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## Judicial Non-Delegation, the Inherent-Powers Corollary, and Federal Common Law

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# JUDICIAL NON-DELEGATION, THE INHERENT-POWERS COROLLARY, AND FEDERAL COMMON LAW

Alexander Volokh\*

## ABSTRACT

*On paper, the non-delegation doctrine, with its demand that congressional delegations of power be accompanied by an “intelligible principle,” looks like it might impose some constraints on Congress’s delegations of power. In practice, it looks like it doesn’t. But this disconnect isn’t as stark as it appears: a longstanding but often ignored branch of the doctrine provides that the intelligible-principle requirement is significantly relaxed, or even dispensed with entirely, when the delegate has independent authority over the subject matter. I call this the “Inherent-Powers Corollary.”*

*Not only that: even when the delegate lacks independent authority over the subject matter, the intelligible-principle requirement is still relaxed when the subject of the delegation is interlinked with an area where the delegate has independent authority. I call this dubious extension to the Inherent-Powers Corollary the “Interlinking Extension.”*

*The non-delegation doctrine applies to any delegate that Congress may choose, including of course the President—but also including courts. Some recent scholars have pointed this out, and have suggested that this implies the invalidity of several statutes that delegate power to the judiciary. However, they have largely ignored the Corollary and Extension, which also apply to courts. In this Article, I argue that, because courts have many inherent or quasi-inherent powers, the Corollary and Extension save many congressional delegations to courts that one might otherwise think suspect. I also explain how the Corollary and Extension cast light on enduring debates among federal courts scholars over the constitutional foundations of the Erie doctrine and the proper scope of federal common law.*

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Daniel J. Meltzer (1951–2015), my own Federal Courts professor (Spring 2003) who, both in person and through his co-authorship of the Hart & Wechsler casebook, *infra* note 21, taught me everything I know about federal common law. I would also have liked to know what Justice Antonin Scalia (1936–2016) thought of my critiques of his writings. I have blogged about this Article in a series of posts. See Sasha Volokh, *Wrapping Up Judicial Non-Delegation*, WASH. POST: VOLOKH CONSPIRACY (Sept. 3, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/09/03/wrapping-up-judicial-non-delegation/> (concluding the series of posts and linking to previous posts in the series).

## INTRODUCTION

We all know the standard theory of the non-delegation doctrine, as it's taught in Administrative Law courses.

The Vesting Clause of Article I, § 1 says that “[a]ll legislative Powers herein granted shall be vested in a Congress of the United States.”<sup>1</sup> This has been taken to mean Congress can't divest itself of its legislative power<sup>2</sup> (though this reading isn't obvious<sup>3</sup>). In turn, this principle has been implemented by requiring that Congress, in delegating power, always provide an “intelligible principle” to guide the delegation—this would prevent the delegation of power from becoming a forbidden delegation of *legislative* power<sup>4</sup> (though this, too, isn't an obvious construction<sup>5</sup>). In other words, Congress must make at least certain hard choices rather than entirely passing responsibility to someone else.

We also know the standard practice of the non-delegation doctrine: Despite the standard theory, pretty much every federal statute nonetheless survives non-delegation review. The non-delegation doctrine is notoriously lax—or should we say it's kind of fictitious? Congress has been allowed to delegate power to agencies using wording like “unduly or unnecessarily complicate[d]” corporate structures and “unfair[] or inequitabl[e] distribut[ions of] voting power,”<sup>6</sup> “generally fair and equitable” price controls,<sup>7</sup> and the “public interest.”<sup>8</sup> The last two times a circuit court has tried to apply the non-delegation doctrine strictly,<sup>9</sup> the Supreme Court has taken a dim view of the effort.<sup>10</sup>

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<sup>1</sup> U.S. CONST. art. I, § 1.

<sup>2</sup> See *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 472 (2001); *Field v. Clark*, 143 U.S. 649, 692 (1892).

<sup>3</sup> See *Am. Trucking*, 531 U.S. at 487–90 (Stevens, J., concurring) (“I am persuaded that it would be both wiser and more faithful to what we have actually done in delegation cases to admit that agency rulemaking authority is ‘legislative power.’”); see also Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 956 (2014).

<sup>4</sup> See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>5</sup> See, e.g., *Am. Trucking*, 531 U.S. at 486–87 (Thomas, J., concurring) (“I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power.”).

<sup>6</sup> *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946).

<sup>7</sup> *Yakus v. United States*, 321 U.S. 414, 420 (1944).

<sup>8</sup> *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932); see also *Am. Trucking*, 531 U.S. at 474–75.

<sup>9</sup> See *Ass'n of Am. R.Rs. v. DOT*, 721 F.3d 666 (D.C. Cir. 2013); *Am. Trucking Ass'ns v. EPA*, 195 F.3d 4 (D.C. Cir. 1999) (holding that a section of the Clean Air Act was an unconstitutional delegation of legislative power to the EPA).

<sup>10</sup> See *DOT v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (holding that the section of the Clean Air Act that the D.C. Circuit had struck down was no worse a delegation than many others that the Supreme Court had previously upheld).

Is this just hypocrisy (or, more charitably, an inability to adequately enforce a fuzzy norm<sup>11</sup>)? No, I argue in this Article—or at least not as much as one might think. The reason is that the “intelligible principle” test only describes a subset of non-delegation cases. For at least eighty years, and continuing through modern cases, the Supreme Court has recognized that the requirement of an intelligible principle is relaxed—or dropped entirely—when the delegate already has some inherent power over the subject matter.<sup>12</sup> Thus, for instance, delegations to the President can be virtually (or entirely) standardless when it comes to foreign affairs or national security. My term for this is the “Inherent-Powers Corollary.”

There’s more to the story than just the Inherent-Powers Corollary. If all that mattered were the presence of a preexisting inherent power in the delegate, one might think that a statute could be upheld under the Corollary only if the delegate could have taken the same actions in the absence of the statute. (In other words, one might think the Inherent-Powers Corollary would have no applicability where the delegate’s power to act derives from the statute.) But the cases have consistently taken a broader view: Congress can delegate without an intelligible principle even when the delegate lacks inherent power, as long as the subject matter of the delegation is *interlinked* with an area where the delegate does have inherent power. My term for this is the “Interlinking Extension” to the Inherent-Powers Corollary.

The Inherent-Powers Corollary is moderately familiar in the literature, but its full power has been imperfectly understood. In the first place, the Interlinking Extension is a subtlety that has gone unremarked. In the second place, many delegations upheld by the Court in what seem like embarrassing applications of the “intelligible principle” theory turn out, on second view, to be justifiable as straightforward applications of the Inherent-Powers Corollary.

I discuss some of these cases below in the context of delegations to the President. But an even more interesting exercise—more interesting because never adequately done—is to see how the Inherent-Powers Corollary can justify a large number of delegations to the judiciary. Non-delegation scholars usually don’t mention the judiciary as delegate; some authors flatly state that the non-

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<sup>11</sup> See *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting) (“[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”).

<sup>12</sup> See *infra* Part II.

delegation doesn't apply to the judiciary at all;<sup>13</sup> others argue that it wouldn't make sense if it did, given the exceedingly general standards that courts often implement.<sup>14</sup> But this is quite incorrect: the theory of non-delegation applies to *any* delegate, including the judiciary, and Supreme Court precedent has long recognized this.<sup>15</sup>

Now, one might at first think that seriously applying the non-delegation doctrine to courts might result in the invalidation of huge chunks of legislation, given that Congress routinely demands that courts administer broad and vague statutes. Thus, Andrew Oldham, writing about antitrust but here speaking more generally, writes that “Congress cannot deputize the federal courts—and federal judges cannot accept such congressional delegation—to make standardless policy judgments.”<sup>16</sup> Margaret Lemos argues that “the Sherman Act would be a likely candidate for constitutional invalidation” under this view;<sup>17</sup> Eugene Kontorovich argues that a broad reading of the Alien Tort Statute would violate the non-delegation doctrine (as well as the constitutional reservation to Congress of the power to define offenses against the law of nations);<sup>18</sup> and Aaron Nielson argues that the pre-*Erie*<sup>19</sup> understanding of the Rules of Decision Act likewise violated the doctrine.<sup>20</sup>

But the Inherent-Powers Corollary shows why that initial view would be wrong. Federal courts have a lot of inherent powers (mostly held concurrently with Congress), from their inherent power to make procedural rules for themselves to their inherent power to make federal common law in particular

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<sup>13</sup> Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1731 (2002) (“[T]he Supreme Court case law conspicuously lacks any suggestion that the delegation metaphor or the concomitant intelligible principle test constrains congressional delegations to the judges rather than the executive.”); Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 739–41 & 741 nn.131–32 (1994) (reviewing DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993), stating that “there is no historical support for applying the nondelegation test to delegation to courts,” though he immediately afterwards discusses a case that did just that, *Wayman v. Southard*, discussed *infra* notes 123–27 and accompanying text).

<sup>14</sup> See, e.g., Thomas C. Berg, *The New Attacks on Religious Freedom Legislation, and Why They Are Wrong*, 21 CARDOZO L. REV. 415, 449 (1999) (“It makes little sense even to apply the nondelegation doctrine to general statutes enforced by federal courts rather than by administrative agencies—given the many federal statutes, like the antitrust, civil rights, and fair use laws, that leave courts to interpret and apply general standards.”).

<sup>15</sup> See *infra* Part III.A.

<sup>16</sup> Andrew S. Oldham, *Sherman’s March (into) the Sea*, 74 TENN. L. REV. 319, 346 (2007).

<sup>17</sup> Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 464 (2008).

<sup>18</sup> Eugene Kontorovich, *Discretion, Delegation, and Defining in the Constitution’s Law of Nations Clause*, 106 NW. U. L. REV. 1675, 1740–41, 1748 (2012).

<sup>19</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

<sup>20</sup> Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 243 (2011).

circumstances. In fact, when we talk about the proper scope of federal common law—which is one of the major current debates among federal courts scholars<sup>21</sup>—we’re also talking about the permissible scope of standardless congressional delegations to federal courts.

Unfortunately—perhaps because academic commentary on the applicability of the non-delegation doctrine to the judiciary is still in its infancy<sup>22</sup>—the relevance of the Inherent-Powers Corollary has been either ignored or passed over too quickly. Some authors writing about congressional delegation to the judiciary don’t mention the Corollary at all;<sup>23</sup> others mention it, but treat it as though it only applied in a narrow area, like procedural rulemaking, remedies, or common lawmaking associated with statutes.<sup>24</sup> Justice Scalia suggested that statutory interpretation and procedural rulemaking don’t violate the non-delegation doctrine because they’re “ancillary” to courts’ exercise of judicial power.<sup>25</sup> He was on the right track because he implicitly recognized some kind of Inherent-Powers Corollary, but he didn’t develop that idea any further or explain what made something “ancillary.”

This Article fills that gap. After introducing the Inherent-Powers Corollary and the Interlinking Extension in Part I, I discuss in Part II how it applies to delegations to the judiciary. Along the way, I explain why (despite a recent article to the contrary<sup>26</sup>) the non-delegation doctrine doesn’t help us make sense of the age-old federal courts dilemma of what is the constitutional basis (if any) of the *Erie* doctrine.

In Part III, I apply the theory to a number of statutes, from procedural rulemaking to the Alien Tort Statute to the Sherman Act. (The theory is also

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<sup>21</sup> The Hart & Wechsler casebook, which is the leading casebook in the field of federal courts, devotes an entire chapter to *Erie* and related issues, see RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER’S THE FEDERAL COURTS AND THE FEDERAL SYSTEM ch. VI, at 533–606 (6th ed. 2009) [hereinafter HART & WECHSLER], and another entire chapter to federal common law, see *id.* ch. VII, at 607–742. In all, *Erie* and federal common law issues take up about one-seventh of the entire book.

<sup>22</sup> The main extended treatments of this issue (though not the first to discuss it) are Lemos, *supra* note 17; Nielson, *supra* note 20; Oldham, *supra* note 16, all of whom I disagree with to a greater or lesser extent.

<sup>23</sup> See, e.g., Kontorovich, *supra* note 18.

<sup>24</sup> DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 189 (1993); Lemos, *supra* note 17, at 416 n.51, 440, 443, 473; Oldham, *supra* note 16, at 375–76 & 376 n.366; Posner & Vermeule, *supra* note 13, at 1731 & n.32.

<sup>25</sup> *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting); see also MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 140 (1995) (stating that judiciary isn’t exercising delegated legislative power as long as it’s “authorized to exercise that power only in a manner incidental to the performance of its constitutionally dictated adjudicatory function”).

<sup>26</sup> Nielson, *supra* note 20.

relevant to the government's recent efforts to use the All Writs Act to secure the cooperation of Apple in helping the FBI disable security features of the iPhone used by the San Bernardino shooter.<sup>27</sup>) The moral of the exercise is that making the Inherent-Powers Corollary central to non-delegation analysis shows how one can save a number of statutes that some thought were doomed (and others that one had never even realized were threatened). Some statutes do turn out to be unconstitutional after all, but one wouldn't have known that without doing the Inherent-Powers analysis.

I then conclude. I suggest that discussion of the non-delegation doctrine shouldn't be so executive-centered—and that the Inherent-Powers Corollary should be central to this discussion. Instead of starting with “intelligible principle” analysis when we think about a non-delegation case—or when we teach the subject in Administrative Law—we should (1)(a) start by checking whether Congress is delegating into an area where the delegate already has power; (1)(b) if not, check for interlinking. (2) If there's no interlinking, only then should we proceed with the ordinary intelligible principle analysis. Future research ought to explore whether the Interlinking Extension—which relaxes the non-delegation doctrine even when the delegate lacks an inherent power—is justified.

### I. THE INHERENT-POWERS COROLLARY

Recall, from the Introduction, the standard story of the non-delegation doctrine, with its demand that Congress provide an “intelligible principle.” In fact, the non-delegation doctrine is more complex than that. In particular, it's more forgiving—*much* more forgiving—when the delegation concerns an area close to the delegate's inherent powers.

This idea is already somewhat familiar in the war and diplomacy context: in the President's areas of inherent power, like national security or foreign affairs, Congress can legislate with no intelligible principle at all. But it extends beyond just the President—it applies to any delegate, whether it's an Indian tribe or a federal court.

This is the Inherent-Powers Corollary to the non-delegation doctrine. In these cases, the extremely forgiving practice actually matches the extremely forgiving theory.

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<sup>27</sup> See *infra* text accompanying notes 114–16, 300–02.

## A. *A Long and Distinguished History*

### 1. *The Early Presidential Cases*

The Supreme Court has been implicitly applying the Inherent-Powers Corollary since the early Republic, and has been explicitly saying so for over eighty years.

In *Panama Refining Co. v. Ryan*,<sup>28</sup> the Supreme Court struck down a delegation to the President under the non-delegation doctrine.<sup>29</sup> The offending delegation was a section of FDR's National Industrial Recovery Act, authorizing the President to prohibit the interstate transportation of oil whose production was illegal under state law.<sup>30</sup> The Supreme Court noted that Congress had provided no criterion to guide the President's discretion in choosing whether to ban such transportation; "[t]he Congress left the matter to the President without standard or rule, to be dealt with as he pleased."<sup>31</sup> The President was thus wielding legislative power, and so the section went beyond "the limits of delegation which there is no constitutional authority to transcend."<sup>32</sup>

In reasoning that this delegation was unconstitutional, the Supreme Court distinguished a number of previous cases where it had upheld delegations to the President. One such example was the early case of *The Cargo of the Brig Aurora v. United States*,<sup>33</sup> in which Congress had given the President the power, during the period leading up to the War of 1812, to make latent embargo terms spring into force by declaring that Great Britain or France was violating the neutral commerce of the United States.<sup>34</sup> In that case and others like it (and unlike in this case, which concerned purely domestic matters), said the Court, Congress had granted the President "an authority which was cognate to the conduct by him of the foreign relations of the Government."<sup>35</sup>

The delegations like that in *The Brig Aurora* didn't all necessarily concern actions that the President could already have taken unilaterally, even in the absence of the statute—so maybe the statutes really gave the President power he

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<sup>28</sup> 293 U.S. 388 (1935).

<sup>29</sup> *Id.* at 433.

<sup>30</sup> *Id.* at 406.

<sup>31</sup> *Id.* at 415–18.

<sup>32</sup> *Id.* at 430.

<sup>33</sup> 11 U.S. (7 Cranch) 382 (1813).

<sup>34</sup> *Panama Refining Co.*, 293 U.S. at 423 (discussing *The Brig Aurora*, 11 U.S. (7 Cranch) at 388).

<sup>35</sup> *Id.* at 422.

didn't already have. Still, the authority they granted was “cognate”<sup>36</sup> to the general foreign relations power that he already had.

Just a year after *Panama Refining*, in *United States v. Curtiss-Wright Export*,<sup>37</sup> the Supreme Court upheld an arms embargo ordered by the President in connection with the Chaco War then being fought between Bolivia and Paraguay.<sup>38</sup> Congress had authorized the President to declare the embargo if he found that it “may contribute to the reestablishment of peace between” the warring countries, and to make any “limitations and exceptions” to the embargo.<sup>39</sup> This was indeed a very broad and fairly unlimited delegation—particularly as to the extent of the exceptions. But, said the Court, such breadth was harmless when it comes to the President’s foreign affairs function:

[W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress . . . .<sup>40</sup>

In upholding the delegation, the Court explicitly assumed that it would have been invalid “if it were confined to internal affairs.”<sup>41</sup> (Possibly a fair assumption at the time: this was right after the Court had struck down domestic delegations to the President not only in *Panama Refining* but also in *A.L.A. Schechter Poultry v. United States*.<sup>42</sup>) So *Curtiss-Wright* is an excellent case to illustrate the proposition that delegations to the executive are given more leeway when they concern core executive functions.<sup>43</sup>

But if this was such a core presidential power, could the President have imposed an arms embargo on his own, without any statute? The Court didn't decide: here, it said, the constitutionality of the delegation was supported by the

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<sup>36</sup> *Id.* (emphasis added).

<sup>37</sup> 299 U.S. 304 (1936).

<sup>38</sup> *Id.* at 333.

<sup>39</sup> *Id.* at 312.

<sup>40</sup> *Id.* at 319–20.

<sup>41</sup> *Id.* at 315.

<sup>42</sup> 295 U.S. 495 (1935).

<sup>43</sup> See also DAVID P. CURRIE, *THE CONSTITUTION IN THE SUPREME COURT: THE SECOND CENTURY 1888–1986*, at 217 n.63 (1990); 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, 346–55 (2001); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492, 1544–48 (2004).

combination of congressional and presidential power—note the conjunction “plus.”<sup>44</sup> In these circumstances, as Justice Jackson wrote some years later, the President’s “authority is at its maximum.”<sup>45</sup> This “plus” is doing the work: the congressional authorization was *related* to an area where the President already had some authority. Maybe he couldn’t have done this on his own, but it was close enough that congressional authorization pushed it over the edge. Compare “plus” here with “cognate” in *Panama Refining*.

The Supreme Court relied on *Curtiss-Wright* and applied the Inherent-Powers Corollary in *Zemel v. Rusk*,<sup>46</sup> where it held that the Secretary of State’s ban on travel to Cuba was authorized by the Passport Act of 1926.<sup>47</sup> The Act allows the Secretary to “grant and issue passports . . . under such rules as the President shall designate and prescribe for and on behalf of the United States.”<sup>48</sup> The Court brushed off a non-delegation challenge by noting “the changeable and explosive nature of contemporary international relations, and the fact that the Executive is immediately privy to information which cannot be swiftly presented to, evaluated by, and acted upon by the legislature”—and explaining that in foreign affairs, Congress “must of necessity paint with a brush broader than that it customarily wields in domestic areas.”<sup>49</sup>

## 2. *Not Just the President: Indian Tribes and Courts*

The Inherent-Powers Corollary doesn’t apply only to delegations to the executive branch; it has also been applied to delegations to tribes and to the judiciary.

In *United States v. Mazurie*,<sup>50</sup> the Supreme Court upheld a prosecution of bar owners for illegally introducing liquor into Indian country.

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<sup>44</sup> *Curtiss-Wright*, 299 U.S. at 319–20 (emphasis added).

<sup>45</sup> *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 636 (1952) (Jackson, J., concurring in the judgment and opinion of the Court); see also *id.* at 635 n.2 (discussing *Curtiss-Wright*’s delegation theory).

<sup>46</sup> 381 U.S. 1 (1965).

<sup>47</sup> *Id.* at 7.

<sup>48</sup> *Id.* at 7–8.

