura K. Donohue, The Original Fourth Amendment, 83 Univ. Chi. L. Rev 1181 (2016) (arguing that "unreasonable searches and seizures" in the Fourth Amendment referred to the reason of the common law and therefore to the common law rules governing searches and seizures).
[47] Motor Vehicle Mfr. Ass'n. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

categorical approach, a court must engage in the ordinary judicial task of weighing which of two interpretations is the stronger one based on the language of the statute and traditional interpretive methods. By contrast, the important subjects approach would require the courts to decide whether a question constituted, under the particular statute, an important subject. But it is difficult to identify how important a subject needs to be in order to be deemed an important subject. Thus, the important subjects test is much less determinate than asking which of two interpretation is the stronger one.

2. Some Real Cases

Now that I have discussed some preliminary examples, it might be useful to apply this approach to some real-world cases. Here I apply my approach to four cases since the New Deal – *Panama Refining Co. v. Ryan*, *Industrial Union Department v. American Petroleum Institute*, *Whitman v. American Trucking Ass'ns*, and *Gundy v. United States*.[48] This discussion clarifies the differences between my theory and the Supreme Court's approach.

In analyzing the constitutionality of these statutory conferrals of authority on the executive, one should engage in a series of the steps. First, one interprets the statute using the traditional methods of legal interpretation to determine the authority that it confers on the executive. If the authority that is conferred is merely the power to interpret the law or to find facts, then the statute is constitutional. But if the statute confers policymaking discretion, then the law unconstitutionally delegates legislative power to the executive.[49]

a. *Panama Refining Co.*

The first case to be discussed, *Panama Refining Co.*, is an easy case for concluding that the statutory authority conferred was unconstitutional. In *Panama*, section 9(c) of the National Industrial Recovery Act authorized the President to prohibit the transportation in interstate and foreign commerce of petroleum and petroleum products "in excess of the amount permitted to be produced or withdrawn from storage by any State law."[50] While the Act appeared to limit the President's authority to a single decision – whether or not to prohibit transportation of these products in excess of the amount permitted by state law – it did not establish any statutory standard to govern how the President should make this decision. Thus, the Act appeared to provide the President with policymaking discretion to decide whether or not to impose this prohibition.

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[48] Gundy v. United States, 139 S. Ct. 2116 (2019); Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607 (1980); Panama Ref. Co. v. Ryan, 293 U.S. 388 (1935).

[49] The laws reviewed in the four cases discussed in this section all appear to be covered by the strict tier of the nondelegation doctrine, since those laws all involved the regulation of private rights in the domestic sphere. See Panama Ref. Co., 293 U.S. at 405 (law restricting the right to transport petroleum in interstate commerce); Indus. Union Dep't, 448 U.S. at 611 (law regulating workplace conditions provided by private employers to private employees); Whitman (law restricting private citizens from polluting the air); Gundy, 139 S. Ct. at 2121–22 (law requiring convicted sex offenders to register with the government). The least certain case here is *Whitman*, since it is arguable that air pollution implicates "propriety rights held by government on behalf of the people," such as public land. See Nelson, supra, at 571. In *Panama Refining*, while the law unconstitutionally conferred discretion as to interstate commerce, it also extended to foreign commerce, which might have been a public right covered by the lenient tier.

[50] Panama Ref. Co., 293 U.S. at 406.

The main question under my approach is whether, despite the language of the statute, one can properly interpret the statute to have a meaning that eliminates this discretion. But that is difficult because of the absence of any statutory language that governs the President's authority as to this decision. While the Supreme Court reviewed other provisions of the Act, including the declaration of policy, none of these provisions could be reasonably interpreted to eliminate the President's policymaking discretion. Thus, the Act conferred an unconstitutional delegation of legislative power.[51]

b. *Industrial Union Dep't*

In *Industrial Union*, the Supreme Court reviewed a portion of the Occupational Safety and Health Act that governed exposure of workers to toxic materials. While the plurality opinion for the Court concluded that the Act required certain agency findings before it could impose a standard governing toxic materials,[52] Justice Rehnquist argued that the statute constituted an unconstitutional delegation of legislative power because it did not decide the basic question of how strictly to protect safety when there was no clear indication that the substance was dangerous.[53] In my view, however, one could properly read the statute to eliminate the policymaking discretion identified by Justice Rehnquist and therefore to be constitutional.

