

# Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine

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*In a time where the executive branch continues to grow in size and strength, reviving the nondelegation doctrine has become more important than ever. Judicial enforcement of this abandoned rule that Congress cannot delegate its legislative power serves three vital functions. It preserves the separation of powers, prevents tyranny, and promotes democratic accountability. But even if we acknowledge that enforcement of the doctrine is necessary to preserve the American form of government, a more difficult question is how the doctrine ought to be enforced. This Article rejects the formulations of the nondelegation doctrine proposed by both functionalists and formalists and proposes “pragmatic formalism” as a solution that carves a path between the two existing theories. After explaining the theory and applying it to the facts of the Supreme Court’s major nondelegation cases, the Article also proposes a solution to one of the most difficult challenges facing the nondelegation doctrine: delegation during times of national emergency. By advocating for the use of pragmatic formalism to enforce the nondelegation doctrine, I hope to provide a rule that preserves the separation of powers, prevents tyranny, and promotes democratic accountability, but that also takes into account the realities and difficulties of lawmaking.*

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#### INTRODUCTION

Not long after the Framers ratified the Constitution, the Supreme Court found itself confronted with the difficult task of defining the roles of the two political branches. Article I, Section 1 unambiguously vests “all legislative powers herein granted” in a Congress, and Article II, Section 1 vests the “executive power” in a president.<sup>1</sup> Based on this language, shortly after its inception the Court recognized that Congress cannot delegate its legislative power.<sup>2</sup> But the Court also realized that enforcing

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1. U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); *id.* art. II, § 1 (“The executive Power shall be vested in a President of the United States of America.”).

2. See *Wayman v. Southard*, 23 U.S. 1, 46 (1825) (recognizing that Congress cannot delegate

this constitutional directive would be no easy feat, because doing so would require the Court to fashion a test for distinguishing *legislative* from *executive* power.<sup>3</sup>

In 1929, the Court announced a principle that remains, at least in theory, good law today. In *J.W. Hampton, Jr. & Company v. United States*, the Court held that if Congress provides an “intelligible principle” by which the person authorized to act must conform, Congress has not delegated its legislative power.<sup>4</sup> Shortly thereafter, the Court relied on this test to invalidate a statute for the first time. In 1935, the Court struck down two provisions of the National Industrial Recovery Act as unconstitutional delegations of legislative power.<sup>5</sup> The Court’s willingness to invalidate broad delegations, however, did not last for long.

After 1935, the Court made a dramatic shift in its application of the nondelegation doctrine and began upholding broad delegations of power in the name of convenience and expertise.<sup>6</sup> For example, in *National Broadcasting Co. v. United States*, the Court upheld a statute granting the Federal Communications Commission (FCC) the power to issue regulations to carry out the Act as “public interest, convenience, or necessity” requires.<sup>7</sup> Although Congress neither defined “public interest” nor provided any guidance as to the types of regulations the FCC should promulgate, the Court found that Congress gave as much guidance as it could be expected to give when addressing the complexities of the radio industry.<sup>8</sup>

Since 1935, the Court has not invalidated any statute on nondelegation grounds. In one of its most recent nondelegation cases, the Court demonstrated its continued adherence to the highly deferential approach

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its legislative power).

3. *Id.* at 46 (explaining that the “precise boundary” of the legislative and executive powers is “a subject of delicate and difficult inquiry”).

4. *See J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928) (holding that when there is an intelligible principle to which a person is directed to conform, the action is not a forbidden delegation).

5. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 405 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

6. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785–86 (1948) (upholding delegation of authority to define “excessive” profits); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104 (1946) (upholding delegation of authority to SEC to prevent “unfairly or inequitably distribut[ing] voting power among security holders”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine “just and reasonable” rates).

7. *See Nat’l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943) (approving the licensing power of the Commission so long as it pertains to public interest, convenience, or necessity).

8. *Id.* at 219–20.

taken in *National Broadcasting*.<sup>9</sup> In *Whitman v. American Trucking Associations*, decided in 2001, the Court upheld a section of the Clean Air Act requiring that the EPA promulgate national air quality standards, “the attainment and maintenance of which,” in the judgment of the Administrator, “are requisite to protect the public health,” despite Congress’s failure to provide any instruction on what constitutes “public health.”<sup>10</sup> The Court found that the statute at issue gave sufficient guidance to satisfy the “intelligible principle” standard,<sup>11</sup> indicating that the standard has become a straw man standing in the place of what used to be a living doctrine. Given this state of the law, and given that the Court has not invalidated a single statute on nondelegation grounds since 1935, many commentators have concluded—with good reason—that the nondelegation doctrine is, for all practical purposes, dead.<sup>12</sup>

This is a most unfortunate development for American constitutional democracy. Without enforcement of the nondelegation doctrine, the foundational precepts of the American system of government are seriously undermined. If Congress is permitted to delegate its power to legislate to the executive branch, the power to make and execute the law will fall into the same hands. Yet, the Framers wisely understood this aggregation of power to be the very definition of tyranny and therefore separated the powers among three distinct branches for the very purpose of preventing such aggregation.<sup>13</sup> Thus, to accept an approach where

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9. In his *Whitman* concurrence, Justice Thomas stated that he would be willing, on a future date, to address “the question of whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

10. *Id.* at 465 (majority opinion); *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019) (plurality opinion) (effectively avoiding a nondelegation issue by noting that the relevant statute had been construed narrowly); *id.* at 2123 (citing *Mistretta v. United States*, 488 U.S. 361, 372 (1989)) (pointing out that Congress “may confer substantial discretion on executive agencies to implement and enforce the laws”).