<sup>49</sup> *Id.* at 17; see also *Haig v. Agee*, 453 U.S. 280, 291–92 (1981); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 542–44 (1950); *Chi. & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 109–10 (1948). This is consistent with the Court, having upheld the delegation, later interpreting it narrowly. See *Regan v. Wald*, 468 U.S. 222, 240–41 (1984); *Kent v. Dulles*, 357 U.S. 116, 129 (1958).

<sup>50</sup> 419 U.S. 544 (1975).

Congress had passed a local-option law under which Indian tribes could regulate the introduction of liquor into Indian country.<sup>51</sup> The Mazuries argued that this was an invalid delegation to tribes. But the Court replied that limitations on delegation are “less stringent in cases where the entity exercising the delegated authority itself possesses independent authority over the subject matter.”<sup>52</sup> Because Indian tribes are “unique aggregations possessing attributes of sovereignty over both their members and their territory,”<sup>53</sup> Congress could validly delegate to the tribes a part of its authority to regulate Indian commerce.<sup>54</sup>

As in *Curtiss-Wright*, the Court refused to decide whether the Indian tribes’ authority extended so far as to allow them to impose a similar liquor regulation on their own; but certainly they could do so once authorized by Congress.<sup>55</sup>

*Mistretta v. United States*<sup>56</sup> shows us how the Inherent-Powers Corollary also applies to courts—in the context of a quasi-legislative power, writing sentencing guidelines. *Mistretta* pled guilty to a federal drug crime and was sentenced under the federal sentencing guidelines.<sup>57</sup> He argued that the guidelines—promulgated by the U.S. Sentencing Commission—were unconstitutional because the statute creating the Commission gave the Commission excessive discretion in choosing what content the guidelines would have.<sup>58</sup> He also argued that the Commission, which was housed in Article III and included some Article III judges as members, violated the separation of powers.<sup>59</sup>

The Court upheld the delegation and found that Congress had provided an ample “intelligible principle” for the Commission to apply in writing the guidelines.<sup>60</sup> But its analysis of the separation of powers question left little doubt that at least some delegations to courts would survive even without such a principle. The Court held that Congress may delegate to the judiciary various “nonadjudicatory functions that do not trench upon the prerogatives of another Branch and that are appropriate to the central mission of the Judiciary.”<sup>61</sup> It cited

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<sup>51</sup> *Id.* at 547–48.

<sup>52</sup> *Id.* at 556–57 (citing *Curtiss-Wright*, 299 U.S. at 319–22).

<sup>53</sup> *Id.* at 557.

<sup>54</sup> See U.S. CONST. art. I, § 8, cl. 3.

<sup>55</sup> *Mazurie*, 419 U.S. at 557; see also *United States v. Lara*, 541 U.S. 193, 207 (2004).

<sup>56</sup> 488 U.S. 361 (1989).

<sup>57</sup> *Id.* at 370–71.

<sup>58</sup> *Id.* at 371.

<sup>59</sup> *Id.* at 380.

<sup>60</sup> *Id.* at 379.

<sup>61</sup> *Id.* at 388.

approvingly, as an example, Congress's vesting in judicial councils of "authority to 'make "all necessary orders for the effective and expeditious administration of the business of the courts"'—which is perhaps close to a textbook example of a statute that *lacks* an intelligible principle.

The Court pointed to various judicial rulemaking bodies and committees that "provid[e] for the fair and efficient fulfillment of responsibilities that are properly the province of the Judiciary."<sup>63</sup> "Because of their close relation to the central mission of the Judicial Branch," the Court wrote, "such extrajudicial activities are consonant with the integrity of the Branch and are not more appropriate for another Branch."<sup>64</sup>

Let's ask our familiar question: could the courts have adopted the guidelines (or performed some of those other nonadjudicatory functions) on their own, in the absence of any statute? *Mistretta* doesn't say—but at least such activity has a "close relation" to the judiciary's "central mission" and is "consonant with [its] integrity."<sup>65</sup>

### 3. *Loving and the Current State of the Law*

The most recent Supreme Court case to apply the Inherent-Powers Corollary is *Loving v. United States*,<sup>66</sup> which upheld a death sentence for murder imposed by a court-martial.<sup>67</sup>

The court-martial had imposed the death sentence because of three aggravating factors it had found.<sup>68</sup> But the list of acceptable aggravating factors sufficient for imposing a death sentence, found in Rule for Courts-Martial 1004(c), had been promulgated by the President through an executive order.<sup>69</sup> The proceedings were governed by the Uniform Code of Military Justice (UCMJ), which was passed by Congress, but the UCMJ granted broad power to courts-martial and the President: courts-martial were authorized to, "under such limitations as the President may prescribe, adjudge any punishment not

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<sup>62</sup> *Id.* (quoting *Chandler v. Judicial Council*, 398 U.S. 74, 86 n.7 (1970) (emphasis added)).

<sup>63</sup> *Id.* at 388–90.

<sup>64</sup> *Id.* at 389–90.

<sup>65</sup> *Id.* (emphasis added).

<sup>66</sup> 517 U.S. 748 (1996).

<sup>67</sup> See also *Clinton v. New York*, 524 U.S. 417, 445 (1998) (alluding to the Inherent-Powers Corollary); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 684 (1980) (Rehnquist, J., concurring in the judgment).

<sup>68</sup> *Loving*, 517 U.S. at 751.

<sup>69</sup> *Id.* at 754.

forbidden by [the UCMJ], including the penalty of death when specifically authorized by [the UCMJ].”<sup>70</sup>

Does a delegation of the power to limit the death penalty by specifying aggravating factors—without providing any guidance as to what limitations are acceptable—violate the non-delegation doctrine? The Inherent-Powers Corollary—as illustrated in *Panama Refining*, *Curtiss-Wright*, *Zemel*, *Mazurie*, and *Mistretta*—hint at the result: the rules are relaxed when “[t]he delegated duty . . . is interlinked with duties already assigned to the President by express terms of the Constitution”<sup>71</sup>—in this case, the Commander in Chief power.

Again, the Court stopped short of saying that the power to specify aggravating factors was part of the President’s inherent Article II power: observe the word “*interlinked*.”<sup>72</sup>

“*Cognate*,” “*plus*,” “*close relation*,” “*interlinked*.” We’ve seen this idea come up over and over now: that the Independent-Powers Corollary applies not just when the delegate could have acted on its own, but also when “[t]he delegated duty . . . is interlinked” with its powers. I call this the “Interlinking Extension.”<sup>73</sup>

Perhaps some other non-delegation cases could be justified based on the Inherent-Powers Corollary even though the Supreme Court didn’t rely on it. For instance, in *Field v. Clark*, the Court upheld a statute reimposing a suspended tariff regime on countries that, in the President’s judgment, imposed “reciprocally unequal and unreasonable” tariffs on American goods.<sup>74</sup> Perhaps such international trade issues are presidential enough to be justified in terms of the president’s inherent powers.<sup>75</sup> If so, then one could say the same of *Buttfield v. Stranahan*, concerning the inspection of imported tea;<sup>76</sup> *Mahler v. Eby*<sup>77</sup> and

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<sup>70</sup> 10 U.S.C. § 818 (2012); see also *Loving*, 517 U.S. at 769.

<sup>71</sup> *Loving*, 517 U.S. at 772.

<sup>72</sup> *Id.* (emphasis added).

<sup>73</sup> *Id.*

<sup>74</sup> 143 U.S. 649, 680 (1892).

<sup>75</sup> *Field*, 143 U.S. at 691; SCHOENBROD, *supra* note 24, at 34; Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 566 (1947).

<sup>76</sup> 192 U.S. 470 (1904).

<sup>77</sup> 264 U.S. 32 (1924).

*Carlson v. Landon*,<sup>78</sup> concerning the exclusion of undesirable aliens; and *Hirabayashi v. United States*, the Japanese-American military curfew case.<sup>79</sup>

### B. *The Limits of the Inherent-Powers Corollary*

Obviously, the Inherent-Powers Corollary (and Interlinking Extension) applies only when the delegation is in (or near) areas where the delegate already has a preexisting power: *Panama Refining*<sup>80</sup> and *Schechter Poultry*,<sup>81</sup> for instance, concerned purely domestic policy and were thus clearly outside those areas.

Similarly, perhaps we shouldn't try to use the Inherent-Powers Corollary to justify the results in *Yakus v. United States*<sup>82</sup> and *Bowles v. Willingham*,<sup>83</sup> which upheld wartime price-control statutes. After all, *Youngstown Sheet & Tube Co. v. Sawyer*, the steel seizure case, suggests that *domestic* actions get no special treatment, even when they are relevant to war needs.<sup>84</sup> The same goes for *United States v. Chemical Foundation*, concerning the delegation to the President of the power to decide whether property expropriated from Germans after World War I—normally required to be sold to American citizens at a competitive auction—should be sold noncompetitively.<sup>85</sup>

But suppose we really are in the national security or foreign affairs areas, where the President has special power. Within those areas, does anything go? Does the Corollary have any limitation at all? Perhaps it does, as illustrated by *Hamdan v. Rumsfeld*.<sup>86</sup>

Hamdan was a Yemeni national who was captured in Afghanistan, turned over to the U.S. military, and transported to Guantanamo Bay.<sup>87</sup> Eventually, the President sought to have Hamdan tried by military commission for the crime of “conspiracy.”<sup>88</sup> Hamdan challenged the jurisdiction of military commissions

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<sup>78</sup> 342 U.S. 524, 542–44 (1952).

<sup>79</sup> 320 U.S. 81, 102–05 (1943); see also *Ex parte Endo*, 323 U.S. 283, 297–304 (1944) (denying a civilian agency's power to detain).

<sup>80</sup> *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935).

<sup>81</sup> *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

<sup>82</sup> 321 U.S. 414 (1944); see also *id.* at 462–63 & 463 n.5 (Rutledge, J., dissenting).

<sup>83</sup> 321 U.S. 503, 512–16 (1944).

<sup>84</sup> 343 U.S. 579, 587–89 (1952).

<sup>85</sup> 272 U.S. 1, 11–13 (1926).

<sup>86</sup> 548 U.S. 557 (2006).

<sup>87</sup> *Id.* at 566.

<sup>88</sup> *Id.*

over his case, arguing—among other things—that he could be tried by a military commission only if he were charged with a violation of “the law of war,” and that “conspiracy” was not such a war crime.<sup>89</sup>

The Supreme Court agreed that the military commission was unauthorized, and a plurality of the Court agreed with Hamdan’s specific argument that conspiracy was not a war crime.<sup>90</sup> Congress could have made conspiracy a war crime by statute: the Constitution grants Congress the power to “define . . . Offenses against the Law of Nations.”<sup>91</sup> But Congress hadn’t used that power.<sup>92</sup> Instead, it passed Article 21 of the UCMJ. Article 21 “‘incorporated by reference’ the common law of war, which may render triable by military commission certain offenses not defined by statute.”<sup>93</sup>

You’d think that Congress, having the power to define war crimes, could likewise delegate that power to the executive branch—and that Inherent-Powers and Interlinking mean that no intelligible principle is necessary.

Not so, said the plurality opinion. “When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous.”<sup>94</sup> If Congress could delegate its war-crimes-defining power to the executive in that blanket way, it would “risk concentrating in military hands a degree of adjudicative and punitive power in excess of that contemplated either by the statute or by the Constitution.”<sup>95</sup> *Hamdan* here cited *Loving* for the general proposition that Congress “may not delegate the power to make laws.”<sup>96</sup>

If the plurality, being a mere plurality, is relevant at all here, it’s to show that the Inherent-Powers Corollary has its limits: a relaxed non-delegation doctrine doesn’t mean Congress can *always* get away with *no* limits at all.<sup>97</sup> *Hamdan* isn’t a constitutional case, but it illustrates how the Court can use a delegation-avoiding clear-statement rule even in an area interlinked with core executive

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<sup>89</sup> *Id.* at 597–600 (plurality opinion).

<sup>90</sup> *Id.* at 598–613.

<sup>91</sup> U.S. CONST. art. I, § 8, cl. 10.

<sup>92</sup> *Hamdan*, 548 U.S. 557, 601–02 (2006) (plurality opinion).

<sup>93</sup> *Id.* at 602.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)).

<sup>97</sup> Kontorovich, *supra* note 18, at 1737–40.

powers—where *Curtiss-Wright* might make you think (and certainly made the dissenting Justice Thomas think<sup>98</sup>) such avoidance is unnecessary.

The limit on the Inherent-Powers Corollary in *Hamdan* may be driven by other structural or constitutional principles. The executive branch can define crimes,<sup>99</sup> but perhaps, as the plurality said, giving that power to the *military* presents unique dangers. Moreover, perhaps here, for historical reasons related to the Offenses Clause, the specific grant of the war-crime-defining power to Congress should be considered exclusive in a way that the grant of the commerce power wouldn't be.<sup>100</sup>

### C. *The Dubious Interlinking Extension*

The Inherent-Powers Corollary makes good sense. If the President (or any other delegate) could already act in some field without congressional authorization (but if Congress also has concurrent power in that field), then what's the harm in Congress mandating that he do something within that field while giving him uncontrolled discretion in how to do it?

For instance, if Congress had established the military but provided no rules for its organization, presumably the President could organize it on his own. Congress may override this judgment, provided it retains the President as Commander in Chief: its power to organize the military seems necessary and proper to its power to “raise and support Armies” and “provide and maintain a Navy.”<sup>101</sup> But if Congress can override the President's judgment, surely it needn't be more specific than the President himself needs to be.

To say otherwise would be to deny Congress a measure of control over the President, even in an area where Congress and the President have concurrent power. Suppose the President had unilaterally (in the absence of congressional direction) adopted a rule that he would consider both merit and seniority (in some indeterminate way) in military promotion. Then, one day, the President changes his rule and decides that he won't consider seniority. Congress disagrees and thinks seniority should continue to be a factor. Surely Congress should be able to pass a statute directing the President to consider both merit and seniority, even if Congress doesn't say exactly how seniority should be considered.

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<sup>98</sup> *Hamdan*, 548 U.S. at 718–19 (Thomas, J., dissenting) (citing *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936)).

<sup>99</sup> *See, e.g.*, *United States v. Grimaud*, 220 U.S. 506, 517 (1911).

<sup>100</sup> U.S. CONST. art. I, § 8, cl. 10; Kontorovich, *supra* note 18, at 1743.

<sup>101</sup> U.S. CONST. art. I, § 8, cl. 12–13.

To insist that Congress be specific in overriding the President’s judgment, while granting that the President needn’t have been specific at all in the initial regime, is to make the President—to a certain extent—superior to Congress in his power to regulate the military. But that can’t be the rule, except in the narrow category of cases where the President has an Article II power to act even contrary to Congress.<sup>102</sup>

But if the Inherent-Powers Corollary makes good intuitive sense, what’s *not* obvious is the Interlinking Extension, under which Congress can delegate broadly—in a way that would otherwise violate the non-delegation doctrine—even in areas where the delegate couldn’t act on his own (but which are sufficiently “interlinked” with areas where the delegate does have inherent power).

Either a delegate can act on his own, or he can’t. If his power derives purely from Congress—if he’s close to an area where he could act on his own, *but isn’t quite there*—why shouldn’t Congress have to legislate with the usual degree of specificity?<sup>103</sup> It was on similar grounds that Justice Black denied, in his dissent in *Zemel v. Rusk*, that the President should have any extra leeway in granting passports just because of the foreign-affairs subject matter.<sup>104</sup>

Moreover, the Interlinking Extension introduces extra uncertainty into non-delegation analysis. The Inherent-Powers Corollary has an elegant simplicity: if the delegation is into an area where the delegate has inherent power, then don’t require any intelligible principle; otherwise, do require one. But the Interlinking Extension means that, even if we’re convinced that what Congress is asking for is outside of the delegate’s inherent powers, we still have to deal with the vagueness of whether there was interlinking. If we had a robust caselaw on the subject, maybe we could answer the question; but the small handful of cases that merely state the conclusion without any analysis isn’t much help.

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<sup>102</sup> See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637–38 (1952) (Jackson, J., concurring in the judgment and opinion of the Court) (noting that this is a limited category where presidential claims “must be scrutinized with caution”).

<sup>103</sup> See Charles A. Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Reassessment*, 83 YALE L.J. 1, 31–32 (1973); Swaine, *supra* note 43, at 1546–47 & 1547 n.220 (citing critics of *Curtiss-Wright*); cf. *United States v. Lara*, 541 U.S. 193, 216 (2004) (Thomas, J., concurring in the judgment) (“Delegated power is the very antithesis of inherent power.”).

<sup>104</sup> 381 U.S. 1, 20–23 (1965) (Black, J., dissenting).

## II. JUDICIAL NON-DELEGATION AND INHERENT JUDICIAL POWER

Most of the cases above have concerned delegation to the executive branch; and, indeed, the contours of non-delegation as applied to Article II are fairly well understood. The rest of this discussion applies the theory to the federal judiciary, because the judiciary as delegate hasn't been discussed as much—certainly not in the full context of the Inherent-Powers Corollary and the Interlinking Extension—even though delegations to courts are widespread.

Here are some interesting examples, which seem to grant courts wide discretion and invite or require them to engage in substantial lawmaking:

- The Rules Enabling Act: “The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”<sup>105</sup>
- Federal Rule of Evidence 501: “The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless [the Constitution, a federal statute, or Supreme Court rules] provide[] otherwise . . . .”<sup>106</sup>
- The Religious Freedom Restoration Act: “[The federal g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>107</sup> (Similar language applies to state governments in a few limited contexts, under the Religious Land Use and Institutionalized Persons Act.<sup>108</sup>)

The Rules Enabling Act has no guidance at all, and Federal Rule of Evidence 501 merely refers to “the light of reason and experience,” which is about the same. Rule 501 isn’t a fluke: § 3008 of the Resource Conservation and Recovery Act and § 113 of the Clean Air Act likewise provide that:

All general defenses, affirmative defenses, and bars to prosecution that may apply with respect to other Federal criminal offenses may

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<sup>105</sup> 28 U.S.C. § 2072(a) (2012).

<sup>106</sup> FED. R. EVID. 501. A *rule* of evidentiary privilege promulgated by the Supreme Court doesn’t go into effect unless approved by Congress, *see* 28 U.S.C. § 2074(b) (2012), but individual courts can still recognize privileges in common-law fashion while adjudicating cases.

<sup>107</sup> 42 U.S.C. § 2000bb-1(b) (2012).

<sup>108</sup> *Id.* §§ 2000cc, 2000cc-1.

apply . . . and shall be determined by the courts of the United States according to the principles of common law as they may be interpreted in the light of reason and experience.<sup>109</sup>

Or consider the following statutes, which might direct courts to engage in substantial lawmaking, depending on how one chooses to interpret them:

- Section 1 of the Sherman Act: “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . . is declared to be illegal.”<sup>110</sup> (This grants the judiciary less discretion if one interprets it to refer only to the preexisting cause of action for unreasonable restraint of trade, and more discretion if it invites the judiciary to develop a sensible antitrust policy.)
- The Alien Tort Statute: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>111</sup> (Less discretion if it refers only to torts recognized under the Founding-era law of nations, more discretion if it invites the judiciary to create new doctrines.)
- The Rules of Decision Act: “The laws of the several states . . . shall be regarded as rules of decision in civil actions in the courts of the United States . . . .”<sup>112</sup> (Less discretion if it requires federal courts to use state decisional law as well as state statutory law, more discretion if it allows federal courts to create a “general law” when state statutes are silent.<sup>113</sup>)

These sorts of statutes—and concerns over their breadth—come up constantly. One example that was in the headlines at the time of this writing: On February 16, 2016, a federal district court ordered Apple to assist federal law enforcement agents in disabling security features of the iPhone used by Syed Farook, one of the perpetrators of the December 2, 2015, shooting in San Bernardino, California.<sup>114</sup> The government applied for the court order under the

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<sup>109</sup> *Id.* §§ 6928(f)(4), 7413(c)(5)(D) (2012); *see also* Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465, 1476 (1999).

<sup>110</sup> 15 U.S.C. § 1 (2012).

<sup>111</sup> 28 U.S.C. § 1350 (2012).

<sup>112</sup> *Id.* § 1652 (2012).

<sup>113</sup> *See* *Erie R.R. v. Tompkins*, 304 U.S. 64, 70, 74–76 (1938).