In *Industrial Union*, the statute at issue provided:

> The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life.[54]

Rehnquist was troubled by this provision on the ground that it was "completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but excusing him from that duty if he cannot."[55] Rehnquist wrote that in "the case of a hazardous substance for which a 'safe' level is either unknown or impractical," the statutes "gives the Secretary absolutely no indication where on the continuum of relative safety he should draw his line."[56] He concluded: "There is certainly nothing to indicate that these words . . . are limited to technological and [business] feasibility."[57]

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[51] While I do not discuss the other National Industrial Recovery Act case, *Schechter Poultry*, Justice Cardozo's description of it as "delegation running riot" was apt and it surely delegated enormous policymaking discretion and therefore was unconstitutional under my standard. See A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).
[52] Indus. Union Dep't, 448 U.S. at 642–43 (plurality opinion).
[53] Id. at 675–76, 687–88 (Rehnquist, J., concurring).
[54] Id. at 612 (plurality opinion) (quoting Occupational Safety and Health Act, 29 U.S.C. § 655(b)(5) (1970)).
[55] Id. at 675.
[56] Id.
[57] Id. at 682.

But Rehnquist seems mistaken here. Under the statutory provision, once the agency concludes that a toxic health standard must be issued, it is required to engage in a two step inquiry. First, it must identify the most protective standard that it can adopt in terms of avoiding material impairments of health. But then it must impose only a standard that is feasible. Justice Rehnquist is certainly correct that the term "feasible" has a number of meanings. Did the statute mean technologically feasible so that an employer would only be obligated to avoid exposure to the extent that a technology allowed it to prevent exposure? Did it mean business feasibility so that an employer would only be obligated to avoid exposure to the extent that it could do so without incurring bankruptcy or a decision to close down that portion of its production facilities? Or did it include economic feasibility where the employer is not required to take an action that would have social costs exceeding social benefits?

But while Rehnquist believed the statute did not indicate which of these definitions was employed, traditional interpretive methods provide an answer. The toxic materials provision is clearly designed to protect workers even if there are substantial costs to doing so. Given the statute's purpose, the feasibility requirement should not be read to mean economic feasibility (such as cost-benefit analysis). That definition would mistakenly place the costs to the economy or business on a par with the protection of workers. By contrast, reading feasibility to mean technological or business feasibility prioritizes the protection of workers. It allows exposure only if there is no technological way of protecting workers or if the costs of protecting them would cause the industry to close down and eliminate the workers' jobs.

Industrial Union illustrates that traditional interpretive methods sometimes can discern a meaning that eliminates policymaking discretion.[58]

c. *Whitman v. American Trucking Ass'ns*

In *Whitman*, the Supreme Court reviewed the constitutionality of a Clean Air Act provision that required the EPA to set National Ambient Air Quality Standards "the attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[59] To determine whether this statute is constitutional, one must begin by interpreting its provisions and then by asking whether the statute confers only legal interpretive and fact-finding responsibilities or allows the executive policymaking discretion.

In reviewing the statute, the first question is what constitutes the public health. In exploring this question, the Court initially considered whether the statute allowed the EPA to consider costs when determining the level of air quality standards. The Court, in my view correctly, held that the EPA could not consider costs, but only the effect of the standards on public health.[60]

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[58] There are other questions of legal interpretation that a court would have to interpret in Industrial Union, such as defining what constitutes a "material impairment of health or functional capacity" or whether the burden of proof of showing that a toxic substance is not safe at existing levels of exposure is on the agency or the industry. But, once again, it is likely that these matters can be addressed using traditional methods of statutory interpretation.