11. *See Whitman*, 531 U.S. at 475–76 (explaining that the statute provides an intelligible principle within the scope of discretion permitted by precedent).

12. *See, e.g.*, Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 GEO. WASH. L. REV. 1181, 1182 (2018) (arguing that the “standard” nondelegation doctrine has been replaced with what he labels “the American nondelegation doctrine”—the rule that “[e]xecutive agencies cannot make certain kinds of decisions unless Congress has explicitly authorized them to do so”); Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2103 (2004) (“The only arguable imprint of the nondelegation doctrine in recent years has been as a canon of interpretation supporting narrow constructions of statutes so as to ‘avoid’ the constitutional question of excessive delegation.”); Sandra B. Zellmer, *The Nondelegation Doctrine: Fledgling Phoenix or Ill-Fated Albatross?*, 31 ENVTL. L. REP. NEWS & ANALYSIS 11151, 11159 (2001) (“[O]ne wonders whether there is anything of substance left [to the nondelegation doctrine].”).

13. THE FEDERALIST NO. 47, at 244 (James Madison) (Buccaneer Books 1992) (“The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly

Congress can delegate its legislative power to the executive branch would be to abandon our constitutional structure. Perhaps because our nation has not yet seen an abuse of power so extreme that it threatens the immediate onset of dictatorship, the post-New Deal Court has been unconcerned with congressional transfers of legislative power to the executive branch. Not only is this approach inconsistent with clear constitutional directive, it is also unwise, because, as recent history has shown, the threat of tyranny is just as real today as it was at the time of the Constitution's framing.

Today, Congress is losing power as a political force and the executive is growing stronger. While Congress enacts roughly fifty laws each year, some of which merely transfer federal land to states or rename post offices, executive agencies promulgate approximately 4,000 substantive rules per year.<sup>14</sup> In the few laws it does enact, instead of making difficult political commitments, Congress often transfers broad swaths of power to the executive through vague directives.<sup>15</sup>

This shift of power from Congress to the executive marks a departure from the power balance initially established by the Constitution. The Framers undoubtedly structured the federal government so that Congress would function as the dominant political branch. Before the adoption of the Constitution, under the Articles of Confederation, the federal government had only one political branch: a Congress.<sup>16</sup> Due to the shortcomings of the Articles of Confederation, however, the Framers recognized that, if only as a practical matter, Congress could not run the country on its own. Congress was simply too large and too diverse to make decisions quickly. Thus, it needed an agent to execute its laws in specific contexts that may arise.<sup>17</sup> To fill this void, the Framers created

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be pronounced the very definition of tyranny.”).

14. See Igbor Bobic & Matt Fuller, *Congress is Failing: So Much for Checks and Balances*, HUFFINGTON POST (May 6, 2019), [https://www.huffpost.com/entry/congress-trump-oversight\\_n\\_5ccb4df5e4b0d12395507c0d](https://www.huffpost.com/entry/congress-trump-oversight_n_5ccb4df5e4b0d12395507c0d) [perma.cc/PZ74-FN45] (explaining that while Congress passes about fifty laws each year, executive agencies issue about 4,000 substantive rules every year).

15. See *infra* Part II (discussing Congress' transfers of power to the executive). See also Merrill, *supra* note 12, at 2159 (“On virtually all matters of legislative policy, the Executive leads, and Congress follows. Sometimes Congress can frustrate or impede the Executive by refusing to enact legislation sought by the President, rejecting presidential appointments, or modifying presidential appropriations requests. But only rarely does Congress take the initiative in setting national policy.”).

16. Gregory E. Maggs, *A Concise Guide to the Articles of Confederation as a Source for Determining the Original Meaning of the Constitution*, 85 GEO. WASH. L. REV. 387, 407 (2017)

17. See Letter from Alexander Hamilton to James Duane (September 3, 1780), reprinted in 2 THE PAPERS OF ALEXANDER HAMILTON 400, 404 (H. Syrett ed., 1961) [hereinafter Letter to James Duane] (explaining that Congress, as “numerous as it is, [is] constantly fluctuating, [and cannot] act with sufficient decision”); THE FEDERALIST NO. 15, at 74 (Alexander Hamilton) (Buccaneer

the executive branch. As the vesting clause of Article II, Section 1 makes clear,<sup>18</sup> the executive branch was not established to function as the dominant policymaker for the country, rather it was formed primarily to implement Congress's laws.