<sup>114</sup> *In re Search of an Apple Iphone Seized During the Execution of a Search Warrant on a Black Lexus IS300, California License Plate 35KGD203*, No. ED 15-0451M, 2016 WL 618401 (C.D. Cal. Feb. 16, 2016); *see also* Orin Kerr, *Preliminary Thoughts on the Apple iPhone Order in the San Bernardino Case: Part 2, the*

All Writs Act,<sup>115</sup> which provides that federal courts “may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.”<sup>116</sup> Is this too broad—does it violate the non-delegation doctrine?

I’ll argue below that it probably doesn’t.<sup>117</sup> But first, in this Part, I’ll defend the proposition that the non-delegation doctrine applies to courts in the first place. In the context of executive agencies, it’s common nowadays to use the non-delegation doctrine as a canon of statutory construction; I’ll discuss how, if at all, this can apply when the delegation is to the judiciary. And I’ll point out how this theory tells us something interesting about the age-old federal courts question about the constitutional foundations of the *Erie* doctrine—in particular, this theory tells us that the foundations of the *Erie* doctrine are *not* to be found in non-delegation principles.

#### A. *The Doctrine Really Does Apply to Courts*

One might wonder whether all this isn’t going too far—whether the non-delegation doctrine even applies to the judiciary at all. But it does; constitutional structure, Supreme Court precedent, and policy considerations all suggest that it should. This point has been ably argued in several recent articles, so I’ll limit myself here to summarizing the case.<sup>118</sup>

As a matter of structure, consider the roots of the non-delegation doctrine in the Vesting Clause.<sup>119</sup> Legislative power has been vested in Congress; this means Congress can’t give it up; and this in turn has been interpreted to mean that Congress must limit any power it yields by an intelligible principle.<sup>120</sup> The focus is on how much power Congress has given up, not who is the recipient of the power.<sup>121</sup>

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*All Writs Act*, WASH. POST: VOLOKH CONSPIRACY (Feb. 19, 2006), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/19/preliminary-thoughts-on-the-apple-iphone-order-in-the-san-bernardino-case-part-2-the-all-writs-act/>.

<sup>115</sup> See Kerr, *supra* note 114.

<sup>116</sup> 28 U.S.C. § 1651(a) (2012).

<sup>117</sup> See *infra* text accompanying notes 300–02.

<sup>118</sup> See generally Lemos, *supra* note 17; Nielson, *supra* note 20; Oldham, *supra* note 16, at 370–75.

<sup>119</sup> U.S. CONST. art. I, § 1.

<sup>120</sup> See *supra* text accompanying notes 1–5.

<sup>121</sup> See Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 RUTGERS L. REV. 331, 347, 354–55 (1998); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 665, 667–68 (1986);

Precedent likewise supports the applicability of the non-delegation doctrine to the judicial branch. We've seen the non-delegation discussion of the Sentencing Guidelines in *Mistretta*,<sup>122</sup> and in fact one of the very earliest non-delegation cases, *Wayman v. Southard*,<sup>123</sup> likewise arose in the context of a congressional delegation of rulemaking power to the judiciary.<sup>124</sup>

Here are the facts of *Wayman*: Congress had provided by statute that the execution of federal judgments would be governed by the procedures that governed in state supreme courts as of 1789, as amended by the state supreme courts themselves or the U.S. Supreme Court.<sup>125</sup> Post-1789 states—like Kentucky, which didn't enter the union until 1792—had no state supreme court procedure in 1789, so there was no statutory basis for applying Kentucky procedure in executing the judgments of federal courts. Thus, if a victorious federal-court litigant in Kentucky wanted to force his losing opponent to—pursuant to Kentucky law—commit to pay the judgment with “bank notes of the Bank of Kentucky, or notes of the Bank of the Commonwealth of Kentucky,”<sup>126</sup> he had no option but to argue that the delegation to federal courts of a procedural rulemaking power was unconstitutional.

The Supreme Court had little trouble upholding this delegation of rulemaking power to the U.S. Supreme Court. Chief Justice Marshall wrote that Congress *can* delegate certain powers to others, and that while it can't delegate legislative powers, in this case Congress had made a general provision and the Court was merely “fill[ing] up the details.”<sup>127</sup>

Nor is the non-delegation doctrine limited to courts in their *rulemaking* capacities; the Supreme Court also considered (and rejected) a non-delegation challenge in the adjudicative context, when it upheld the Sherman Act in *Standard Oil v. United States*.<sup>128</sup> The Court wrote that the statute adequately defined the prohibited acts and thus gave courts sufficient guidance:

So far as the arguments proceed upon the conception that in view of the generality of the statute[, ] it is not susceptible of being enforced by

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Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2167–68 (2004); Posner & Vermeule, *supra* note 13, at 1731, 1757; Volokh, *supra* note 3, at 957.

<sup>122</sup> See *supra* text accompanying notes 56–64.

<sup>123</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>124</sup> Lemos, *supra* note 17, at 413–16.

<sup>125</sup> HART & WECHSLER, *supra* note 21, at 534–37.

<sup>126</sup> *Wayman*, 23 U.S. (10 Wheat.) at 2–3 (syllabus).

<sup>127</sup> *Id.* at 42–43 (opinion of the Court).

<sup>128</sup> 221 U.S. 1 (1911).

the courts because it cannot be carried out without a judicial exertion of legislative power, they are clearly unsound. The statute certainly generically enumerates the character of acts which it prohibits and the wrong which it was intended to prevent. The propositions therefore insist that, consistently with the fundamental principles of due process of law, it never can be left to the judiciary to decide whether[,] in a given case[,] particular acts come within a generic statutory provision. But to reduce the propositions, however, to this[,] their final meaning[,] makes it clear that in substance they deny the existence of essential legislative authority and challenge the right of the judiciary to perform duties which that department of the government has exerted from the beginning.<sup>129</sup>

Here, the Court mentions the prohibition on judges exerting legislative power, which is the definition of the non-delegation doctrine. And it rejects the non-delegation challenge in the usual way, which is to explain that the subject matter of the statute is adequately specified—rather than explain that the non-delegation doctrine doesn't apply to judicial adjudication.<sup>130</sup>

Finally, as a matter of policy, it makes sense to be suspicious of congressional delegations to the judiciary in the same way that one is suspicious of congressional delegations to the executive branch. (Recall that executive agencies conduct adjudications too,<sup>131</sup> that they are allowed to announce policy in adjudications just as much as in rulemakings,<sup>132</sup> and that this power of agencies is just as subject to the non-delegation doctrine as is agencies' rulemaking power.) The statutes above could just as easily have been delegations to agencies—here are two actual examples, similar to the Alien Tort Statute and Federal Rule of Evidence 501:

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<sup>129</sup> *Id.* at 69–70.

<sup>130</sup> For what it's worth (perhaps not much), a clear reference to the non-delegation doctrine does appear in Westlaw's headnote 9 to the case. Note the reference to "due process of law": this is an example of the common practice of courts' commingling non-delegation and due process rhetoric. *See Volokh, supra* note 3, at 970–73, 981–84.

<sup>131</sup> *See, e.g.*, 5 U.S.C. §§ 554, 556–557 (2012).

<sup>132</sup> *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 510–11 (noting that the FCC's new policy on expletives was announced in an "order") (2009); *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974) ("[T]he Board is not precluded from announcing new principles in an adjudicative proceeding and . . . the choice between rulemaking and adjudication lies in the first instance within the Board's discretion."); *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 765 (1969) (plurality opinion) ("Adjudicated cases may and do, of course, serve as vehicles for the formulation of agency policies, which are applied and announced therein."); *SEC v. Cheney Corp.*, 332 U.S. 194, 202 (1947) (declining to adopt a "rigid requirement" that new policies be announced by "quasi-legislative promulgation of rules to be applied in the future," and leaving the choice between "proceeding by general rule or by individual, ad hoc litigation . . . primarily" to the "informed discretion of the administrative agency").

- Article 21 of the Uniform Code of Military Justice: “[M]ilitary tribunals [shall have] concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by . . . military tribunals.”<sup>133</sup>
- Section 6607 of the Patient Protection and Affordable Care Act, amending section 504 of ERISA:  
The Secretary [of Labor] may promulgate a regulation that provides an evidentiary privilege for, and provides for the confidentiality of communications between or among, any of the following entities or their agents, consultants, or employees: [various state and federal agencies or a]ny other Federal or State authority that the Secretary determines is appropriate for the purposes of enforcing the provisions of this subchapter.<sup>134</sup>

We could do the same trick with the Sherman Act—which, recall, declares illegal “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce.”<sup>135</sup> The Sherman Act is administered by both the courts and the FTC. But imagine an alternate Sherman Act exclusively administered in the federal courts; now imagine one exclusively administered by the FTC. Or what about a statute telling *agencies* to develop substantive rules “in the light of reason and experience?”<sup>136</sup>

Obviously these statutes delegating to agencies are subject to analysis under the non-delegation doctrine. It would then seem weird to accept the possibility that Congress might have delegated too much power in the agency cases but (in principle) can’t have done so in the judiciary cases.

A few commentators suggest that delegations to the judiciary are *less* problematic than delegations to the executive: Schoenbrod, for instance,

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<sup>133</sup> 10 U.S.C. § 821 (2012).

<sup>134</sup> Patient Protection and Affordable Care Act § 6607, Pub. L. No. 111-148, 124 Stat. 119, 781–82 (2010) (codified at 29 U.S.C. § 1134(d) (2012)) (amending Employee Retirement Income Security Act of 1974, § 504). *See generally* Mila Sohoni, *The Power to Privilege*, 163 U. PA. L. REV. 487 (2015) (discussing § 6607 of Patient Protection and Affordable Care Act).

<sup>135</sup> 15 U.S.C. § 1 (2012).

<sup>136</sup> I’ve found two such regulations, though procedural ones related to agency tribunals: 16 C.F.R. §§ 3.31(c)(4), 1025.31(c)(2) (2017) (allowing FTC and the Consumer Product Safety Commission to limit discovery to preserve evidentiary privileges “as [the relevant laws] may be interpreted by the Commission in the light of reason and experience”).

suggests that this is so because judges are more insulated from the political process and so pose a lesser danger to liberty than do agencies.<sup>137</sup>

On the other hand, perhaps the opposite is true: perhaps we should be *more* concerned about delegations to the judiciary.<sup>138</sup> The standard modern defenses of delegation have rested on the idea that executive agencies have both expertise and (through the President) accountability.<sup>139</sup> But federal judges (who are often generalists<sup>140</sup>) do not have much subject-matter expertise, nor (as life appointees) do they have much political accountability.<sup>141</sup> And while agencies' exercise of broad discretion is at least subject to judicial review,<sup>142</sup> there is no other branch to police the delegation when courts themselves are the delegates.<sup>143</sup>

### B. *Judicial Non-Delegation as a Canon?*

It has been suggested that the norm against delegation of legislative power is not loose so much as underenforced. The question of when delegation crosses the line into the forbidden delegation of *legislative* power is a difficult question

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<sup>137</sup> See SCHOENBROD, *supra* note 24, at 113, 189. Perhaps this also has something to do with his apparent perception that delegations to courts largely involve delegations of remedial power. *Id.* at 189. Schoenbrod also argues that the requirement that judges explain an opinion's coherence with precedent constrains judges more than the APA-based requirement of reasoned explanation constrains agencies. *Id.* at 113. Moreover, he argues, the common law, to a "considerable extent . . . reflects a popular consensus and so is no less democratic [than] statutory law"—and thus has "supermajoritarian support." *Id.* at 157. *But see* Krent, *supra* note 13, at 728 n.74, 741 n.131 (critiquing Schoenbrod's view of the common law). Similarly, Lemos suggests that delegations to courts might be especially valuable in some instances, for instance where discrimination against minorities is at issue. Lemos, *supra* note 17, at 470.

<sup>138</sup> See Lemos, *supra* note 17, at 409; Rafael I. Pardo & Kathryn A. Watts, *The Structural Exceptionalism of Bankruptcy Administration*, 60 UCLA L. REV. 384, 423 (2012).

<sup>139</sup> See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 93–94 (1985); *see also* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 865–66 (1984).

<sup>140</sup> With some exceptions: the judges on the Federal Circuit have expertise in areas such as patent law because of their specialized jurisdiction, while the judges on the D.C. Circuit have expertise in administrative law because of that circuit's substantial administrative docket. Otherwise, some judges may have expertise in a particular field because they once practiced in that field, or they might develop expertise in various areas over time as they work on opinions. See Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599 (2014).

<sup>141</sup> Daniel A. Farber & Brett H. McDonnell, "Is There a Text in This Class?" *The Conflict Between Textualism and Antitrust*, 14 J. CONTEMP. LEGAL ISSUES 619, 655, 665–66 (2005); Kontorovich, *supra* note 18, at 1743; Lemos, *supra* note 17, at 426, 445–48, 464–67; Thomas W. Merrill, *The Common Law Powers of Federal Courts*, 52 U. CHI. L. REV. 1, 21–22, 24–27, 41 n.182 (1985); Oldham, *supra* note 16, at 371.

<sup>142</sup> See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring in the judgment).

<sup>143</sup> Merrill, *supra* note 141, at 41 n.182; Nielson, *supra* note 20, at 280; Oldham, *supra* note 16, at 372.

of degree, and thus (as Justice Scalia wrote in his *Mistretta* dissent) “not . . . readily enforceable by the courts.”<sup>144</sup>

But courts might be better able to determine when a congressional delegation to *themselves* is excessive and not justified by the necessities of the situation. So when the delegate is the judiciary, strong judicial enforcement of the rule against delegation of legislative power might be able to more closely approach the true constitutional norm.

In fact—just as Cass Sunstein has argued that the executive non-delegation doctrine is not dead but merely operating in hiding through interpretive canons and clear-statement rules<sup>145</sup>—perhaps an implicit judicial non-delegation doctrine is already in operation.

In the context of delegation to the executive branch, if the scope of the delegation is ambiguous, courts occasionally use an avoidance canon and interpret the statute narrowly to sidestep the potential non-delegation problem.<sup>146</sup> We’ve already seen delegation avoidance in *Hamdan*.<sup>147</sup> Sometimes courts act even more subtly to avoid non-delegation problems—perhaps in doctrines like the *Chenery I*<sup>148</sup> rule of administrative law that agency action stands or falls based on an agency’s stated rationale,<sup>149</sup> or in the modern-day

<sup>144</sup> *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

<sup>145</sup> C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 TEX. REV. L. & POL. 1, 22–25, 38 (2000); Dan M. Kahan, *Lenity and Federal Common Law Crimes*, 1994 SUP. CT. REV. 345, 355–56; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000).

<sup>146</sup> *See Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 646 (plurality opinion) (“If the Government[’s argument] was correct . . . , the statute would make such a ‘sweeping delegation of legislative power’ that it might be unconstitutional under the [non-delegation doctrine]. A construction of the statute that avoids this kind of open-ended grant should certainly be favored.” (citations omitted)); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341–42 (1974) (“Whether the present Act meets the requirement of [the non-delegation doctrine] is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.”); *cf. Arizona v. California*, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting in part) (“These substantial constitutional doubts [based on the non-delegation doctrine] do not, of course, lead to the conclusion that the Project Act must be held invalid. Rather, they buttress the conviction, already firmly grounded in the Act and its history, that no such authority was vested in the Secretary by Congress.”).

<sup>147</sup> *See supra* text accompanying note 98.

<sup>148</sup> *SEC v. Chenery Corp.*, 318 U.S. 80 (1943) (remanding an agency adjudication to the agency because the Court could not uphold the agency action based on theories that were not those on which the agency had relied); *see also Lemos, supra* note 17, at 420; Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 YALE L.J. 952, 981–1004 (2007) (“[T]he *Chenery* principle supplements the enforcement of the nondelegation doctrine as it is currently formulated.”).

<sup>149</sup> Non-delegation concerns also show up in general concerns about limiting agency discretion and requiring reasoned decisionmaking. *See, e.g., FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536–37 (2009) (Kennedy, J., concurring in part and concurring in the judgment) (“If agencies were permitted unbridled discretion, their actions might violate important constitutional principles of separation of powers and checks and

resistance to *Chevron* maximalism, reflecting unease with giving agencies the power to authoritatively interpret ambiguous statutes.<sup>150</sup>

Courts have similar avoidance tools at their disposal when the delegation is to the judiciary. They can unilaterally interpret the statute narrowly to avoid the problem. Consider the Alien Tort Statute, which grants federal jurisdiction over actions by aliens for torts that violate the “law of nations.”<sup>151</sup> In *Sosa v. Alvarez-Machain*, the Supreme Court decided to interpret “law of nations” narrowly to preclude recognizing offenses beyond the historical ones of “violation of safe conducts, infringement of the rights of ambassadors, and piracy.”<sup>152</sup> It did so in part because it wanted to “look for legislative guidance before exercising innovative authority over substantive law”<sup>153</sup>—a concern that, at least on its face, looks like delegation avoidance.<sup>154</sup>

Likewise, consider *Armstrong v. Exceptional Child Center*, where healthcare providers sued Idaho officials for setting insufficient reimbursement rates for the services they provided, in violation of § 30(a) of the Medicaid Act.<sup>155</sup> The Supreme Court held, as a matter of statutory construction, that Congress didn’t want to allow the providers to sue the Idaho plaintiffs in federal court for equitable relief.<sup>156</sup> This was in part because the statute already provided a single remedy for state non-compliance— withholding of federal funds—and in part because the adequate-funding provision was “judicially unadministrable.”<sup>157</sup> The Court wrote, in language that smacks of delegation avoidance based on a distaste for free-floating judicial policymaking, that this standard was much better suited for political than for judicial enforcement:

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balances. . . . Congress passed the Administrative Procedure Act . . . to ensure that agencies follow constraints even as they exercise their powers.”); Lisa Schultz Bressman, Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State, 109 YALE L.J. 1399 (2000); Lemos, *supra* note 17, at 420.

<sup>150</sup> See *City of Arlington v. FCC*, 133 S. Ct. 1863, 1879 (2013) (Roberts, C.J., dissenting) (“It would be a bit much to describe [the *Chevron* doctrine] as ‘the very definition of tyranny,’ but the danger posed by the growing power of the administrative state cannot be dismissed.”); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001) (limiting *Chevron* deference to cases where Congress plausibly would have wanted courts to defer to agencies, i.e. mostly in cases where the agency spoke with the force of law using relatively formal procedures); see also 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5-19, at 997 n.71, 998 n.74 (3d ed. 2000).

<sup>151</sup> 28 U.S.C. § 1350 (2012); see *supra* text accompanying note 111.

<sup>152</sup> 542 U.S. 692, 724–28 (2004).

<sup>153</sup> *Id.* at 726.

<sup>154</sup> Kontorovich, *supra* note 18, at 1684, 1747, 1749; Nielson, *supra* note 20, at 288.

<sup>155</sup> 135 S. Ct. 1378 (2015).

<sup>156</sup> *Id.* at 1385–87.

<sup>157</sup> *Id.* at 1385.

It is difficult to imagine a requirement broader and less specific than § 30(A)'s mandate that state plans provide for payments that are "consistent with efficiency, economy, and quality of care," all the while "safeguard[ing] against unnecessary utilization of . . . care and services." Explicitly conferring enforcement of this judgment-laden standard upon the Secretary alone establishes, we think, that Congress "wanted to make the agency remedy that it provided exclusive," thereby achieving "the expertise, uniformity, widespread consultation, and resulting administrative guidance that can accompany agency decisionmaking," and avoiding "the comparative risk of inconsistent interpretations and misincentives that can arise out of an occasional inappropriate application of the statute in a private action."<sup>158</sup>

Also, the Supreme Court has recognized that courts aren't ideal at formulating antitrust policy, which is why the Court has sometimes proceeded by making per se rules, trading off abstract optimality for administrability.<sup>159</sup> And invalidating criminal laws under the Due Process Clause because they're void for vagueness also has a delegation-avoiding effect, even though the void-for-vagueness theory is broader than delegation avoidance. (The void-for-vagueness theory is rights-based and thus applies to state criminal laws as well, which aren't subject to the non-delegation doctrine.<sup>160</sup>)

None of these examples explicitly grounds delegation avoidance in constitutional separation-of-powers considerations—it could just be courts' policy judgment about their own limitations relative to Congress (or, in the case of the void-for-vagueness doctrine, some other constitutional principle). Clearly there are many reasons to interpret judicial power narrowly. Still, the *effect* of such narrow construction is delegation avoidance, and I can't rule out that it's partly motivated, below the surface, with some discomfort with broad delegations to the judiciary.