[59] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465 (2001) (quoting Clean Air Act, 42 U.S.C. § 7409(b)(1) (1970)).

[60] See id. at 465.

But while this aspect of the decision was correct, it still leaves the question what the meaning of public health is and whether the standards confers policymaking discretion on the agency. If the term "public health" had a precise meaning, then the EPA's responsibility to set air quality standards requisite to protect health would appear not to provide any policymaking discretion. Instead, the standards would have to be set based entirely on factual findings about health at different levels of air pollution.

But there does not appear to be a sufficiently clear meaning to public health in this context. There is no cutoff as to how many people need to harmed by polluted air for it to create a public health problem. Or to examine the issue in a more sophisticated way, the term does not indicate the expected harm necessary for there to be a public health problem, which would take into account both the expected number of cases of illness and the severity of those illnesses. Thus, the EPA is given what appears to be policymaking discretion to determine what is a public health problem.

Of course, even if the term had an unclear meaning, the legal interpretive rules might still discern a determinate meaning for it that eliminated agency policymaking discretion. But it is questionable that there was such a meaning available.

d. *Gundy*

The most recent case involving delegation is *Gundy v. United States*. That case concerned SORNA, which had delegated to the Attorney General authority to determine whether sex offenders convicted prior to the enactment of the statute imposing registration requirements were also required to register. The court split on the delegation question. Four Justices interpreted the statute to place limits on the Attorney General's discretion, and then concluded that the resulting discretion was consistent with the Constitution's lenient nondelegation requirement.[61] Three Justices interpreted the statute to provide substantial discretion to the Attorney General, and then concluded that the delegation was unconstitutional under the plurality's interpretation of the statute as well as their own interpretation of the statute.[62] One Justice concurred in the judgment of the four members who concluded SORNA was constitutional, but indicated his sympathy with the position adopted by the other three Justices, if the issue arose in an appropriate case.[63]

The correct analysis of the delegation in this case turns on the usual steps. First, one interprets the statute using traditional methods of legal interpretation to determine the authority that it confers on the Attorney General. If the authority that is conferred is merely the power to interpret the law or to find facts, then there is no delegation of legislative power. If there is a delegation of policymaking discretion, then the law is unconstitutional.

While the Court disagreed about the proper interpretation of the statute, Justice Gorsuch's dissenting opinion had the better of the argument. The statute provided that the Attorney General

[61] Gundy v. United States, 139 S. Ct. 2116, 2125–26, 2129–30 (2019) (plurality opinion).
[62] See id. at 2143, 2146–48 (Gorsuch, J., dissenting).
[63] Id. at 2131 (Alito, J., concurring).

> shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter . . . and to prescribe rules for the registration of any such sex offender.[64]

Under this statute, the Attorney General appeared to have broad policymaking discretion to determine whether the reporting requirements applied to sex offenders convicted prior to SORNA's enactment. In addition, he had similar authority to set the rules for registration by such offenders. Clearly, this is an unconstitutional delegation of legislative power under my test, which prohibits any delegation of policymaking discretion.

While the Court might have attempted to interpret the statute to be constitutional based on the avoidance canon, this approach cannot work here to cure the delegation problem. While the plurality interprets the provision to narrow its discretion, this appears to rewrite the statute. But even if one accepts the plurality's rewriting, it still allows policymaking discretion, since its claim that the statute requires the Attorney General to register pre act offenders "to the maximum extent feasible," still allows significant policymaking discretion. Under this standard, the Attorney General is permitted to determine the type of feasibility that it must consider, such as "technological" feasibility, "economic" feasibility, "administrative" feasibility, or even "political" feasibility. Such authority to decide based not on law, but on discretion is impermissible policymaking discretion.[65]

B. Distinguishing Between Fact-Finding and Policymaking

Another area where the delegation of policymaking discretion might be involved is decisions that are based on fact-finding by agencies and courts. Under my approach, if an agency is required to make a decision genuinely based on facts, then that decision does not involve policymaking discretion. But this approach requires that one draw a line between fact-finding and policymaking. This section explains how the distinction should be drawn.

Consider the statute discussed above that requires the Department of Transportation to pass a regulation requiring motor vehicle safety features that would result in a reduction of the lives lost from motor vehicle accidents by 2 percent and have a cost of not more than the average cost of existing motor vehicle safety features that are presently required. Under this statute, the Department would be required to show, by a preponderance of the evidence, that the safety feature it promulgated would satisfy these requirements.

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[64] Id. at 2132 (Gorsuch, J., dissenting) (quoting Sex Offender Registration and Notification Act, 34 U.S.C. § 20913(d) (2006)).

[65] One question that I do not address is to what extent the nondelegation doctrine applies to the courts when they interpret laws regulating private rights in the domestic sphere. I have argued that courts do not exercise policymaking discretion when they interpret laws using traditional interpretive methods. But it might be argued that statutes could be so unclear or indeterminate that they ask courts to exercise policymaking discretion when they interpret them. Cf supra Section II.A.1 (arguing that some indeterminate statutes are best understood as delegating policymaking discretion to the executive). In my view, the best way to resolve such cases is to ask whether the meaning of the statute can be determined by using the traditional interpretive rules. If the meaning can so be determined, then there is no delegation since the court merely applies the law. If the meaning cannot be determined, then the statute should not be enforced, since the law cannot be applied.

In order to promulgate a regulation, the agency would need to make certain factual findings. It would need to find the number of lives lost at present from motor vehicle accidents and predict the number of lives that would be saved by the new safety feature. It would also need to find the costs of all motor vehicle safety features that are presently required and the cost of the new safety feature.

In making these findings, the agency would have to rely on theories or methodologies for estimating these future benefits and costs. In selecting a theory, the agency would need to make the decision, perhaps based on expert evidence, of the correct approach. In making this decision, the agency would not be making the decision based on policy. Rather, the question would be whether the theory was based on science and whether it accurately predicted the future in these type of cases.

While the above examples distinguish between fact-finding and policymaking, there are other situations when drawing the distinction is more difficult. There can be situations – involving what are known as judgmental facts – where what seems like a factual question actually functions like a policy judgment.[66] For example, a substance may be dangerous to humans at high exposure levels, but there may be no evidence whether the substance is dangerous at low exposure levels. Under these assumptions, whether the substance is dangerous would theoretically be a factual question but one that cannot be answered as a fact based on current knowledge. Thus, the agency's decision whether to prohibit the substance at low exposure levels can only be made on a policy basis. Therefore, the categorical approach would prohibit the agency from being given this seemingly fact based decision.

But this prohibition on judgmental facts does not mean that Congress cannot prohibit substances for which there is not at present evidence indicating that the substance is more likely than not to cause harm. Congress has various methods it could use to regulate such substances that do not violate the delegation prohibition. For example, assume that Congress seeks to prohibit substances for which there is some evidence – say a 30 percent probability – that they can cause death or serious illness. If Congress passed such a statute, then the agency would be required to ban substances for which the requisite evidence existed. There would be no policymaking discretion conferred on the agency. It is true that determining whether a substance has a 30 percent probability of causing harm is different than determining whether it has a 51 percent probability, but in both cases the task involves fact-finding rather than policymaking.

Congress might even go further and attempt to ban substances based on a sliding scale of severity and probability of harm. For example, Congress might seek to prohibit a moderate amount of harm that was more likely than not to occur, but to prohibit a more severe degree of harm even though it had a lower probability of occurring. The basic principle would be that a certain level of expected harm would be needed before the prohibition could be imposed. The level of expected harm could then be produced by a higher probability of a lower severity of harm or a lower probability of a higher severity. It is true that this standard would appear to be less clear than the previous ones I discussed, but that uncertainty might not be fatal if it could be

[66] Michael Herz, Richard Murphy, & Katherine Watts, A Guide to Judicial and Political Review of Federal Agencies 192 (2nd ed. 2015).

resolved using the traditional interpretive rules. It would seem that traditional interpretive rules could address this situation, since a sliding scale as to probability and severity of harm has long been employed to determine whether an injunction should issue.