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<sup>158</sup> *Id.*

<sup>159</sup> *United States v. Topco Assocs.*, 405 U.S. 596, 609–10 (1972) ("The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules." (footnote omitted)); *Town of Concord v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) ("[A]ntitrust rules are court-administered rules. . . . (Indeed, the need for clarity and administrability sometimes leads to per se rules that prohibit inquiry into the actual harms and benefits of challenged conduct.)" (citation omitted)); Daniel A. Crane, *Rules Versus Standards in Antitrust Adjudication*, 64 WASH. & LEE L. REV. 49, 58 (2007); Lemos, *supra* note 17, at 464–65.

<sup>160</sup> *See infra* Part III.E.3.a; *see also* Gray, *supra* note 145, at 21; Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 337 (1999).

Delegation avoidance can go further than merely interpreting “narrowly”<sup>161</sup>: one can choose one’s overarching theory of statutory interpretation based on these same avoidance concerns.<sup>162</sup> Perhaps, if one interprets the Sherman Act purposively, as a free-floating license to make sensible antitrust policy, the Act might be an excessive delegation—but maybe not if one chooses textualism and interprets the Act as incorporating the preexisting law on unreasonable restraints of trade<sup>163</sup> (though one still has to decide which strand of the common law to choose!<sup>164</sup>), or if one focuses specifically on the evils that Congress was trying to eliminate at the time.<sup>165</sup>

Judges who choose a theory that relies heavily on the state of the law at the time of enactment (i.e., static rather than dynamic) may be doing so to avoid delegation problems—and indeed, proponents of textualism often justify their choice as motivated, at least in part, by the need to limit judicial discretion.<sup>166</sup>

So perhaps there’s a lot of implicit delegation avoidance going on when courts confront possibly excessive delegations to themselves.<sup>167</sup>

One might fairly ask: Is this judicial adoption of narrowing constructions and strategies of self-restraint valid? Agencies certainly can’t fix an unconstitutional delegation by voluntary self-restraint. When Congress delegates too much power to an agency, the agency can’t simply choose to adopt a narrowing

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<sup>161</sup> See also Lemos, *supra* note 17, at 472 n.329 (arguing that the standing doctrine serves a delegation-minimizing role by reducing the number of cases where courts are in the position of making law—though at the cost of making courts less accessible).

<sup>162</sup> On choice of interpretive methods, see Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769 (2008).

<sup>163</sup> 15 U.S.C. § 1 (2012); see also *supra* text accompanying note 110; *infra* text accompanying notes 373–94.

<sup>164</sup> See Thomas C. Arthur, *Farewell to the Sea of Doubt: Jettisoning the Constitutional Sherman Act*, 74 CALIF. L. REV. 263, 280–84 (1986) (discussing English and American majority and minority cases).

<sup>165</sup> See Thomas C. Arthur, *The Core of Antitrust and the Slow Death of Dr. Miles*, 62 SMU L. REV. 437, 441–44 (2009).

<sup>166</sup> See, e.g., Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL’Y 59, 62, 65 (1988); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 17–18, 36 (Amy Gutmann ed., 1997). The claim that textualism actually does so is debated, but what’s important here is that proponents of textualism make this claim. See William N. Eskridge, Jr. & Philip P. Frickey, *The Supreme Court, 1993 Term—Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26, 87 (1994); Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 396 (1950).

<sup>167</sup> Not all the time, though: Some judges complain about being forced to make value-laden decisions, but conclude that the statute forces them to do so anyway. See, e.g., Reporters Comm. for Freedom of the Press v. DOJ, 816 F.2d 730 (D.C. Cir. 1987), *rev’d*, 489 U.S. 749 (1989); Krent, *supra* note 13, at 741 n.132.

construction to limit how much power it has;<sup>168</sup> merely making that choice would itself be an exercise of the forbidden legislative power!<sup>169</sup>

However, in such cases of delegation to agencies, *courts* may adopt a narrowing construction. They're not the recipients of the invalid delegation, so using the power to narrow the delegation isn't itself an exercise of the forbidden power. Rather, the courts are using their own power to choose interpretations of statutes to avoid unconstitutionality.<sup>170</sup>

What about when courts themselves are the recipients of the delegation? Is adopting a narrowing construction valid because it's a sort of constitutional avoidance? Or is it invalid because your own self-restraint in exercising an invalidly delegated power doesn't cure Congress's constitutional violation in delegating that much power in the first place?<sup>171</sup>

I'm inclined to say that it's valid for courts to narrow excessive delegations to themselves. Not all unconstitutional statutes have to be struck down in their entirety. If the unconstitutional part is severable, a court can just strike down part and leave the rest standing<sup>172</sup>—and the result might look like adopting a narrowing construction.<sup>173</sup> Still, it would be good for courts to be more explicit about the process, find a constitutional violation, and actually conduct the severability analysis, because not all narrowing is necessarily reducible to severability.<sup>174</sup>

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<sup>168</sup> See *Am. Trucking Ass'ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999); *Amalgamated Meat Cutters & Butcher Workmen of N. Am., AFL-CIO v. Connally*, 337 F. Supp. 737, 758–59 (D.D.C. 1971); Bressman, *supra* note 149, at 1422–31; Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 713 (1969).

<sup>169</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 463 (2001); Gray, *supra* note 145, at 25–27; Sunstein, *supra* note 160, at 351 n.241.

<sup>170</sup> Even then, controversy remains about the scope of courts' power to rewrite the statute to cure a constitutional problem. See, e.g., Matthew D. Adler & Michael C. Dorf, *Constitutional Existence Conditions and Judicial Review*, 89 VA. L. REV. 1105, 1157 (2003); Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 HARV. L. REV. 1321, 1333–34 (2000); David H. Gans, *Severability as Judicial Lawmaking*, 76 GEO. WASH. L. REV. 639 (2008).

<sup>171</sup> Lemos, *supra* note 17, at 458 & nn.258–59.

<sup>172</sup> See, e.g., *INS v. Chadha*, 462 U.S. 919, 931–35 (1983); *id.* at 1013–16 (Rehnquist, J., dissenting).

<sup>173</sup> See, e.g., *United States v. Booker*, 543 U.S. 220, 246–49 (2005) (opinion of Breyer, J.).

<sup>174</sup> For a good discussion of severability, which ties severability directly to judicial non-delegation concerns, and suggests that legislatively provided fallback provisions alleviate non-delegation concerns, see Michael C. Dorf, *Fallback Law*, 107 COLUM. L. REV. 303, 326–27 (2007).

C. *Federal Common Law and the Foundations of Erie*

Suppose one agrees with me in principle that the non-delegation doctrine applies when Congress delegates to courts, just like it applies when Congress delegates to anyone else. One might still be uncomfortable with this result because, as we know, the judiciary deals with vague tests like “reasonableness” and virtually unconstrained common law-style adjudication all the time. Can all this really be (potentially) unconstitutional?

The Inherent-Powers Corollary provides the answer: where federal courts have inherent powers (or in areas interlinked with areas of inherent power), the non-delegation doctrine demands little, if anything.<sup>175</sup> And—fortunately for the constitutionality of many delegations to the judiciary—those areas of inherent power are fairly large.

What are those areas of inherent power? First, as to judicial rulemaking: we know (from *Mistretta* and history) that judges have a certain rulemaking power to make their own procedures. And second, as to adjudication—courts’ main job—looking for the federal judiciary’s independent power requires talking about the proper scope of federal common law.

Part IV discusses particular areas of federal common law, for instance the judicial power to make law in areas involving “uniquely federal interests” or to interpret statutory terms. But before we get there, it’s useful to remind ourselves why federal courts’ common-lawmaking power—though broad enough to accommodate many delegations—is much more limited than that of state courts. This excursus through the *Erie* doctrine gives us an interesting theoretical payoff of the Inherent-Powers Corollary: it allows us to critically evaluate the recently proposed thesis that the *Erie* doctrine is best explained by non-delegation concerns.

*Erie Railroad v. Tompkins* is best known for its statement that “[t]here is no federal general common law.”<sup>176</sup> Federal courts generally lack the power to make substantive rules of decision in diversity cases where, were the case brought in state court, a rule of state law would apply.<sup>177</sup> But while this holding

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<sup>175</sup> See Posner & Vermeule, *supra* note 13, at 1731.

<sup>176</sup> 304 U.S. 64, 78 (1938).

<sup>177</sup> *Id.*

is widely accepted, it's never been clear what (if anything) *Erie's constitutional* holding is.<sup>178</sup>

Perhaps *Erie* is just a statutory interpretation decision about the Rules of Decision Act, which provides that “[t]he laws of the several states . . . shall be regarded as rules of decision” in federal court.<sup>179</sup> Previously, “laws of the several states” had been interpreted to mean only state statutory law; now we understand it to also include state decisional law. This view of *Erie* would imply that Congress could reestablish the regime of *Swift v. Tyson*<sup>180</sup> by statute.<sup>181</sup>

But *Erie* presented itself as a constitutional decision,<sup>182</sup> and later cases have confirmed this.<sup>183</sup> So what part of the Constitution did the *Swift v. Tyson* rule violate? Most proposed constitutional theories, whether stated in the opinion itself or developed after the fact, have come under severe critique—whether it’s the Equal Protection Clause, enumerated powers, the Supremacy Clause, or federalism.<sup>184</sup>

To fill this gap, Aaron Nielson has suggested a judicial non-delegation account. If Congress, in 1938, had authorized the President (without any further guidance) to make uniform rules of commercial law to govern when a state didn’t have a statute on point, such a statute would surely have been unconstitutional. But that hypothetical statute (with “President” replaced by “federal courts”) is essentially how the courts had understood the Rules of Decision Act (RDA) before *Erie*.<sup>185</sup> Because the hypothetical statute would have been an unconstitutional delegation to the President, so should the RDA (so construed) have been considered an unconstitutional delegation to the courts; and *Erie*, which picks the opposite construction, is thus justified as a non-delegation decision.<sup>186</sup>

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<sup>178</sup> See, e.g., HART & WECHSLER, *supra* note 21, at 563–64 & 563 n.2 (“From the time of its rendition to the present day, controversy has surrounded the scope and meaning of *Erie* as a constitutional holding. Is the Court saying that Congress itself could not have enacted a rule of decision to govern a case like *Erie*?”).

<sup>179</sup> 28 U.S.C. § 1652 (2012); see also *supra* text accompanying note 112.

<sup>180</sup> 41 U.S. (16 Pet.) 1 (1842) (holding that federal courts sitting in diversity could ignore state common law and apply their own common law).

<sup>181</sup> See REDISH, *supra* note 25, at 140–41 (apparently taking this position).

<sup>182</sup> *Erie R.R. v. Tompkins*, 304 U.S. 64, 77–78 (1938).

<sup>183</sup> *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 202 (1956).

<sup>184</sup> See Nielson, *supra* note 20, at 253–62.

<sup>185</sup> *Id.* at 240–41.

<sup>186</sup> See Oldham, *supra* note 16, at 374–75.

The Inherent-Powers Corollary suggests that this explanation is incomplete. Perhaps the RDA, in some form, does violate the non-delegation doctrine, but this conclusion requires more than just observing that the RDA lacks an intelligible principle.

### 1. *The Non-Statutory Erie Principle*

Certainly, if a court interprets Congress's intent in enacting the RDA to be that federal courts should make up special rules of decision in diversity cases, that does seem like a type of delegation. So the non-delegation doctrine is potentially *implicated*. But the Inherent-Powers Corollary teaches us that this is only the beginning of the analysis.

It's true that such an act doesn't provide any guidance as to the content of those federal rules of decision. But now we have to see whether the federal courts would have had a preexisting power to create such rules *in the absence of the statute*.

To answer this question, let's imagine a world where there had never been a RDA. Could federal courts validly make "general law" in that world? It turns out that—both before *Erie* and since—the Supreme Court has consistently taken the position that the RDA was "merely declarative of the rule which would exist in the absence of the statute."<sup>187</sup> In other words, federal courts would have to look to state law as the rule of decision in diversity cases *even if Congress had never directed them to do so*. This is why, even though the Act originally said only that state law would be a rule of decision "in trials at common law"<sup>188</sup> and didn't mention equity, federal courts also followed state equity statutes in the *Swift v. Tyson* period—and *Erie*'s holding was quickly applied to state decisional equity rules.<sup>189</sup>

The only change *Erie* made is that state law was now understood as including not just state statutes but also state decisional law. Thus, pre-*Erie*, the RDA was interpreted as authorizing federal courts to make general law in the absence of a state statute—and the same would have been true without the RDA. Post-*Erie*, the RDA is interpreted in the opposite way—and our new understanding is still

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<sup>187</sup> *Mason v. United States*, 260 U.S. 545, 559 (1923); *see also* *Guaranty Trust Co. v. York*, 326 U.S. 99, 103–04 (1945); *Erie R.R. v. Tompkins*, 304 U.S. 64, 72 (1938); *Hawkins v. Barney's Lessee*, 30 U.S. (5 Pet.) 457, 464 (1831).

<sup>188</sup> Judiciary Act of 1789, ch. 20, § 34, 1 Stat. 73, 92 (1789), *quoted in* *Guaranty Trust*, 326 U.S. at 103.

<sup>189</sup> *Guaranty Trust*, 326 U.S. at 107; Merrill, *supra* note 141, at 29. *But see* HART & WECHSLER, *supra* note 21, at 577 n.1; John T. Cross, *The Erie Doctrine in Equity*, 60 LA. L. REV. 173 (1999).

that the same would be true without the RDA. The RDA has never been interpreted to grant the courts powers they didn't already have.

So however we understand the narrow *Erie* case, the broad *Erie* principle is about more than just the RDA. The *Erie* principle holds that—regardless of the Act—federal courts have *always* lacked the legitimate power to create “general law.” If the *Erie* principle stands for this, then it can't be driven by the non-delegation doctrine, since the non-delegation doctrine only constrains what statutes Congress can pass.<sup>190</sup> Perhaps there are some constitutional limits that prevent federal courts' policymaking via federal common law from going too far,<sup>191</sup> but the non-delegation doctrine isn't the place to find them.

## 2. Statutory Erie

So we can safely reject the idea that the modern *Erie* doctrine can be adequately explained by the non-delegation doctrine. But now let's consider a new hypothetical. Suppose that Congress *today* chooses to *explicitly* reenact the *Swift v. Tyson* regime by statute: now, says Congress, federal courts *can* make general law in diversity cases.

This hypothetical statute would stand on a different footing than our existing RDA, which was silent on whether federal courts could make general law. The RDA, however it's been interpreted, has always been thought to match the default rule that would have obtained in the absence of the statute. But our hypothetical statute would establish the *Swift v. Tyson* rule in an era when the *Erie* rule is believed to be the default rule. So, unlike the RDA, such a statute would (if valid) have real substantive effect.

Such a statute would, the cases say, be unconstitutional. Let's explore why—and whether the non-delegation doctrine might do some work for this statute.

First, the Inherent-Powers Corollary tells us to see whether the courts would have had the delegated power in the absence of the statute. (If they would have had such a power, then the statute is valid even though it has no intelligible principle.) We've just determined that the courts have no such power: that's the *Erie* background principle that we now recognize.

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<sup>190</sup> See, e.g., SCHOENBROD, *supra* note 24, at 189.

<sup>191</sup> Nielson, *supra* note 20, at 243, 280–81.

Second, we look to the Interlinking Extension. Even though federal courts lack the *inherent* power to make general law, the statute might still be valid if such a power is *interlinked* with federal courts' inherent power.

This question is hard to answer, because we don't really know what *interlinked* means. What did it take for the President's power to ban arms sales to the Chaco or to define death-eligible military offenses to be interlinked with his core areas of power? Was it just because the subject matter related to foreign affairs or the military? If so, one could easily say that the hypothetical *Swift v. Tyson* statute is interlinked with judicial power, because the power to make rules of decision for federal courts relates to federal courts' power to hear diversity cases and other cases within their jurisdiction. And if so, it would be hard to see what plausible delegations to the judiciary in its adjudicative capacity could ever invoke the ordinary non-delegation doctrine—everything courts do in deciding cases relates to their core function of deciding cases within their jurisdiction, and even their quasi-legislative activity of writing Sentencing Guidelines has been held to be “appropriate to the central mission of the Judiciary.”<sup>192</sup> We could think of non-interlinked areas—perhaps a judge-written tax code would be out of bounds?—but it would be hard to think of areas that would reasonably come up.

On the other hand, one could imagine a stricter version of what “interlinked” means in the judicial context. In the specific context of *Erie*, perhaps the problem is that the concept of general law, in the sense of a rule of decision that applies only in federal court, is fishy, and perhaps not really law at all. Judges should apply *the law*; sometimes they make law, but since they're federal actors, that law is *federal law*; and by the Supremacy Clause, federal law must also apply in state courts and preempt state law. If general law isn't really law, one can argue that it's also not interlinked with the judiciary's inherent power, so the Interlinking Extension doesn't apply.

Note that this interlinking discussion (like the discussion of the *Erie* principle above) required us to probe the foundations of why the constitutional *Erie* principle exists at all; and, as noted above, commentators disagree on this. The one thing that's clear is that we can't use the non-delegation doctrine to discuss that background principle, because (1) the principle doesn't stem from an Act of Congress, so the non-delegation doctrine can't apply; and (2) since the Inherent-Powers Corollary and the Interlinking Extension require that we inspect the background principle in order to judge the validity of a congressional delegation,

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<sup>192</sup> *Mistretta v. United States*, 488 U.S. 361, 388 (1989).

it would be circular to use the non-delegation doctrine to judge the background principle itself.

In any event, the hypothetical statute is neither within courts' inherent powers nor interlinked with them. So, if it's even valid at all for Congress to direct federal courts to apply their own substantive rules that apply nowhere else (which I doubt), Congress should do so with an intelligible principle and not the sort of "in the light of reason and experience" language found in Federal Rule of Evidence 501<sup>193</sup> or similar statutes.<sup>194</sup>

The non-delegation verdict on *Erie* is thus complicated, because there are two *Erie* principles, one about the non-statutory rule and one about congressional power to re-enact the *Swift v. Tyson* regime. Once we disentangle these two principles, we can see that federal courts lack the inherent power to make general law for reasons independent of the non-delegation doctrine. Only then can we examine whether the RDA, if interpreted *today* on *Swift v. Tyson* lines (or reenacted on explicitly *Swift v. Tyson* lines), violates the non-delegation doctrine. It does—but we know this only because we've already applied the Inherent-Powers Corollary, figured out that there's no inherent power in federal courts, and therefore concluded that an intelligible principle is required.

### III. RULEMAKING, ADJUDICATION, AND FEDERAL JUDICIAL POWER

This Part applies the foregoing theory to specific statutes. The Inherent-Powers Corollary commands us to look to courts' inherent powers if we want to dispense with the intelligible principle analysis. What, then, are those powers? In section A, I discuss courts' rulemaking powers. But of course, the main powers of courts relate to adjudication—which is the subject of the remaining sections of this Part. When Congress passes a vague statute delegating power to courts in an adjudicatory context, what the courts are exercising is essentially their federal common-lawmaking power. So the non-delegation inquiry folds into the familiar inquiry of the proper scope of federal common law. In section B, I discuss federal courts' power to make common law in areas of "uniquely federal interests"; in section C, I discuss their power to craft common-law defenses and other doctrines that narrow the scope of statutes; in section D, I discuss their power to craft remedies; and in section E, I discuss their inherent power to interpret the meaning of terms.

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<sup>193</sup> See *supra* text accompanying note 106.

<sup>194</sup> See *supra* text accompanying note 109.

## A. *Procedural Rulemaking: An Easy Case?*

### 1. *The Power to Make Rules*

*Mistretta* tells us that Congress may delegate procedural rulemaking power to courts.<sup>195</sup> These sorts of delegations are of ancient vintage,<sup>196</sup> and have been blessed by the Supreme Court since *Wayman v. Southard*,<sup>197</sup> *Bank of the United States v. Halstead*,<sup>198</sup> and (more recently, as to the Rules Enabling Act of 1934) *Sibbach v. Wilson & Co.*<sup>199</sup>

Generally speaking, federal courts' procedural rulemaking has been authorized by Congress.<sup>200</sup> But it seems clear that such authorization isn't necessary. Courts must have some power of their own over their internal procedures<sup>201</sup>—indeed, if Congress had established federal courts but remained completely silent about their procedure, courts would necessarily have had to adopt procedures of their own.<sup>202</sup>

Courts may thus adopt procedural rules—at least as long as the rules don't “abridge, enlarge[,] or modify any substantive rights” of any litigant,<sup>203</sup> and possibly as long as they don't substantially affect the plaintiff's choice of forum.<sup>204</sup> To be sure, Congress generally has concurrent power in this area, so it can authorize the rules that courts would already be making, or partly mandate the content of future rules, or override some past rules, or allocate rulemaking power to particular actors in the judicial branch (such as the Supreme Court). But broad congressional delegations with no intelligible principle would be acceptable here.<sup>205</sup>

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<sup>195</sup> See *supra* text accompanying note 63.