C. Implications of the Strict Approach

The strict tier of the nondelegation doctrine employs a categorical prohibition on policymaking discretion. Under this categorical approach, agencies can engage in legal interpretation, can undertake fact-finding, and can apply the law to the facts. In each of these cases, the agency will not have any policymaking discretion. Instead, the legal interpretation, fact-finding, and law application will be decisions that are determined by the law and the facts, For each of these type of decisions, the agency's action will be subject to a nondiscretionary duty.

Under this approach, agencies will be able to conduct a variety of activities that involve the regulation of private rights covered by the strict tier. In particular, they will be able to promulgate legislative regulations, adjudicate cases, and implement programs so long as those regulations, adjudications, and implementations are determined solely based on the law and facts.

III. A Complication: Reviewability

This Part discusses a complication of the categorical approach. How does the extent to which legal and factual determinations are reviewable by courts affect the analysis?

A. Reviewability of Legal and Factual Determinations

In discussing law interpretation and fact-finding, I have mainly focused on the task that the executive is required to undertake. If the executive is engaged in genuine legal interpretation under the traditional interpretive rules or genuine fact-finding, then it is not engaged in policymaking discretion and therefore its actions are constitutional.

But it might be objected that even if the executive is required to engage in genuine legal interpretation or fact-finding, the executive might not do so and instead might exercise policymaking discretion under the guise of these other tasks. As a result, the objection continues, my analysis would only be persuasive if the executive were subject to *de novo* judicial review, which does not occur under existing law.

This objection, however, is mistaken. There is an important distinction between a constitutional requirement and the practical effect of that requirement. As a matter of constitutional requirements, when the executive engages in law interpretation or fact-finding, it is not engaging in policymaking discretion. If the executive does not actually engage in law interpretation or fact-finding, but instead decides these matters based on its policy views, that would be illegal, because the executive is not allowed to exercise such authority.

It is true that the practical effect of this legal obligation will depend on whether and, if so, the extent to which the executive's actions are reviewable by the courts. If there is no judicial review, then the executive may be able to get away with illegal actions unless congressional oversight or impeachment were to operate as an effective deterrent.[67] But this result does not mean that the distinction between policymaking discretion on the one hand and law interpretation and fact-finding on the other is not the correct one under the original meaning. Some constitutional obligations are not as enforceable as one might hope they would be.

But even though there is only deferential judicial review under existing law for cases covered by the strict tier, that does not mean that the practical effect of the nondelegation requirement can easily be ignored. Even under the existing law of reviewability, the practical limits on the executive of the categorical approach would be stricter than under the existing law's lenient nondelegation doctrine.

Under existing law, fact questions are reviewed under a deferential arbitrary and capricious or substantial evidence standard. Legal questions are reviewed under the reasonability standard associated with *Chevron*.[68] This deference would allow the executive some opportunity to pursue policy under the guise of making legal interpretations or finding facts. But the categorical approach would still require that the executive appear as if it is not acting based on any policy considerations. Thus, agencies could pursue policy concerns surreptitiously, but could only do so to the extent that their interpretations or findings did not appear unreasonable to the courts. This involves less policymaking than under existing law under which agencies can openly engage in policymaking.

Finally, while the existing law does allow the executive some ability to circumvent delegation limits, in my view the Constitution's original meaning as to reviewability would greatly limit the executive's power to circumvent the Constitution. I believe that, under the the original meaning, most, if not all, government acts covered by the strict tier must be reviewed *de novo* by the courts. As I argued above, the scope of the strict tier substantially overlaps with

[67] Historically, most but not all individuals harmed by federal government action could bring a tort claim against the officer in their personal capacity. See David E. Engdahl, Immunity and Accountability for Positive Governmental Wrongs, 44 U. Colo. L. Rev. 1 (1972). Such tort actions were decided by courts de novo without any deference to the officer or the agency. If such tort actions existed today, there would be far less opportunity for agencies to get away with surreptitious policymaking. While I have strong doubts about the federal government's power to eliminate these tort actions without replacing them with comparable substitutes, I leave that question for another time.