<sup>196</sup> Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83 (1789).

<sup>197</sup> 23 U.S. (10 Wheat.) 1 (1825).

<sup>198</sup> 23 U.S. (10 Wheat.) 51 (1825).

<sup>199</sup> 312 U.S. 1 (1941); see also CURRIE, *supra* note 43, at 217 n.63.

<sup>200</sup> HART & WECHSLER, *supra* note 21, at 535–37.

<sup>201</sup> See Merrill, *supra* note 141, at 18, 24, 32; Oldham, *supra* note 16, at 352–53; Posner & Vermeule, *supra* note 13, at 1731; Rappaport, *supra* note 43, at 354–55.

<sup>202</sup> See *Florida v. Georgia*, 58 U.S. (17 How.) 478, 492 (1854) (“[I]n the absence of any legislation by congress, the court itself was authorized to prescribe its mode and form of proceeding, so as to accomplish the ends for which the jurisdiction was given.”); Oldham, *supra* note 16, at 353.

<sup>203</sup> 28 U.S.C. § 2072(b) (2012); see also Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1025–26, 1028–29, 1078 (1982).

<sup>204</sup> Merrill, *supra* note 141, at 33 (citing *Hanna v. Plumer*, 380 U.S. 460, 469 (1965) (dictum)).

<sup>205</sup> Lemos, *supra* note 17, at 408 n.10.

This idea applies more broadly than just internal procedural rules. Though federal courts can't create common-law crimes, they do have an inherent power to impose sanctions for bad faith and fraudulent litigation behavior; this power has been justified by the need to “vindicat[e] judicial authority.”<sup>206</sup> *United States v. Hudson & Goodwin* calls this an “implied power[],” one “which cannot be dispensed with in a Court, because [it is] necessary to the exercise of all others.”<sup>207</sup> Courts’ “supervisory power to formulate and apply proper standards for enforcement of the criminal law in the federal courts”<sup>208</sup> even extends into policing some aspects of grand-jury-related conduct.<sup>209</sup> A standardless delegation into these areas of judicial power would likewise be acceptable.

Finally, when the Supreme Court suggested Federal Rules of Evidence, questions over whether this power fell within the rulemaking power originally granted by the Rules Enabling Act led to the Rules’ being adopted as a statute by Congress.<sup>210</sup> It’s likely, though, that courts could have adopted rules of evidence if Congress had remained silent—and indeed they did make rules of evidence for a long time, in common-law fashion, without any statutory authorization.<sup>211</sup> Federal Rule of Evidence 501 is therefore valid,<sup>212</sup> as are the later enabling acts for rules of evidence.<sup>213</sup>

## 2. *The Power to Repeal Procedural Statutes*

But even in procedural rulemaking—supposedly the easiest case for congressional delegation to courts—there can be unconstitutional delegations. In the Rules Enabling Act, right after giving the Supreme Court the power to

<sup>206</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46 (1991) (quoting *Hutto v. Finney*, 437 U.S. 678, 689 n.14 (1978)); see also *Goodyear Tire & Rubber Co. v. Haeger*, 137 S. Ct. 1178, 1186 (2017).

<sup>207</sup> 11 U.S. (7 Cranch) 32, 34 (1812); see also HART & WECHSLER, *supra* note 21, at 613.

<sup>208</sup> *Marshall v. United States*, 360 U.S. 310, 313 (1959) (per curiam).

<sup>209</sup> *Compare Bank of Nova Scotia v. United States*, 487 U.S. 250, 254–55 (1988) (granting, in the context of district court oversight over a grand jury proceeding, that federal courts could exercise supervisory authority to devise procedural rules, but reasoning that this power could not be used to conflict with a Federal Rule of Criminal Procedure), with *United States v. Williams*, 504 U.S. 36, 50 (1992) (holding that federal courts’ supervisory authority over grand jury proceedings is “very limited” and “not remotely comparable to the power [courts] maintain over their own proceedings”).

<sup>210</sup> See *Rules of Evidence for United States Courts and Magistrates*, 56 F.R.D. 183, 185 (1972) (Douglas, J., dissenting); HART & WECHSLER, *supra* note 21, at 540–41.

<sup>211</sup> See KENNETH W. GRAHAM, JR., 21 FEDERAL PRACTICE AND PROCEDURE: FEDERAL RULES OF EVIDENCE §§ 5001–5006 (2d ed.).

<sup>212</sup> See *Merrill*, *supra* note 141, at 42; *Volokh*, *supra* note 109, at 1476; *supra* text accompanying note 106; see also *infra* Part III.C (suggesting an alternative basis for the validity of Federal Rule of Evidence 501).

<sup>213</sup> See, e.g., Pub. L. No. 93-595, § 2, 88 Stat. 1926, 1948 (1975) (codified at the former 28 U.S.C. § 2076 (2012)). This power is now merged with the general rulemaking power in 28 U.S.C. § 2072.

prescribe procedural rules,<sup>214</sup> Congress provided that “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.”<sup>215</sup>

At first, the Court seemed to suggest that allowing the Court to repeal a statute by enacting procedural rules would be invalid;<sup>216</sup> later, in dictum, it suggested that such a “repeal by implication” would present “a difficult question”;<sup>217</sup> and in more recent dictum, the Court suggested that such repeals are entirely unproblematic.<sup>218</sup>

Can Congress delegate to the Supreme Court the power to repeal statutes? It seems doubtful that Congress could delegate such a power to, say, the EPA or the IRS<sup>219</sup>—and the unconstitutionality of the Line Item Veto Act suggests that “doubtful” is putting it mildly.<sup>220</sup> The problem with the Line Item Veto Act, the Court said in *Clinton v. New York*, was that it allowed the President to essentially repeal a statute, and this is exactly what’s happening here.<sup>221</sup>

Leslie Kelleher argues that the two statutes are distinguishable because the Line Item Veto Act aggrandizes one branch at the expense of another, whereas the Rules Enabling Act doesn’t, because it only allows the repeal of truly procedural statutes that “reflect no real substantive policy decisions.”<sup>222</sup> But given the real-world effects of procedure, from class actions to discovery to summary judgment standards, it seems hard to truly describe the Federal Rules of Civil Procedure as reflecting no real substantive policy decisions; and even so, given the importance of procedure to courts, the Rules Enabling Act really does look like it aggrandizes courts.

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<sup>214</sup> 28 U.S.C. § 2072(a) (2012); see *supra* text accompanying note 105.

<sup>215</sup> 28 U.S.C. § 2072(b).

<sup>216</sup> See *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9–10 (1941); see also Robert N. Clinton, *Rule 9 of the Federal Habeas Corpus Rules: A Case Study on the Need for Reform of the Rules Enabling Acts*, 63 IOWA L. REV. 15, 72 (1977).

<sup>217</sup> *Davis v. United States*, 411 U.S. 233, 241 (1973); see also *United States v. Isaacs*, 351 F. Supp. 1323, 1328 (N.D. Ill. 1972) (assuming such a conflict and finding that the rule controlled); Clinton, *supra* note 216, at 73.

<sup>218</sup> See *Henderson v. United States*, 517 U.S. 654 (1996).

<sup>219</sup> See *Morrill v. Jones*, 106 U.S. 466 (1882); Clinton, *supra* note 216, at 74.

<sup>220</sup> See *Clinton v. City of New York*, 524 U.S. 417, 421 (1998).

<sup>221</sup> See *id.*; see also Saikrishna Bangalore Prakash, *Deviant Executive Lawmaking*, 67 GEO. WASH. L. REV. 1, 42 (1998). Justice Breyer, in dissent, noted that these two statutes were similar (“[A] contingent power to deny effect to certain statutory language”)—his view was that both should be equally *valid*. *Clinton*, 524 U.S. at 477 (Breyer, J., dissenting).

<sup>222</sup> Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 399–400 (2000).

## B. *Uniquely Federal Interests*

Now let's move into the discussion of the proper scope of federal common law. To begin with, the Supreme Court has held that federal courts may make federal common law in areas involving "uniquely federal interests."<sup>223</sup>

There's substantial controversy over how unique the federal interest has to be—and different views as to the scope of this category correspond to different views on what delegations are valid. For purposes of this Article, I don't need to commit myself as to which theory of federal common law is correct. I'll just make the following three points: federal common law is permissible in certain subject-matter enclaves; for purposes of the Inherent-Powers Corollary, we have to focus only on statute-independent federal common-lawmaking powers, and ignore federal common-lawmaking powers that are derived from statutes; and jurisdictional grants shouldn't be considered sufficient to grant federal common-lawmaking power.

### 1. *Enclaves*

First, even the narrowest of theories allows for a small category of federal common-lawmaking, such as for interstate controversies, international relations, and (in most cases<sup>224</sup>) admiralty.<sup>225</sup>

As for proprietary relations of the United States, there's a federal common law of contract to govern commercial transactions involving the federal government,<sup>226</sup> a federal common law of tort to govern torts committed against the federal government or in areas of significant federal interest,<sup>227</sup> and a federal common law of property to govern the scope of property rights granted by the federal government.<sup>228</sup>

Under the Inherent-Powers Corollary, this by itself is enough to justify standardless delegations of lawmaking power to the courts in these enclaves.

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<sup>223</sup> See, e.g., *Boyle v. United Techs. Corp.*, 487 U.S. 500, 504 (1988); *Tex. Indus. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424, 426 (1964).

<sup>224</sup> See HART & WECHSLER, *supra* note 21, at 656–57.

<sup>225</sup> See, e.g., *Norfolk S. Ry. v. Kirby*, 543 U.S. 14, 22–29 (2004) (explaining that the case is governed by the federal common law of admiralty and not by state law).

<sup>226</sup> *Gen. Dynamics Corp. v. United States*, 563 U.S. 478, 485 (2011); *Clearfield Tr. Co. v. United States*, 318 U.S. 363, 367 (1943).

<sup>227</sup> See *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947); HART & WECHSLER, *supra* note 21, at 631.

<sup>228</sup> See *Hughes v. Washington*, 389 U.S. 290, 292–93 (1967); HART & WECHSLER, *supra* note 21, at 642.

This potentially includes the Alien Tort Statute's incorporation of law-of-nations torts. Determining what torts violate the law of nations is either part of courts' common-lawmaking powers as to international relations, or is interlinked with those powers.<sup>229</sup> There might be some independent constitutional bar to letting courts define law-of-nations torts—Kontorovich argues that the Offenses Clause makes Congress the exclusive lawmaker in this area<sup>230</sup>—but if so, this is a separate, specific non-delegation principle, not the general non-delegation doctrine.

## 2. *The Need to Ignore Delegated Judicial Power*

Second, it's necessary to distinguish the Inherent-Powers Corollary from some of the broader formulations of federal common-lawmaking power.

Some cases, like *D'Oench, Duhme & Co. v. FDIC*,<sup>231</sup> have been interpreted broadly, to stand for the proposition that “a statute establishing a federal program can be understood to include an implied delegation to judges to supply necessary omissions.”<sup>232</sup> This may be correct, but it's not relevant to our quest for federal courts' inherent power. Note the word *delegation* in that quote: obviously, this isn't a statement of the federal courts' *inherent* common-lawmaking power, but rather a statement of the courts' *delegated* common-lawmaking power.

The Inherent-Powers Corollary requires us to look to courts' *inherent* powers only if we want to dispense with the intelligible principle analysis. So if we are examining such a statute establishing a federal program, the Inherent-Powers Corollary doesn't allow us to use the courts' supposed “supply necessary omissions” power to validate the delegation. If the delegation is valid, it's for some other reason.

We thus need to clearly separate courts' delegated and inherent—that is, their statute-dependent and statute-independent—powers. The Inherent-Powers Corollary considers the statute-independent powers of courts, and ignores the extra delegated powers that they get from statutes. Not just ignores: whether those extra powers are *validly* delegated—whether courts really do have a broad

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<sup>229</sup> See *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398 (1964); HART & WECHSLER, *supra* note 21, at 671–79 (discussing the act of state doctrine and dormant foreign affairs preemption). Nielson, *supra* note 20, and Kontorovich, *supra* note 18, don't consider the possibility that the Inherent-Powers Corollary could save the ATS in this way.

<sup>230</sup> See Kontorovich, *supra* note 18, at 1743.

<sup>231</sup> 315 U.S. 447, 457 (1942); *id.* at 468–69 (Jackson, J., concurring).

<sup>232</sup> HART & WECHSLER, *supra* note 21, at 622.

power to develop statutory schemes, as some of the federal common law literature puts it—should be the *result* of the non-delegation inquiry. (This is true for delegations to the President as well. The President has inherent powers like the Commander in Chief power to organize the military, but also has all the delegated power represented by the Take Care Clause.<sup>233</sup> But clearly we can't justify all delegations to the President on the theory that the President has a Take Care power to execute the statute: that would similarly be a confusion of statute-independent and statute-dependent powers.)

The Sherman Act, in the antitrust context, provides a good illustration of this inherent-vs.-delegated distinction. Later, I'll discuss a different ground for the validity of the Sherman Act: that, by incorporating a well-defined pre-existing common law prohibition, it delegates to courts no more than the inherent statutory-interpretation power that they already have.<sup>234</sup> But can I justify the Sherman Act the way I justified the Alien Tort Statute—by placing it within an area involving uniquely federal interests, where courts already have a federal common-lawmaking power? Clearly, I won't be able to justify antitrust delegation using the general argument that courts have an unlimited power to fill out any congressional delegated regime. But can I make a specific argument that antitrust implicates uniquely federal interests?

The Supreme Court's discussion in *Texas Industries v. Radcliff Materials*<sup>235</sup> suggests that I can't: antitrust just isn't uniquely federal enough. In *Texas Industries*, a defendant in an antitrust lawsuit filed a third-party complaint against his alleged co-conspirators, seeking contribution from them if he was held liable.<sup>236</sup> The Court noted that the antitrust statutes didn't expressly establish a right of contribution, nor could the Court find such a right in the legislative history.<sup>237</sup> Because Congress didn't create such a right, “[i]f any right to contribution exists, its source must be federal common law.”<sup>238</sup> The Court had previously recognized a right to contribution in admiralty, but admiralty is one of the recognized areas of federal interest.<sup>239</sup> By contrast, antitrust is just a set of prohibitions of private business practices, not a uniquely federal interest:

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<sup>233</sup> U.S. CONST. art. II, § 3.

<sup>234</sup> See *infra* text accompanying notes 373–94.

<sup>235</sup> 451 U.S. 630 (1981).

<sup>236</sup> *Id.* at 632–33.

<sup>237</sup> *Id.* at 639.

<sup>238</sup> *Id.* at 640.

<sup>239</sup> *Id.* at 641–42.

[A] treble-damages action remains a private suit involving the rights and obligations of private parties. Admittedly, there is a federal interest in the sense that vindication of rights arising out of these congressional enactments supplements federal enforcement and fulfills the objects of the statutory scheme. Notwithstanding that nexus, contribution among antitrust wrongdoers does not involve the duties of the Federal Government, the distribution of powers in our federal system, or *matters necessarily subject to federal control even in the absence of statutory authority*. In short, contribution does not implicate “uniquely federal interests” of the kind that oblige courts to formulate federal common law.<sup>240</sup>

Note the phrase I’ve italicized, referring explicitly to the courts’ *statute-independent* powers. The Court went on to discuss the courts’ *statute-dependent* power in antitrust: “Congress has vested jurisdiction in the federal courts and empowered them to create governing rules of law” in the area of *substantive* antitrust.<sup>241</sup> “It does not necessarily follow, however, that Congress intended to give courts as wide discretion in formulating remedies to enforce the provisions of the Sherman Act or the kind of relief sought through contribution.”<sup>242</sup>

So there isn’t an inherent, statute-independent power to create an antitrust right of contribution (i.e., it can’t be justified by an enclave). And, in the Court’s view, there likewise wasn’t a delegated, statute-dependent power to create such a right (i.e., it can’t be justified by statutory interpretation)—though whether this last point is correct or not is a question of substantive antitrust law that has no bearing on this Article. The more general statute-dependent question—whether the statute-dependent power to create substantive antitrust rules is truly valid—is something I’ll discuss in a later section.<sup>243</sup> But for purposes of this section—where we check whether the statute is valid under the Inherent-Powers Corollary because it falls within a uniquely federal interests enclave—we focus single-mindedly on the statute-independent power, and find it lacking.

### 3. *Jurisdictional Grants*

Likewise, a grant of jurisdiction is insufficient to create an area of uniquely federal interests. The best-known case of common-lawmaking power through jurisdictional grant involves § 301 of the Taft-Hartley Act, where the Supreme

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<sup>240</sup> *Id.* at 642 (citation omitted) (emphasis added).

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* at 643.

<sup>243</sup> See *infra* text accompanying notes 373–94.

Court took a grant of jurisdiction to enforce collective bargaining agreements as a license to make a federal common law of collective bargaining agreement (CBA) enforceability.<sup>244</sup> But we can't just bypass the non-delegation question by assuming that courts can constitutionally assert common-lawmaking power in such cases, because this would again be confusing delegated power with inherent power.

The better view is that stated in *Texas Industries*: “The vesting of jurisdiction in the federal courts does not in and of itself give rise to authority to formulate federal common law.”<sup>245</sup> Whether a jurisdictional statute (or any other statute) confers federal common-lawmaking power is a matter of statutory interpretation, taking into account the overall structure of the statute. Thus, in the Taft-Hartley Act, perhaps the enforceability of CBAs should be governed by federal common law because we interpret “violation of contracts”<sup>246</sup> in light of the overall Act to require a national standard.<sup>247</sup> On the other hand, the range of inventiveness in developing law-of-nations torts under the Alien Tort Statute might be more limited, again because of a statute-specific inquiry;<sup>248</sup> of course federal law will apply to such torts because state law seems clearly inappropriate given the subject matter, but whether a particular tort is recognized at all depends on Congress’s intent. In any event, the mere fact of a jurisdictional grant shouldn’t count for much.<sup>249</sup>

Whether, and to what extent, a statute granting jurisdiction authorizes federal common law thus merges into the statutory interpretation inquiry; whether this satisfies non-delegation depends on what methods of statutory interpretation are within the powers of courts.<sup>250</sup>

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<sup>244</sup> 29 U.S.C. § 185 (2012); *see also* *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448 (1957); HART & WECHSLER, *supra* note 21, at 663–65; *id.* at 663 n.18 (listing the Alien Tort Statute, federal equity jurisdiction, and federal habeas corpus jurisdiction as other examples); Merrill, *supra* note 141, at 30 & nn.130–32, 40–42.

<sup>245</sup> 451 U.S. at 640–41.

<sup>246</sup> 29 U.S.C. § 185(a).

<sup>247</sup> *Lincoln Mills*, 353 U.S. at 456–57; HART & WECHSLER, *supra* note 21, at 664; Merrill, *supra* note 141, at 43.

<sup>248</sup> *See Sosa v. Alvarez-Machain*, 542 U.S. 692, 712–24 (2004).

<sup>249</sup> *See* HART & WECHSLER, *supra* note 21, at 653, 654 & n.2, 661.

<sup>250</sup> *See infra* Part III.E.

### C. *Defenses and Similar Statute-Narrowing Doctrines*

Though federal courts don't have the power to create common-law crimes, they have long exercised powers to create defenses (for instance, self-defense<sup>251</sup>) and similar rules (for instance, the rule of lenity<sup>252</sup>). This power extends beyond criminal law: while retroactive criminal laws are unconstitutional,<sup>253</sup> retroactive civil laws are merely disfavored, and this disfavor is expressed through a judicially created presumption against retroactivity.<sup>254</sup> Likewise with statutes of limitations that apply when a statute hasn't specified one.

These powers have their critics. As to statutes of limitations, why does a court need to imply one if the statute doesn't provide for one? Is it so unthinkable that a statute would lack a limitations period?<sup>255</sup> As to defenses, the Supreme Court has stated in dictum that courts' power to recognize a non-statutory necessity defense is questionable.<sup>256</sup> But Judge Easterbrook is on solid ground suggesting that creating such defenses is legitimate because they're so firmly established in history that they create a baseline against which Congress legislates.<sup>257</sup>

If this is so, courts' implication of traditional defenses and similar exceptions to laws reduces to a matter of statutory interpretation, which I discuss below<sup>258</sup>: courts creating defenses are merely reading the statute in its proper context, which includes the entire structure of the law as it existed at the time of the statute's enactment. This justifies the delegation to courts of the power, in § 3008 of RCRA and § 113 of the Clean Air Act, to develop defenses.<sup>259</sup>

Similarly, we can interpret an evidentiary privilege as a defense of a sort (to the general rule that everyone has to testify); and in light of the long history of

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<sup>251</sup> See *Brown v. United States*, 256 U.S. 335 (1921).