[68] It is important to distinguish between two aspects of *Chevron* deference: reviewability and authority. Under the reviewability aspects of *Chevron*, agency interpretations of the statutes they administer will only be set aside under step two of *Chevron* if the courts conclude these interpretations are unreasonable. Under the authority aspects of *Chevron*, agencies are allowed to choose between reasonable agency interpretations on the basis of policy considerations. The categorical approach rejects the authority aspect of *Chevron*, because agencies are not permitted to make decisions based on policy. But the reviewability aspects of *Chevron* are not necessarily foreclosed. Under the reviewability but not the authority aspect of *Chevron*, agencies are required to select the strongest interpretation based exclusively on the meaning of the statute, but courts are allowed to set aside that interpretation if they believe it is an unreasonable interpretation of the meaning of the statute.

the scope of issues that Caleb Nelson maintains require full court review.[69] Thus, the Constitution's original meaning integrates reviewability and the delegation prohibition.

Conclusion

I have argued that the Constitution's original meaning imposes a regime that differs from both the leading version of a strict nondelegation doctrine and from the lenient nondelegation doctrine followed by the Supreme Court. My approach would establish a two tiered doctrine that would permit broader delegations in certain areas, but would impose a strict prohibition for actions covered by the strict tier. Under the strict tier, the Court would enforce a categorical prohibition of delegations of policymaking discretion. By contrast, the leading version of the strict nondelegation doctrine would prohibit delegation to the executive only of decisions as to important subjects under a statute.[70]

My approach also differs significantly from the lenient Supreme Court caselaw that currently enforces the nondelegation doctrine.[71] The differences between the original meaning and the existing law raise serious questions as to what extent the original meaning should be applied. Applying the original meaning in every case might involve an extreme disruption of a large number of government programs.

Such a disruption should be considered under the Court's precedent doctrine. For example, my own work with John McGinnis argues that the overturning of nonoriginalist precedents should not occur if it would lead to enormous costs.[72] The Court might therefore introduce the original meaning by applying it to future statutes and utilizing a more lenient approach for existing statutes.

Ultimately, the appropriate way for the Supreme Court to apply the nondelegation doctrine will depend on two main questions – the Constitution's original meaning and the applicable precedent rules. But before one addresses how to apply the original meaning under the appropriate precedent rules, one must first determine what that meaning is. This essay has attempted to make progress on that essential task.

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[69] One area where I differ with Nelson is for findings of legislative facts, which he argues do not need to be decided by courts. He bases this conclusion on two rules at the time: that fact-finding by the legislature did not need to be reviewed by courts and certain foreign affairs cases involving legislative facts were political questions that did not require full court review. Nelson, supra, at 591-93. But because certain legislative facts did not need to be finally decided by the courts does not mean that all legislative facts did not need to be. It is not surprising that fact-finding by legislatures did not require judicial determination. The opposite result would have been quite a departure from traditional law. Moreover, that certain foreign affairs matters were political questions is also not surprising given the predominant role of the political branches in this area. These results do not suggest that, when an agency was given legislative fact-finding as to private rights in the domestic sphere, judicial determinations were not required.

[70] The leading version has taken an agnostic approach as to whether the Constitution establishes a two tiered approach to the doctrine. See Lawson, Delegation, supra, at 394 (citing without endorsing my earlier article and stating that "there may be certain subject matter areas in which the range of discretion permitted under the executive power (or the judicial power) is larger than in other areas").

[71] See Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (applying a lenient intelligible principles test).

[72] John O. McGinnis & Michael B. Rappaport, Originalism and the Good Constitution (2013).