<sup>252</sup> See *United States v. Bass*, 404 U.S. 336, 347–49 (1971); Kahan, *supra* note 145, at 357–63; Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 *FORDHAM L. REV.* 885 (2004).

<sup>253</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>254</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994) (“If [a] statute would operate retroactively, our traditional presumption teaches that it does not govern absent clear congressional intent favoring such a result.”).

<sup>255</sup> See *Agency Holding Corp. v. Malley-Duff & Assocs.*, 483 U.S. 143, 163–70 (1987) (Scalia, J., concurring in the judgment); HART & WECHSLER, *supra* note 21, at 689.

<sup>256</sup> See *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001); HART & WECHSLER, *supra* note 21, at 613.

<sup>257</sup> See HART & WECHSLER, *supra* note 21, at 613; *The Case of the Speluncean Explorers: Revisited*, 112 *HARV. L. REV.* 1876, 1913–14 (1999) (opinion of Easterbrook, J.).

<sup>258</sup> See *infra* Part III.E.

<sup>259</sup> See *supra* text accompanying note 109.

evidentiary privileges, it's sensible to read the Federal Rules of Evidence (even without Rule 501) to implicitly incorporate those privileges. Federal Rule of Evidence 501 can thus likewise be justified on the basis that the implication of privileges is something that courts could have done anyway. (And recall that I've also justified it on the basis that it's a procedural rule.<sup>260</sup>)

What about the Religious Freedom Restoration Act (RFRA) and its regime of religious exemptions to generally applicable laws? Recall that RFRA prohibits the federal government from “substantially burden[ing] a person’s exercise of religion” unless “it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>261</sup>

One might try to justify RFRA as an effort by judges to create a necessity-like defense to every federal statute—on the theory that we don’t lightly presume Congress to have wanted to force people to violate their religious beliefs as the price of complying with a statute. On the other hand, there doesn’t seem to be a history of religious-liberty-themed defenses to generally applicable statutes, comparable to the history of general criminal defenses, that has become part of the statutory baseline.

Whether one can justify RFRA along these lines depends on how broadly one reads the legitimate scope of federal courts’ powers. Federal courts have created many substantive canons, inspired but not mandated by constitutional considerations—like the canon of constitutional avoidance,<sup>262</sup> the canon against retroactivity,<sup>263</sup> the clear-statement rule for abrogating state sovereign immunity,<sup>264</sup> or the cost-benefit canon<sup>265</sup>—which aren’t closely tied to congressional intent.

If you agree with the enterprise of creating substantive canons, then federal courts could similarly have crafted a non-constitutional clear-statement rule against interpreting a statute to burden someone’s religious exercise, and that clear-statement rule would function like RFRA. The Inherent-Powers Corollary

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<sup>260</sup> See *supra* text accompanying notes 210–13.

<sup>261</sup> 42 U.S.C. § 2000bb-1(b) (2012).

<sup>262</sup> See *Ashwander v. TVA*, 297 U.S. 288, 346–48 (1936) (Brandeis, J., concurring). See generally Note, *Should the Supreme Court Presume that Congress Acts Constitutionally? The Role of the Canon of Avoidance and Reliance on Early Legislative Practice in Constitutional Interpretation*, 116 HARV. L. REV. 1798 (2003).

<sup>263</sup> See *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994).

<sup>264</sup> See John Copeland Nagle, *Waiving Sovereign Immunity in an Age of Clear Statement Rules*, 1995 WIS. L. REV. 771.

<sup>265</sup> See Gray, *supra* note 145, at 23–25; Sunstein, *supra* note 145, at 334–35.

then tells us that RFRA would be constitutional even without an intelligible principle, as a delegation related to the inherent judicial power to create constitutionally inspired—though not constitutionally mandated—interpretive canons. Certainly modern practice supports such a power, and Bill Eskridge plausibly argues that this practice has deep roots in English and early American law.<sup>266</sup>

On the other hand, if you think federal courts lack the power to craft substantive canons that put a thumb on the scale of some value that’s neither part of congressional intent nor constitutionally required, then this method would be a non-starter for justifying RFRA.<sup>267</sup> (I give alternate grounds for RFRA’s validity below.<sup>268</sup>)

#### D. Remedies

Schoenbrod argues that Congress may validly grant courts a power to determine remedies for statutory violations without violating the non-delegation doctrine: a court’s remedial power is narrow, since it only comes into play once a statutory violation has been found.<sup>269</sup> (The detail required in the intelligible principle, after all, varies with the importance of the delegation.<sup>270</sup>)

This is possible, but to save statutes that have *no* intelligible principle relevant to remedies—such as indeterminate criminal sentencing statutes<sup>271</sup> or provisions authorizing courts to award “any appropriate relief”<sup>272</sup>—it would be nice to have a broader theory. Here, perhaps we can use the Inherent-Powers Corollary, on the theory that federal courts already have a broad remedial power.<sup>273</sup> For instance, they have some power to imply private remedies for

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<sup>266</sup> William N. Eskridge, Jr., *All About Words: Early Understandings of the “Judicial Power” in Statutory Interpretation, 1776–1806*, 101 COLUM. L. REV. 990, 1005–06, 1025–26, 1057, 1066–68, 1075–77, 1079–81, 1099–1100, 1103–05 (2001).

<sup>267</sup> See WILLIAM N. ESKRIDGE, JR., *DYNAMIC STATUTORY INTERPRETATION* 283–85 (1994); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2142–44 (2002).

<sup>268</sup> See *infra* text accompanying notes 346–60.

<sup>269</sup> SCHOENBROD, *supra* note 24, at 189.

<sup>270</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 475 (2001).

<sup>271</sup> See, e.g., 18 U.S.C. § 2113 (2012) (stating a bank robber “[s]hall be fined under this title or imprisoned not more than twenty years, or both”).

<sup>272</sup> See, e.g., 11 U.S.C. § 1521(a) (2012); 42 U.S.C. § 7413(b) (2012); 46 U.S.C. § 2114(b) (2002) (amended in 2010 to remove the “any appropriate relief” language).

<sup>273</sup> See *Franklin v. Gwinnett Cty. Pub. Schs.*, 503 U.S. 60, 69 (1992) (“[T]he Court has [long] held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.”); Merrill, *supra* note 141, at 48–59.

statutory violations,<sup>274</sup> though this power has shrunk dramatically, and the recent trend is mostly to inquire whether Congress intended to create such a remedy.<sup>275</sup> As with defenses, much of this thus boils down to statutory interpretation.<sup>276</sup>

Moreover, as to indeterminate sentencing, federal courts probably do have an inherent power to choose a reasonable point within a broad range of remedies.<sup>277</sup> If they didn't, it would be hard to see how indeterminate sentencing could survive a non-delegation challenge.<sup>278</sup> But if this is so, the Inherent-Powers Corollary tells us that it wouldn't violate the non-delegation doctrine for Congress to delegate a discretion-limiting power to the federal courts. This suggests an alternate justification for the Sentencing Guidelines and thus an alternate ground for the non-delegation holding in *Mistretta v. United States*<sup>279</sup> (or perhaps a more precise explanation of what the Supreme Court might have meant in writing that developing guidelines was “appropriate to the central mission of the Judiciary”<sup>280</sup>). Such guidelines would do no more than codify what the Supreme Court could already do through its supervisory power over the lower courts: develop a common law of reasonable sentences within a range. Even though the Court found an intelligible principle to save the statute,<sup>281</sup> the Sentencing Guidelines would have been consistent with the non-delegation doctrine even if they were completely standardless.

#### *E. Statutory Interpretation*

Finally, I'll examine the implicit “delegation” to courts that occurs every time Congress passes a statute with an ambiguous term that courts must interpret.<sup>282</sup> Cases of common-law-style and policy-laden judicial development of vague statutory standards are of course pervasive—I'll limit myself here to a handful of cases.

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<sup>274</sup> See *Cort v. Ash*, 422 U.S. 66, 78 (1975).

<sup>275</sup> See, e.g., *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979); see also HART & WECHSLER, *supra* note 21, at 690, 705–15; Lemos, *supra* note 17, at 473 n.332; Merrill, *supra* note 141, at 49–50.

<sup>276</sup> See *supra* text accompanying note 258.

<sup>277</sup> See *Beckles v. United States*, 137 S. Ct. 886, 893 (2017) (“[O]ur cases have never suggested that a defendant can successfully challenge as vague a sentencing statute conferring discretion to select an appropriate sentence from within a statutory range, even when that discretion is unfettered.”).

<sup>278</sup> *Oldham*, *supra* note 16, at 349.

<sup>279</sup> 488 U.S. 361, 387 (1989).

<sup>280</sup> *Id.* at 388; see also *supra* text accompanying notes 56–64.

<sup>281</sup> *Mistretta*, 488 U.S. at 374–77.

<sup>282</sup> See Rosenkranz, *supra* note 267, at 2127 (“Ascribing meaning to words that Congress leaves undefined is an inherent incident of the judicial power.”).

### 1. *Is Ambiguity a Delegation?*

First, is it really a delegation for Congress to pass an ambiguous statute? It's perfectly conventional to refer to certain open-ended statutes—chiefly the Sherman Act, but also other statutes like the Alien Tort Statute and securities laws—as delegations to the judiciary. Moreover, when Congress passes an agency-administered statute with an ambiguous term, the *Chevron* rule<sup>283</sup> (when it applies) interprets the ambiguity as an implicit delegation of interpretive power to agencies.<sup>284</sup> If that's the case when an *agency* is doing the interpreting, it seems plausible that the same ambiguity in a *judicially* administered statute is an equivalent delegation of interpretive power to courts.

The “ambiguity as delegation” perspective shows up in some judicial opinions<sup>285</sup> and is quite common in the scholarly literature.<sup>286</sup> Justice Scalia (who was, incidentally, one of the foremost proponents of the rule of lenity<sup>287</sup>) disagreed with this perspective. He wrote that, unlike agencies, which are allowed to choose any reasonable interpretation of ambiguous text, courts lack discretion:

Courts . . . *must* give the statute its single, most plausible, reading. To describe this as an exercise of “delegated lawmaking authority” seems to me peculiar—unless one believes in lawmakers who have no discretion. Courts must apply judgment, to be sure. But judgment is not discretion.<sup>288</sup>

One can respond to Justice Scalia in at least three ways.

First, why must a delegate have discretion—why is it unthinkable to imagine that lawmakers who have no discretion might be exercising delegated power?

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<sup>283</sup> *Chevron*, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).

<sup>284</sup> *Id.* at 843–44.

<sup>285</sup> *See, e.g.*, *McNally v. United States*, 483 U.S. 350, 372–73 (1987) (Stevens, J., dissenting); *Reporters Comm. for Freedom of Press v. DOJ*, 816 F.2d 730, 734 (D.C. Cir. 1987).

<sup>286</sup> *See, e.g.*, HART & WECHSLER, *supra* note 21, at 621 n.9; Kahan, *supra* note 145, at 347, 354; Rosenkranz, *supra* note 267, at 2104.

<sup>287</sup> *See, e.g.*, *Abramski v. United States*, 134 S. Ct. 2259, 2276 (2014) (Scalia, J., dissenting); *Maracich v. Spears*, 133 S. Ct. 2191, 2212 (2013) (Ginsburg, J., joined by Scalia, J., dissenting); *United States v. Santos*, 553 U.S. 507 (2008) (Scalia, J.); *United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 519 (1992) (Scalia, J., concurring in the judgment); *United States v. R.L.C.*, 503 U.S. 291, 307 (1992) (Scalia, J., concurring in part and concurring in the judgment); *Moskal v. United States*, 498 U.S. 103, 119 (1990) (Scalia, J., dissenting); *see also* Kahan, *supra* note 145, at 348, 390–96.

<sup>288</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 332 (2007) (Scalia, J., concurring in the judgment); *cf. Lemos, supra* note 17, at 430–32 (distinguishing between how courts and agencies respond to statutory ambiguity).

Delegation doesn't by definition *require* that the delegate have discretion; Congress may delegate even a ministerial power.

Second, the exercise of judgment in finding the single best meaning does in fact often involve significant discretion. Justice Scalia himself granted as much in his *Mistretta* dissent:

[A] certain degree of discretion, and thus of lawmaking, *inheres* in most . . . judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be. Thus, the courts could be given the power to say precisely what constitutes a “restraint of trade” . . . because that “lawmaking” was ancillary to their exercise of judicial powers.<sup>289</sup>

So Justice Scalia has recognized that at least interpreting “restraint of trade” from the Sherman Act involves “a certain degree of discretion,” and therefore some lawmaking.<sup>290</sup> Likewise, the proliferation of substantive canons of interpretation has been an exercise of judicial discretion.<sup>291</sup> One might say the same of *Chevron*, which is likewise a rule of statutory interpretation that judges adopted in their discretion, in part for policy reasons.<sup>292</sup>

Third—and relatedly—there are many interpretive methods out there, and even if textualism involved no discretion<sup>293</sup> and were fully determinate,<sup>294</sup> other methods might give more room for the exercise of judicial discretion.<sup>295</sup>

So interpretation of vague terms is a sort of judicial discretion that isn't different in kind from the delegations with discretion that we see for executive agencies.

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<sup>289</sup> *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting).

<sup>290</sup> See Farber & McDonnell, *supra* note 141, at 621; *infra* text accompanying notes 376–77.

<sup>291</sup> See *supra* text accompanying notes 262–66 (noting that this might even be an inherent power of courts).

<sup>292</sup> *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

<sup>293</sup> Justice Scalia wrote that “the ‘traditional tools of statutory construction’ include . . . the consideration of policy consequences,” since statutory interpretation often involves rejecting readings that are absurd or even “less compatible with the reason or purpose of the statute.” Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515. This policy evaluation, he wrote, is part of the *Chevron* step one analysis that determines whether the law is ambiguous in the first place, and serves the same purpose when courts do it as when agencies do: “to determine which one will best effectuate the statutory purpose.” *Id.*

<sup>294</sup> But see *supra* sources cited note 166.

<sup>295</sup> See generally WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 219–56 (2d ed. 2006).

But perhaps Justice Scalia was *partly* right. Just because judges are using discretion in interpreting statutes doesn't mean that they're necessarily using a *delegated* discretion.<sup>296</sup> This makes a difference to whether statutory interpretation issues are subject to non-delegation analysis. The status of statutory interpretation is unclear and somewhat metaphysical. Congress sometimes gives specific interpretive instructions, but often doesn't. When explicit guidance is lacking, do judges choose an interpretive method because Congress has implicitly ordered them to do so, or because they believe it's true? The former situation is a delegation; the latter is just an exercise of judges' inherent power to figure out what words mean.

Both ideas—congressional intent as to judicial interpretation, and judicial interpretation not tied to congressional intent—are common in federal law.

The *Chevron* rule (determining what the law is by looking to agencies' interpretation<sup>297</sup>) is one example of a rule of statutory interpretation that courts adopted on the (fictional) theory that Congress implicitly desired it.<sup>298</sup> But the choice of interpretive method isn't always justified by reference to congressional intent; this is especially true for, say, a canon of constitutional avoidance applied to avoid a constitutional problem that wasn't even recognized by courts until after the statute was passed.<sup>299</sup>

As a result, though there's plenty of discretion in statutory interpretation, it's often unclear whether this discretion is really *delegated*—and different observers will see it differently. Thus, it's unclear whether the non-delegation doctrine really applies. Some might speak of vague statutes as being unconstitutional delegations to the judiciary; others might speak instead of excessively indeterminate interpretive methods being beyond judges' power to adopt.

These are two different but closely related ways of looking at the statutory interpretation problem. One of them doesn't implicate the Inherent-Powers Corollary, and the other one does:

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<sup>296</sup> See RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 289 (1990); Nielson, *supra* note 20, at 285–86.

<sup>297</sup> See *Chevron*, 467 U.S. at 865–66 (holding that courts must defer to an agency interpretation of an ambiguous federal statute when it is “a reasonable choice within a gap left open by Congress”).

<sup>298</sup> See *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001); *id.* at 241 (Scalia, J., dissenting); *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996).

<sup>299</sup> See *supra* text accompanying notes 262–66.

1. The statute doesn't say, or even imply, how it should be interpreted. The judge uses his own judgment as to which method to use. Here, there's no delegation. Of all the interpretive methods out there, some are within the judge's inherent power, and some aren't. This inquiry may involve the illegitimacy of excessive judicial policymaking, but that will be because of Article III concerns, not Article I concerns. If the judge uses a permissible method, so much the better; if not, we can say that he's acting *ultra vires*.
2. The statute either explicitly says how it should be interpreted, or one can infer Congress's intent on the matter. Now *that's* a delegation. To the extent Congress is mandating a method that's within the judge's inherent power, the Inherent-Powers Corollary says all is well, even if that method is quite indeterminate. Even if the method is *slightly* beyond the judge's inherent power, but "interlinked" with it, the Interlinking Extension says all is still well. If not, Congress has violated the non-delegation doctrine if the substantive standard plus the interpretive method leaves the judge too much discretion.

These two rhetorics of statutory interpretation are *more or less* equivalent, but not completely: the main difference between them is the applicability of the Interlinking Extension. Under the delegation view, there could be some methods that judges can't use on their own but that are interlinked enough with judicial power that Congress can require the judges to use them.

Current headlines (at the time of this writing) provide an excellent example of the difference between these two ways of thinking about the issue.

Consider the All Writs Act, and its applicability to the court order requiring Apple to cooperate with federal authorities in disabling the San Bernardino shooter's iPhone.<sup>300</sup> Recall that the All Writs Act lets federal courts "issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>301</sup> Federal courts' jurisdiction is primarily defined by the Constitution—if Congress hadn't passed any jurisdictional statutes,<sup>302</sup> the Supreme Court could immediately start hearing cases (and even make rules for filing documents) based on the constitutional grant. We say colloquially that federal statutes "grant" jurisdiction, but really, if a court is operating within those statutes, and if those statutes are constitutional,

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<sup>300</sup> See *supra* text accompanying notes 27, 114–16.

<sup>301</sup> 28 U.S.C. § 1651(a) (2012).

<sup>302</sup> *E.g.*, 28 U.S.C. § 1331 (2012).

then the ultimate source of the court's jurisdiction is its inherent constitutional authority.

Thus, it's clear that a court can issue a writ that directly enforces its jurisdiction. The All Writs Act seems to authorize writs that go at least slightly further, as long as they are "*in aid of*" the court's jurisdiction. How far does "in aid of" go? There's Interlinking for you. As long as "in aid of" is interpreted to stretch no further than the Interlinking Extension allows, the All Writs Act is necessarily consistent with the non-delegation doctrine.

What if a court interprets "in aid of" as a blank check, to authorize any and all exercises of judicial authority? If Congress intended "in aid of" to stretch further than the Interlinking Extension allows, then there's a violation of the non-delegation doctrine. But if that interpretation is just a judicial choice not grounded in congressional intent, this is the judge's fault, not Congress's—and therefore not a violation of the non-delegation doctrine.

Sometimes, of course, Congress *is* explicit about interpretive methods. Consider, for instance, Nick Rosenkranz's discussion of "starting-point rule[s]" or "default rule[s]" of statutory interpretation, which only Congress can change.<sup>303</sup> Perhaps judges are constitutionally required to apply the rule of lenity<sup>304</sup> or the canon against altering the state-federal balance<sup>305</sup> or horizontal statutory stare decisis,<sup>306</sup> but Congress is constitutionally permitted to override those methods and mandate other ones. Suppose the methods that Congress substitutes provide very little guidance to courts: do the statutes mandating those methods violate the non-delegation doctrine? It depends whether Congress's substitute methods are interlinked with judges' core powers. If the methods are interlinked, then the relaxed version of the non-delegation doctrine applies, and so the substitute methods are valid. Congress might also be able to mandate other methods that *aren't* interlinked with judges' core powers; this is fine, but then Congress is subject to the ordinary non-delegation doctrine and can't mandate a method that's too indeterminate.

If you think that *any* interpretive method is within judges' power—or at least interlinked with it—then Congress could implicitly or explicitly mandate any

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<sup>303</sup> Rosenkranz, *supra* note 267, at 2093, 2120–21 (emphasis omitted). The difference between the two is that Congress may change default rules statute by statute, and may change starting-point rules wholesale. *Id.* at 2098–99.

<sup>304</sup> *Id.* at 2093–94, 2097–98.

<sup>305</sup> *Id.* at 2097–98, 2121–23.

<sup>306</sup> *Id.* at 2125–26.

method without violating the non-delegation doctrine. But if you think that some methods are so far beyond judges' inherent power that they're not even interlinked with it, then, to the extent those methods are too indeterminate, Congress violates the non-delegation doctrine when it implicitly or explicitly mandates those methods in a statute.<sup>307</sup> Perhaps one example might be if the Sherman Act candidly told judges to develop antitrust law "in the light of reason and experience."

Because, as I noted earlier,<sup>308</sup> it's not clear what exactly interlinking involves, it's not clear how much leeway the interlinking possibility gives Congress—and thus how much leeway this gives judges in reading implicit interpretive directions into statutes.

## 2. *The Problem of Delegated Lawmaking*

The harder it is to determine semantic meaning or congressional intent, the more statutory interpretation shades into lawmaking.<sup>309</sup> At one extreme are statutes where an elaborate common-law-style edifice has been constructed on the barest of text. I'll discuss four such statutes: the residual clause of the Armed Career Criminal Act, RFRA, the Alien Tort Statute (ATS), and § 1 of the Sherman Act.

The last three of these statutes have been conceptualized as invitations to the judiciary to develop a federal common law. The recurring question is how the courts should treat such an invitation. If a statute merely states a heretofore undeveloped standard and tells courts to develop it "in the light of reason and experience," it would seem hard to justify it by reference to an inherent power to interpret words. Such a statute would be automatically constitutional under the Inherent-Powers Corollary (plus the Interlinking Extension) only if it were interlinked with a power courts already had in that area—for instance, as noted above, the delegation to courts of the power to develop evidentiary privileges or statutory defenses or law in a federal enclave.<sup>310</sup> Without the possibility of

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<sup>307</sup> See *id.* at 2131–35 (giving examples of interpretive methods that might violate the non-delegation doctrine; one that is a delegation to the judiciary is a hypothetical statute mandating deference to the future judicial writings of Judge Frank Easterbrook).

<sup>308</sup> See *supra* text accompanying notes 192–93.

<sup>309</sup> Merrill, *supra* note 141, at 3. The distinction between the two is "as clear as night and day—that is, not very clear at the boundaries, where it counts." Thomas C. Grey, *The Constitution as Scripture*, 37 STAN. L. REV. 1, 4 (1984) (discussing the analogous distinction between, on the one hand, strictly textual interpretation and, on the other hand, interpretation that takes so much extratextual context into account that the text is no longer primary).

<sup>310</sup> See *supra* text accompanying note 259.

relying on inherent powers, we'd need an intelligible principle—and the phrase “reason and experience,” as a naked appeal to the judgment of the courts rather than any judgments made in the first instance by Congress, can't be good enough.

Now let's consider delegations that are less stark: statutes that state an existing legal test. RFRA states the pre-*Smith* test for religious exemptions; the ATS refers to the preexisting concept of torts that violate the law of nations; the Sherman Act refers to the pre-1890 notion of unreasonable restraints of trade; Federal Rule of Evidence 501 (despite its “reason and experience” language) was enacted against a background of prior caselaw on evidentiary privileges.<sup>311</sup> In the area of tort law, the Federal Tort Claims Act (FTCA) incorporates the tort law of all fifty states.<sup>312</sup> (Just as in *Erie* cases, federal courts are required to predict how a state's highest court would decide a tort law issue when there are no cases directly on point;<sup>313</sup> but they can and must draw on a huge body of state tort caselaw in doing so.) More dramatically, the Federal Employers' Liability Act has been taken to direct courts to develop a federal tort law;<sup>314</sup> but of course courts develop such a federal tort law using well-known tort principles.

Interpreting the statutes as freezing the earlier caselaw in place might seem as though it doesn't pose non-delegation problems, because then Congress isn't inviting courts to make common law.<sup>315</sup> Daniel Farber and Brett McDonnell suggest, for instance, that a textualist approach to antitrust should favor a *static* incorporation of the common law of restraints of trade.<sup>316</sup> Dan Kahan notes that the federal courts could have “tied the meaning of the mail fraud and conspiracy statutes to some finite schedule of deceptive practices that existed at the time these statutes were enacted, thereby forcing Congress to enact additional statutes to deal with any new forms of dishonesty or deception.”<sup>317</sup> Kontorovich argues for static incorporation of Founding-era law-of-nations torts.<sup>318</sup>

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<sup>311</sup> See Merrill, *supra* note 141, at 42–45.

<sup>312</sup> See 28 U.S.C. § 1346(b)(1) (2012) (making the federal government liable for tort damages claims “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred”).

<sup>313</sup> See, e.g., *Bravo v. United States*, 577 F.3d 1324, 1325–26 (11th Cir. 2009) (per curiam); *DeJesus v. U.S. Dep't of Veterans Affairs*, 479 F.3d 271, 279 (3d Cir. 2007).

<sup>314</sup> See *St. Louis Sw. Ry. v. Dickerson*, 470 U.S. 409, 409 (1985) (per curiam); *Urie v. Thompson*, 337 U.S. 163, 165, 178–79 (1949).

<sup>315</sup> See Merrill, *supra* note 141, at 44, 64–65; Oldham, *supra* note 16, at 325.

<sup>316</sup> Farber & McDonnell, *supra* note 141, at 632.

<sup>317</sup> Kahan, *supra* note 145, at 375.

<sup>318</sup> See Kontorovich, *supra* note 18.

But it might not be possible to avoid making common law—even in criminal law, despite the supposed prohibition on common-law crimes and despite the limiting effect of the rule of lenity on statutory interpretation.<sup>319</sup> Even before *Smith*, people might have disagreed on the direct (versus indirect) implications of existing religious exemptions caselaw. It's actually difficult to distinguish between participating in the ongoing development of caselaw and merely limiting oneself to finding what was there the whole time.

Rather than trying to grasp that elusive distinction, we should instead focus on whether the prior caselaw was well-enough developed at the time of enactment. Perhaps, if no prior caselaw existed, a command to develop a common law on the subject would lack an intelligible principle. But given a determinate enough baseline of prior caselaw, a command to develop that caselaw in common-law style either satisfies the intelligible principle requirement—or satisfies the Inherent-Powers Corollary because it's an exercise of the federal common-lawmaking power to interpret terms.<sup>320</sup>

For instance, we might take the FTCA's incorporation of the tort law of all fifty states as the paradigm of well-enough developed caselaw: some states have been developing their common law for centuries, and even Hawaii has received Anglo-American common law by statute.<sup>321</sup> (The FTCA can also fit into the enclave of torts involving the federal government.<sup>322</sup>) When federal courts determine unresolved questions of state law by, common-law style, predicting what the state supreme court would do, they're not doing anything fundamentally different than what the NLRB does when it develops a nationwide statutory common law of employees and independent contractors.<sup>323</sup> If such agency-based common-law decisionmaking satisfies the non-delegation doctrine, it's hard to say that it should violate the doctrine when courts do it (even if judicial delegations should be judged more strictly than agency delegations).<sup>324</sup>

Moreover, the methods of common-law decisionmaking—figuring out whether the case at hand is more similar to one precedent or another—has a family resemblance to traditional tools of statutory interpretation, like the canons *ejusdem generis* and *noscitur a sociis* (whether an item is similar enough to

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<sup>319</sup> See Kahan, *supra* note 145, at 376, 378.

<sup>320</sup> Cf. SCHOENBROD, *supra* note 24, at 33, 34 & n.27.

<sup>321</sup> HAW. REV. STAT. § 1-1 (2016); see also ALASKA STAT. § 01.10.010 (2016).

<sup>322</sup> See *supra* Part III.B.

<sup>323</sup> NLRB v. Hearst Publ'ns, 322 U.S. 111, 120, 131 (1944).

<sup>324</sup> See *supra* text accompanying notes 138–43.

existing items in a list).<sup>325</sup> Given a well-enough set of starting principles, perhaps there are some bounds to what interpretive methods Congress may mandate (perhaps some forms of “dynamic statutory interpretation,”<sup>326</sup> which involve overt judicial policymaking and reliance on subsequent legislative history, might be illegitimate<sup>327</sup>), but clearly Congress has leeway in this respect.

### 3. *Some Ambiguous Statutes*

Having gotten these preliminaries out of the way, we’re ready to look at particular statutes. Below, I discuss four statutes. I’ve chosen these four merely because they are convenient for illustrating the framework of this Article, are moderately well known, and have shown up in recent high-profile cases—but any number of other statutes would also have done the trick.<sup>328</sup>

- I argue that the residual clause of the Armed Career Criminal Act, which was struck down under the Due Process Clause, could just as well have been struck down under the non-delegation doctrine.
- RFRA’s standard is adequately specified in the statute; and recall that it could be justified under a more general theory if one takes a broad view of courts’ power to develop substantive canons and clear statement rules that function like defenses.
- The ATS doesn’t incorporate a comparably clear caselaw, so the statutory interpretation power wouldn’t be able to support much more than the core law-of-nations torts that existed in 1789. But as noted above, a broader ATS passes non-delegation scrutiny based on the federal courts’ common-lawmaking power in international

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<sup>325</sup> See Merrill, *supra* note 141, at 40–47.

<sup>326</sup> See, e.g., William N. Eskridge, Jr., *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1483 (1987).

<sup>327</sup> See Merrill, *supra* note 141, at 17–18, 23–24 (suggesting that an “originalist” interpretive mode may be more consistent with federalism than “non-originalist” mode); *id.* at 59–70 (suggesting that some non-originalist interpretation may nonetheless be seen as legitimate implied delegated lawmaking).

<sup>328</sup> Some other possibilities would have included: (1) the development of fair use doctrines in copyright and trademark, see Volokh, *supra* note 109; (2) the development of the law of bona fide occupational qualifications under Title VII, see *id.*; (3) the development of a federal common law of negligence under the Federal Employers’ Liability Act, see 45 U.S.C. §§ 51–60 (2012); *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 543–44 (1994); *id.* at 558 (Souter, J., concurring) (“[T]he Court’s duty . . . in interpreting FELA . . . is to develop a federal common law of negligence . . .”); (4) the development of a common law of trusts under the Employee Retirement Income Security Act, see Michael J. Collins, *It’s Common, but Is It Right? The Common Law of Trusts in ERISA Fiduciary Litigation*, 16 LAB. LAW. 391 (2001); or (5) the delegation to the Supreme Court of control over its own docket, see Kathryn A. Watts, *Constraining Certiorari Using Administrative Law Principles*, 160 U. PA. L. REV. 1, 28–33 (2011). There are of course many other examples.

affairs (though there might be objections based on other constitutional provisions).

- The Sherman Act is the reverse of the ATS: antitrust isn't an area involving "uniquely federal interests" sufficient to suppose an independent common-lawmaking power; but in light of the pre-1890 caselaw, the standard is adequately specified.

a. *The Armed Career Criminal Act*

In *Johnson v. United States*, the Supreme Court considered the Armed Career Criminal Act, which increases criminal penalties for a "violent felony."<sup>329</sup> "[V]iolent felony" is defined to include certain listed crimes and crimes with certain elements, but the definition ends with a so-called "residual clause" that includes crimes that "involv[e] conduct that presents a serious potential risk of physical injury to another."<sup>330</sup>

The Court held that the residual clause is unconstitutionally vague and thus violates due process.<sup>331</sup> In past cases, the Court had held that whether a crime is a violent felony under the Act doesn't depend on whether there was violence in the specific case. Rather, one has to apply the "categorical approach" first recognized in *Taylor v. United States*<sup>332</sup>—that is, "picture the kind of conduct that the crime involves in 'the ordinary case,' and . . . judge whether that abstraction presents a serious potential risk of physical injury."<sup>333</sup> But imagining "the ordinary case" is speculative and subjective. What materials do we use: "A statistical analysis of the state reporter? A survey? Expert evidence? Google? Gut instinct?"<sup>334</sup> Evaluating the "serious[ness]" of the potential risk posed in this hypothetical ordinary case introduces still more subjective elements.<sup>335</sup> As Justice Scalia wrote, this was inconsistent with the rule of law:

Each of the uncertainties in the residual clause may be tolerable in isolation, but "their sum makes a task for us which at best could be only guesswork." . . . Invoking so shapeless a provision to condemn

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<sup>329</sup> 18 U.S.C. § 924(e)(1) (2012); 135 S. Ct. 2551, 2555 (2015).

<sup>330</sup> 18 U.S.C. § 924(e)(2)(B); *Johnson*, 135 S. Ct. at 2555–56 (emphasis removed).

<sup>331</sup> *Johnson*, 135 S. Ct. at 2557.

<sup>332</sup> *Id.* (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)).

<sup>333</sup> *Id.* (quoting *James v. United States*, 550 U.S. 192, 208 (2007)).

<sup>334</sup> *Id.* (quoting *United States v. Mayer*, 560 F.3d 948, 952 (9th Cir. 2009) (Kozinski, C.J., dissenting from denial of rehearing en banc)).

<sup>335</sup> *Id.* at 2558; see also Jonathan Remy Nash, *The Supreme Court and the Regulation of Risk in Criminal Law Enforcement*, 92 B.U.L. REV. 171, 215–19 (2012) ("[T]he courts are poor institutions to implement risk analysis in the ACCA context.").

someone to prison for 15 years to life does not comport with the Constitution's guarantee of due process.<sup>336</sup>

The Court was right to decide this case under due process: the void-for-vagueness doctrine should apply against both state and federal governments. But the language quoted above could just as well establish that the statute—interpreted in light of the *Taylor* “categorical approach”—violates the non-delegation doctrine. Inviting judges to imagine the ordinary case lacks an intelligible principle; nor does the Inherent-Powers Corollary help here, because the notion that federal judges have an inherent common-law power to define crimes was rejected in the early nineteenth century. (Though I have suggested above that sentencing guidelines are valid based on federal courts' broad power to determine remedies,<sup>337</sup> the Armed Career Criminal Act does not involve the remedial power because it provides for criminal penalties above the maximum that would otherwise be allowed.<sup>338</sup> This takes the Act out of the acceptable “remedial” area and into the forbidden “common-law crimes” area.)

To the extent the categorical approach was invented by courts contrary to Congress's intent, it was just *ultra vires*. But in *Taylor*, Justice Blackmun argued that, though the matter was ambiguous,<sup>339</sup> on balance Congress intended the categorical approach.<sup>340</sup> If we can extend that congressional intent to the specific application of the categorical approach involved in *Johnson*—the “imagine the ordinary case” rule for applying the residual clause—then we can conclude that Congress was responsible for that rule. And that delegation is so indeterminate, and so distant from courts' inherent powers, that it violates the non-delegation doctrine.<sup>341</sup>

Is this analysis worthwhile, since we already have a holding on the issue rooted in due process? Non-delegation and due process are related,<sup>342</sup> but

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<sup>336</sup> *Johnson*, 135 S. Ct. at 2560 (quoting *United States v. Evans*, 333 U.S. 483, 495 (1948)).

<sup>337</sup> See *supra* Part III.D.

<sup>338</sup> See *Johnson*, 135 S. Ct. at 2555 (citing 18 U.S.C. §§ 922(g), 924(a)(2), (e)(1) (2012)) (stating firearms ban punishable by up to ten years' imprisonment, but ACCA increases prison term to minimum of fifteen years if defendant has three or more “violent felony” convictions).

<sup>339</sup> *Taylor v. United States*, 495 U.S. 575, 580 (1990).

<sup>340</sup> *Id.* at 588–89.

<sup>341</sup> See also Lemos, *supra* note 17, at 421 n.79, 472 n.331; Sunstein, *supra* note 145, at 320.

<sup>342</sup> On the connection between vagueness and non-delegation or separation of powers, see *United States v. Jones*, 689 F.3d 696, 703 (7th Cir. 2012); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 *YALE L.J.* 1672, 1806 (2012); Gray, *supra* note 145, at 19–22; Nicholas Quinn Rosenkranz, *The Objects of the Constitution*, 63 *STAN. L. REV.* 1005, 1043 (2011); Sunstein, *supra* note 145, at 320.

obviously not identical. A disadvantage is that the non-delegation theory applies only to statutes passed by Congress, not to state statutes.

But non-delegation does have some coverage that the due process void-for-vagueness theory lacks. Due process applies to all state action, but its void-for-vagueness aspect applies only when criminal statutes or fundamental rights are at issue<sup>343</sup>: Justice Scalia’s *Johnson* opinion stressed the injustice of “condemn[ing] someone to prison for 15 years to life” on the basis of such vagueness.<sup>344</sup> By contrast, a doctrine rooted in the non-delegation doctrine would apply whenever there was a vague term, whether the statute was civil or criminal, and even if it didn’t implicate a “life, liberty, or property” interest within the meaning of the Due Process Clause.<sup>345</sup> The required degree of specificity would vary in a more general way depending whether the delegation had a significant effect, but it wouldn’t be triggered by the same circumstances as the due process analysis.

*b. The Religious Freedom Restoration Act*

Recall the text of RFRA: “[The federal g]overnment may substantially burden a person’s exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest.”<sup>346</sup> This seems awfully vague.

In *Employment Division v. Smith*,<sup>347</sup> Justice Scalia wrote that courts couldn’t reliably apply the then-prevailing substantial burden/compelling government interest test:

[T]o say that a nondiscriminatory religious-practice exemption is permitted, or even that it is desirable, is not to say that it is constitutionally required, and that the appropriate occasions for its creation can be discerned by the courts.<sup>348</sup>

Why was this test too hard for judges to apply, according to Scalia? It would be inappropriate for courts to apply the compelling governmental interest test “only when the conduct prohibited is ‘central’ to the individual’s religion. . . .

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<sup>343</sup> See Lemos, *supra* note 17, at 421 n.79.

<sup>344</sup> *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015).

<sup>345</sup> See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570–72 (1972).

<sup>346</sup> 42 U.S.C. § 2000bb-1(b) (2012); see *supra* text accompanying note 107.

<sup>347</sup> 494 U.S. 872 (1990).

<sup>348</sup> *Id.* at 890.

Judging the centrality of different religious practices is akin to the unacceptable ‘business of evaluating the relative merits of differing religious claims.’<sup>349</sup> Therefore, “[i]f the ‘compelling interest’ test is to be applied at all . . . , it must be applied across the board, to all actions thought to be religiously commanded.”<sup>350</sup> Which would require either watering down the “compelling interest” concept or granting exemptions from laws on every conceivable subject.<sup>351</sup>

If some exemptions were to be made, Scalia wrote, they should be made legislatively, by the political process.<sup>352</sup> And indeed, some legislative exemptions turn out to be relatively easy for judges to implement: Scalia himself listed statutes from Arizona, Colorado, and New Mexico making “an exception to their drug laws for sacramental peyote use.”<sup>353</sup>

But Congress not only took Scalia’s hint, they went so far as to adopt a blanket exemption regime covering all past and future statutes<sup>354</sup>—a regime that substantially reenacted the pre-*Smith* religious exemption framework, the very test that Scalia had argued was too hard for courts to reliably apply.<sup>355</sup> Congress was quite clear about its intentions: one of the expressed “Purposes” of the statute was “restor[ing] the compelling interest test as set forth in *Sherbert v. Verner* and *Wisconsin v. Yoder* and . . . guarantee[ing] its application in all cases where free exercise of religion is substantially burdened.”<sup>356</sup>

One way of reading Scalia’s note in *Smith*—that judges can’t discern the appropriate occasions for creating a non-discriminatory religious practice exemption (even using the then-current test)—is that the principle behind it is insufficiently intelligible. If so, reenacting that principle in a statute does nothing to make it more intelligible.<sup>357</sup> When judges were making the doctrine up (so the argument might go), they were engaged in illegitimate judicial lawmaking; the passage of RFRA removed that source of illegitimacy but created a new one:

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<sup>349</sup> *Id.* at 886–87 (first quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring); then quoting *United States v. Lee*, 455 U.S. 252, 263 n.2 (1982) (Stevens, J., concurring)).

<sup>350</sup> *Id.* at 888.

<sup>351</sup> *Id.* at 888–89.

<sup>352</sup> *See id.* at 890; *Sherbert v. Verner*, 374 U.S. 398, 402–03 (1963).

<sup>353</sup> *Smith*, 494 U.S. at 890.

<sup>354</sup> 42 U.S.C. § 2000bb-1 (2012).

<sup>355</sup> *Smith*, 494 U.S. at 890.

<sup>356</sup> Religious Freedom Restoration Act of 1993, § 2(b)(1), Pub. L. No. 103-141, 107 Stat. 1488, 1488.

<sup>357</sup> *See* Joanne C. Brant, *Taking the Supreme Court at Its Word: The Implications for RFRA and Separation of Powers*, 56 MONT. L. REV. 5, 18 (1995).

Congress gave away some of its legislative power by specifying an excessively vague test.

That's one way of reading *Smith*, but not the only way. Perhaps the pre-*Smith* test was difficult, but not so difficult as to be unconstitutional. Had it really been constitutionally required, the Court would have gritted its teeth and tried to make some sense of it; the real reason to abandon the pre-*Smith* test was that it simply wasn't constitutionally required. If that's so, Congress could still reenact the test as a statutory matter.<sup>358</sup>

And indeed, RFRA's "substantial burden"/"compelling governmental interest" test is actually pretty intelligible. Whether a means is least restrictive doesn't seem all that problematic, and "substantial[] burden" has been pretty well fleshed out in the twenty-five years of pre-*Smith* caselaw. "Compelling governmental interest" is a lot more in the eye of the beholder, but we also have long experience with that concept, both from the pre-*Smith* standard and from elsewhere in constitutional law.<sup>359</sup> (Alternatively, as discussed above, we could say not that the statute *has* an intelligible principle, but that it *doesn't need* an intelligible principle because of the federal common law power to use legitimate methods of statutory interpretation. Recall, also, the discussion above, giving an independent possible justification of RFRA in terms of courts' power to craft defenses, clear-statement rules, and substantive canons.<sup>360</sup>)

### c. *The Alien Tort Statute*

The ATS gives district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."<sup>361</sup> The question is what conduct violates the "law of nations."

I've already argued above that international relations is an area involving uniquely federal interests where federal courts have a common-lawmaking power.<sup>362</sup> And international-law torts are either within that area or interlinked with it. So even a broad reading of the ATS survives non-delegation scrutiny

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<sup>358</sup> See Michael Stokes Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 253 n.11 (1995).

<sup>359</sup> See Thomas C. Berg, *The Constitutional Future of Religious Freedom Legislation*, 20 U. ARK. LITTLE ROCK L.J. 715, 734–35 (1998); Aaron K. Block, *When Money Is Tight, Is Strict Scrutiny Loose?: Cost Sensitivity as a Compelling Governmental Interest Under the Religious Land Use and Institutionalized Persons Act of 2000*, 14 TEX. J. ON C.L. & C.R. 237, 251 (2009).

<sup>360</sup> See *supra* Part III.C.

<sup>361</sup> 28 U.S.C. § 1350 (2012); see also *supra* text accompanying note 111.

<sup>362</sup> See *supra* Part III.B.

under the Inherent-Powers Corollary<sup>363</sup> (though there might still be arguments against a broad ATS based on other provisions, like the Offenses Clause<sup>364</sup>). In this section, though, the question is whether the validity of the statute is also supported by the inherent judicial statutory-interpretation power.

Kontorovich writes that “the breadth of the delegation in the ATS is troubling. The statute leaves it to the courts, without any statutory guidance, to identify and adopt causes of action for torts in ‘violation of the law of nations.’”<sup>365</sup> He argues that Congress has abdicated its law-of-nations-torts-defining power to courts:

In the ATS, the subject matter of the delegation is as broad as the Offenses Clause itself. . . . The only limits (aliens, torts) are jurisdictional, not substantive; there is no policy determination at all in the statute. Congress has not specified any particular offenses or even kinds of offenses, let alone their elements, that can serve as a basis for liability under the statute. Rather, Congress has left all of the defining to the judiciary.<sup>366</sup>

In the early-nineteenth-century case *United States v. Smith*, the Supreme Court had said that a statute providing the death penalty for the crime of “piracy, as defined by the law of nations” was an appropriate exercise of Congress’s Offenses Clause power because piracy had a precise definition in international law.<sup>367</sup> By comparison, the ATS doesn’t refer to a comparably precise concept.<sup>368</sup> Thus, Kontorovich writes, Justice Souter’s limiting of the statute, in *Sosa v. Alvarez-Machain*, to cover only the historical offenses of “violation of safe conducts, infringement of the rights of ambassadors, and piracy”<sup>369</sup> was not just a good prudential decision but also a form of constitutional delegation avoidance.<sup>370</sup>

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<sup>363</sup> See, e.g., Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824, 1834–35 (1998); Gerald L. Neuman, *Sense and Nonsense About Customary International Law: A Response to Professors Bradley and Goldsmith*, 66 FORDHAM L. REV. 371, 375–80 (1997); Beth Stephens, *The Law of Our Land: Customary International Law as Federal Law After Erie*, 66 FORDHAM L. REV. 393, 440–47 (1997). But see Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997) (denying that customary international law is federal common law).

<sup>364</sup> See Kontorovich, *supra* note 18, at 1740, 1748.

<sup>365</sup> *Id.* at 1682–83.

<sup>366</sup> *Id.* at 1746; see also Nielson, *supra* note 20, at 294.

<sup>367</sup> *United States v. Smith*, 18 U.S. (5 Wheat.) 153, 157–61 (1820); see also *Ex parte Quirin*, 317 U.S. 1, 29–30 (1942) (citing *Smith*, 18 U.S. (5 Wheat.) at 153); Kontorovich, *supra* note 18, at 1736.

<sup>368</sup> See *Quirin*, 317 U.S. at 30 n.6; Kontorovich, *supra* note 18, at 1743–45.

<sup>369</sup> 542 U.S. 692, 724–28 (2004).

<sup>370</sup> Nielson, *supra* note 20, at 295.

Certainly, a hyper-minimalist view—that the ATS freezes law-of-nations torts in place where they were when the ATS was passed in 1789—satisfies the non-delegation doctrine. But the ATS doesn't need to be constitutionally limited to those three torts, provided there's a caselaw that's sufficiently determinate that judges can continue developing it by common-law methods.

If, as Kontorovich argues, the law wasn't well-enough developed in 1789 to support torts other than the classic three, the inherent interpretive power can't support a broad ATS—if we're limited to static interpretive methods. But a lot depends on one's view of federal courts' inherent statutory interpretation powers. If these include the power to use dynamic statutory interpretation (a controversial point), then courts can rely on developments since 1789 that have made the doctrine more developed. This analysis would be consistent with Justice Souter's opinion, which allows courts to recognize further law-of-nations torts. “[T]he door is still ajar subject to vigilant doorkeeping, and thus open to a narrow class of international norms today,”<sup>371</sup> Justice Souter wrote; he thus looked at present-day international-law norms, but determined that the specific conduct complained of didn't violate them.<sup>372</sup> Again, one's scope of legitimate federal common law will determine the non-delegation analysis.

And, of course, even if dynamic statutory interpretation is impermissible, a broad reading of the ATS still doesn't violate the non-delegation doctrine unless the command to read the statute dynamically can be attributed to *Congress*. If the use of dynamic methods stems merely from a judge's independent preference for the method (rather than an interpretation of the statute as requiring the method), the judge is merely acting *ultra vires*; there's no violation of the non-delegation doctrine.

#### d. *The Sherman Act*

Section 1 of the Sherman Act declares “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce” to be illegal.<sup>373</sup> Since the late 1970s, the Supreme Court has been designing antitrust doctrine to comport with its views of economic efficiency,<sup>374</sup> and this sort of freewheeling policymaking has been frequently attacked by opponents of unmoored judicial discretion.<sup>375</sup>

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<sup>371</sup> *Sosa*, 542 U.S. at 729.

<sup>372</sup> *Id.* at 731–38.

<sup>373</sup> 15 U.S.C. § 1 (2012); see *supra* text accompanying note 110.

<sup>374</sup> Lemos, *supra* note 17, at 462.

<sup>375</sup> See Farber & McDonnell, *supra* note 141; Lemos, *supra* note 17, at 410, 464; Nielson, *supra* note 20, at 296 n.302; Oldham, *supra* note 16, at 334.

Three aspects of antitrust law are important to the non-delegation inquiry. First, the statute itself bans *all* contracts in restraint of trade, which on its face is reasonably clear and doesn't raise non-delegation concerns; but since this hyper-literal reading would also ban a huge range of ordinary contracts and business associations, no one takes such a reading seriously.

Second, the Supreme Court has long taken the view that its common-law-style policy development was part of the intent of the enacting Congress.<sup>376</sup> Recall that judicial elaboration of a vague statute using an impermissible method can't be considered a violation of the non-delegation doctrine unless *Congress* has mandated that method; otherwise, it's just judges acting beyond their rightful powers.<sup>377</sup> Right or wrong, (the Supreme Court's view of) the legislative history brings us into non-delegation land (at least, by the Supreme Court's own standards).

Third, there was already, at the time of the enactment of the Sherman Act, an existing body of caselaw elaborating what was an unreasonable restraint of trade.<sup>378</sup> This caselaw is well-enough developed that the Sherman Act has an intelligible principle (or, under the Inherent-Powers Corollary, doesn't require an intelligible principle because of the courts' power to interpret terms).<sup>379</sup> And it's clear that the Supreme Court has long understood itself, and continues to understand itself, as participating in the ongoing development of a preexisting common-law action on Congress's command.<sup>380</sup> Thus, Justice Scalia has written that the Sherman Act incorporates the common-law term "restraint of trade," but in a dynamic way: it bars "not . . . a particular list of agreements, but . . . a particular economic consequence," and courts may apply the Act in changing ways as economic knowledge (of what produces those bad consequences) develops.<sup>381</sup>

Oldham attacks the statute in at least two ways. On the one hand, he uses the literal language of the statute as a non-delegation argument: Perhaps banning all contracts and firms has an intelligible principle, but since that's clearly not what

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<sup>376</sup> Nat'l Soc. of Prof'l Eng'rs v. United States, 435 U.S. 679, 688 (1978).

<sup>377</sup> See *supra* Part III.E.

<sup>378</sup> Here, I'm only discussing § 1 of the Sherman Act, and not § 2, which bans monopolization, a term without a preexisting common-law definition. 1 PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 104a, 104c (4th ed. 2013); see also Farber & McDonnell, *supra* note 141, at 634–35.

<sup>379</sup> See Arthur, *supra* note 164, at 280–84.

<sup>380</sup> See Krent, *supra* note 13, at 728. Both Lemos and Nielson acknowledge the incorporation of existing common law, see Lemos, *supra* note 17, at 429, 463 n.282, 464 n.288; Nielson, *supra* note 20, at 297, but don't follow the insight further.

<sup>381</sup> Bus. Elec. Corp. v. Sharp Elec. Corp., 485 U.S. 717, 731–33 (1988).

Congress intended, Congress must have wanted judges to make exceptions from the text. And this move—*explicitly* banning all contracts and firms, while *implicitly* telling judges to exempt whatever conduct they like—self-evidently grants too much power to courts and lacks an intelligible principle.<sup>382</sup> But this concern of Oldham’s rests entirely on taking seriously the statute’s general ban on contracts and firms. And this literal reading is clearly incorrect, since textual interpretation properly reads terms of art (like “restraint of trade”) in their legal context.<sup>383</sup>

On the other hand, Oldham writes, the statute would violate the non-delegation doctrine “even if the Sherman Act means what modern interpreters assert.”<sup>384</sup> He grants that a standard like promoting consumer welfare would qualify as an intelligible principle under the delegation standards that apply to the executive branch, but argues (as I do) that judicial delegations should be policed more tightly.<sup>385</sup> Perhaps that’s true; maybe there would be a violation of the non-delegation doctrine if Congress had truly written a statute providing that “courts shall ban any economic transactions or business practices that do not promote consumer welfare.” And perhaps some judges really do think about antitrust that way. For instance, Judge Posner has written that “[t]he modern rationale for antitrust law . . . is that cartelizing and other anticompetitive practices reduce welfare”; this judgment is supported by “simple cost-benefit analysis” and “provides an uncontroversial basis for modern antitrust law.”<sup>386</sup> Judge Easterbrook, too, argues that antitrust law should promote efficiency,<sup>387</sup> though he counsels that judges should be appropriately humble as to how much they can understand about practices that appear to be anticompetitive.<sup>388</sup>

But there’s another possibility—one that the Supreme Court itself has repeatedly endorsed: Congress meant to refer to the prior restraint-of-trade caselaw; that caselaw is determinate enough to guide us; and we continue to develop that caselaw. But because the statute bans a result, not particular practices, antitrust rules can legitimately change with new understanding.

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<sup>382</sup> Oldham, *supra* note 16, at 354.

<sup>383</sup> See Farber & McDonnell, *supra* note 141, at 628–29, 660; John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2392–93 (2003). Oldham himself recognizes this elsewhere, though he characterizes the prior common law as “fuzzy.” Oldham, *supra* note 16, at 320 & n.13.

<sup>384</sup> Oldham, *supra* note 16, at 343.

<sup>385</sup> *Id.* at 351; see also *supra* text accompanying notes 138–43.

<sup>386</sup> Richard A. Posner, *Cost-Benefit Analysis: Definition, Justification, and Comment on Conference Papers*, 29 J. LEG. STUD. 1153, 1169–70 (2000).

<sup>387</sup> See Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1702–05 (1986).

<sup>388</sup> *Id.* at 1700–01.

This is crucial for determining what, if anything, has been violated if judges have it wrong. Suppose the Court is wrong that the Sherman Act is about economic efficiency and consumer welfare;<sup>389</sup> perhaps we should give more credence to other principles present in both the legislative history and the common law, like “fairness and economic independence,”<sup>390</sup> protecting competitors (even less efficient ones) from being forced from the business,<sup>391</sup> and preventing undue concentrations of political influence.<sup>392</sup> Perhaps modern-day doctrine can’t *really* be justified as a series of steps since 1890 developing the original common-law standard.<sup>393</sup>

But if so, that’s the courts’ fault, not Congress’s. It’s a problem of judges acting *ultra vires*, not of Congress delegating away its legislative power. Congress gave the courts a coherent common-law standard; at that point, the non-delegation doctrine was satisfied. Any later misapplication of that standard by others implicates different norms.

I argued above that antitrust isn’t one of the areas involving “uniquely federal interests” like admiralty or international relations, where courts have a federal common-lawmaking power independent of statute,<sup>394</sup> so the Inherent-Powers Corollary doesn’t automatically validate the statute on that ground. But fortunately for the Sherman Act, it has an intelligible principle (or, equivalently, doesn’t need an intelligible principle because of the Inherent-Powers Corollary), since its meaning is adequately determined by conventional methods of statutory interpretation.

In this sense, the Sherman Act is the mirror image of the ATS, which lacks an ascertainable meaning beyond covering a few core historical torts, but falls within the federal courts’ international-relations common-lawmaking power.

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<sup>389</sup> See, e.g., *Nat’l Soc. of Prof’l Engrs. v. United States*, 435 U.S. 679, 688 (1978).

<sup>390</sup> Farber & McDonnell, *supra* note 141, at 632, 666–67; Lemos, *supra* note 17, at 462; Oldham, *supra* note 16, at 334 n.88, 351 n.208; Barak Orbach, *Foreword: Antitrust’s Pursuit of Purpose*, 81 *FORDHAM L. REV.* 2151 (2013).

<sup>391</sup> AREEDA & HOVENKAMP, *supra* note 378, ¶ 103b, at 53.

<sup>392</sup> See Alexander Volokh, *Privatization and the Law and Economics of Political Advocacy*, 60 *STAN. L. REV.* 1197, 1253 (2008).

<sup>393</sup> Oldham, *supra* note 16, at 343.

<sup>394</sup> See *supra* text accompanying notes 235–43.

## CONCLUSION

Realizing that the non-delegation doctrine applies to courts may seem shocking at first glance: given all the vague laws out there, who knows what might be held unconstitutional!

Then one realizes that many strategies that courts use to narrow statutes—from adopting limited interpretations, to using modest interpretive methods, to declining to find private rights of action—can already be seen as a species of delegation avoidance, so courts are already implicitly kind of talking about non-delegation.

Then one figures out the Inherent-Powers Corollary. We already easily understand that Congress can delegate more broadly than usual to the President (and even leave decisions to his unfettered discretion) when it comes to national security. And when we try to apply the same idea to the federal courts, we realize that (despite what we may have retained from *Erie*) federal courts, too, have many inherent powers.

The power to make procedural rules is significant, though in a narrow field; and federal common law is miscellaneous and interstitial, but ubiquitous. Of course the scope of federal common law is controversial, so your mileage may vary. Indeed, when we argue about federal common law, we're indirectly arguing about non-delegation even if we don't realize it. Likewise, when we argue about permissible and impermissible methods of statutory interpretation, we're making arguments that are closely related to non-delegation arguments.

But even under narrow conceptions of federal common law, a great many delegations that one might have hoped or feared were unconstitutional turn out to pass non-delegation scrutiny after all. Though courts have tended to ignore non-delegation concerns in the context of judicial adjudication, maybe they've been reaching the right results anyway most of the time.

RFRA may or may not be a good exercise of the federal common-lawmaking power to craft statutory defenses, but it does state an intelligible enough legal rule because it incorporates a well-developed pre-*Smith* caselaw. The ATS may not state an intelligible enough legal rule beyond a few historical torts, but it does fall within a field of uniquely federal interests (international relations) that supports a federal common-lawmaking power. The Sherman Act is the mirror image of the ATS: it *doesn't* fall within a field involving uniquely federal interests—antitrust law is just a set of prohibitions of certain private business

practices—but it *does* state an intelligible enough legal rule because it incorporates a well-developed pre-1890 caselaw.

But not everything passes muster under the Inherent-Powers Corollary. For instance, the RDA can't authorize the Supreme Court to repeal procedural statutes that conflict with promulgated procedural rules, and the residual clause of the Armed Career Criminal Act violates the non-delegation doctrine as well as the Due Process Clause.

Foregrounding the inherent-powers analysis thus turns out to be useful. Even when talking about delegation to the executive branch, we should think explicitly in terms of the Inherent-Powers Corollary when discussing cases like *The Brig Aurora* (the President gets to decide whether a country is neutral), *Field v. Clark* (the President gets to decide whether other countries' tariffs are fair), *Mahler v. Eby* (exclusion of undesirable aliens), and similar cases. And *Curtiss-Wright*—one of the few non-delegation cases that continues to be used in modern times!—should be taught as a principal case in the non-delegation section of administrative law courses.

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Stepping back and surveying the Inherent-Powers Corollary more generally, one avenue for further research is to formulate workable tests for delegations to the judiciary. If delegations to the judiciary should be judged more stringently than delegations to the executive branch, should the test be “intelligible principle with teeth,” or something else entirely?

Another avenue would be to probe what exactly counts as a delegation into an area interlinked with a delegate's powers. Once we've established that the delegate couldn't have taken the required action on his own, how do we determine whether the granted power is interlinked with powers he already has? Is it just a question of related subject matter? Different views of interlinking will obviously translate into different views of what's saved by the Inherent-Powers Corollary and what will instead require the traditional intelligible principle.

A third avenue would be to revisit the whole idea of the Interlinking Extension—the idea, stated in a line of cases including *Curtiss-Wright* and *Loving*, that interlinked powers should qualify for the relaxed non-delegation treatment. As I've suggested above, if a statute directs a delegate to take an action, either the delegate *could* have already taken that action in the absence of the statute, or he *couldn't* have. If he could have, it makes sense not to require specificity from Congress; but if he couldn't have, why not require the usual

degree of specificity? Why should it matter that the power granted is *close to* a power that the delegate already has?

Questioning the Interlinking Extension could call into question the specific holdings of cases like *Curtiss-Wright*, *Zemel*, *Mazurie* (tribes get to ban importation of liquor into Indian country), *Loving*, and *Mistretta* (upholding the Sentencing Guidelines).<sup>395</sup> Not that those cases would necessarily go the other way, but we'd at least have to confront the question of whether the President, or tribes, or courts, could have done the delegated act as an exercise of their inherent power. This wouldn't touch the Inherent-Powers Corollary—the core idea that Congress doesn't need to be specific when delegating into an area where the delegate has power—but it would simplify it by eliminating one troublesome extension.

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<sup>395</sup> But recall that I've suggested an independent justification for *Mistretta*: the very broad inherent judicial power to choose remedies, in this case a reasonable point within a statutory range. *See supra* Part III.D.