In recent years, respected constitutional scholars have dismissed as empty formalism the concern that the nondelegation doctrine's atrophy threatens the onset of tyranny. Instead, they focus on what they see as the functional benefits to which legislative delegation gives rise. But the current aggregation of both lawmaking and executive powers in the executive branch shows that the threat of tyranny has not dissipated. Illustrative is the current chief executive's widespread disregard for the role given to Congress by the Constitution. As one source put it, our current president is taking "defiance of Congress to a level we have not seen before."<sup>19</sup> For example, in February 2019, after Congress refused to allocate the funds the president wanted to construct his promised wall along the United States-Mexico border, he declared a national emergency for no reason other than to bypass Congress and obtain the funds to begin construction.<sup>20</sup> He acknowledged that the situation did not constitute a genuine emergency and admitted that he declared a national emergency solely to circumvent congressional authority.<sup>21</sup> The president's declaration of a national emergency as a strategy to circumvent Congress exemplifies his disrespect for Congress as the primary policymaking body. Given this state of affairs, any skeptic who argues that the Framers' fear of tyranny is no longer realistic ought to pay closer attention to very ominous current events.<sup>22</sup>

To prevent tyranny and maintain the separation of powers, the Court should revisit its current application of the nondelegation doctrine and revive the dictate that Congress cannot delegate its legislative power. Enforcement of the nondelegation doctrine preserves the separation of powers, ensuring that all political power will not be concentrated in the

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Books 1992) ("In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed . . .").

18. U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

19. Bobic & Fuller, *supra* note 14.

20. Peter Baker, *Trump Declares a National Emergency, and Provokes a Constitutional Clash*, N.Y. TIMES (Feb. 15, 2019), <https://www.nytimes.com/2019/02/15/us/politics/national-emergency-trump.html> [perma.cc/V2BB-EQ6Z].

21. When declaring the emergency, President Trump stated he could build the wall over a longer period of time but that he "didn't need to do [that]" and he would "rather do it much faster." *Id.*

22. In this context, it should be noted that numerous observers have recently raised what they consider the very real danger that the current occupant of the White House will refuse to leave office if defeated in the 2020 presidential election.

one branch whose assumption of such power is most likely to lead to tyranny: the executive branch.

The nondelegation doctrine also serves another vital function: promotion of democratic accountability. Enforcement of the doctrine requires Congress, the only branch elected directly by the voting public, to make fundamental policy decisions and prevents Congress from avoiding their constitutionally-dictated lawmaking function by passing off these decisions to administrative agencies, which do not answer to the American people.

The supposedly insoluble problem to which functionalist scholars regularly point is the difficulty in conceptually separating the legislative from the executive powers. The task, they argue, is hopeless. The executive power of implementation, it is contended, often requires as much discretionary choice as does legislating, and where the dividing line is to be drawn is invariably arbitrary. Therefore, the central task for anyone who argues that the Court should revisit the nondelegation doctrine, as I do, is to develop a theoretical and doctrinal model for its enforcement. Performing this task is no easy feat, given that any method of enforcement must guide the Court as it wades through the murky distinction between legislative and executive authority.

The task in this Article, then, is twofold. First, I need to establish that, without some meaningful form of the constitutionally-dictated nondelegation doctrine, the foundations of our constitutional structure are seriously undermined. Second, I must provide a workable standard—meaning at least as workable as most constitutional standards, virtually all of which are plagued by varying levels of uncertainty—to guide courts in implementing and enforcing it.

The scholarly debate over how the Court should enforce the doctrine is for the most part divided into two camps: the formalists and functionalists. On one side of the debate, functionalists support broad delegations of power and argue that Congress should be able to give away its legislative authority if it so chooses. Some functionalists argue that today, administrative agencies are better positioned than Congress to make foundational policy choices and that a robust nondelegation doctrine could not coexist with the modern administrative state, in which the executive branch acts as the primary lawmaker.<sup>23</sup> Such nakedly

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23. See, e.g., Merrill, *supra* note 12, at 2177–78 (discussing the difference between the formalist and functionalist approaches); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775, 778 (1999) (discussing how social complexity makes it difficult for legislatures to predict the consequences of their choices); E. Donald Elliot, *INS v. Chadha: The Administrative Constitution, the Constitution, and the Legislative Veto*, 1983 SUP. CT. REV. 125, 167 (arguing that the new “vast administrative bureaucracy” fundamentally alters the

functionalist arguments must be summarily rejected if the foundations of our constitutional system are to survive. If the nondelegation doctrine is to serve the essential function of preserving the separation of powers, it must begin from the formal rule that Congress cannot delegate the legislative power vested in it by Article I, Section 1.<sup>24</sup> Any functionalist formulation of the nondelegation doctrine that enables Congress to transfer its legislative power in the name of convenience or expertise fatally erodes the separation between the branches, thereby undermining one of the Framers' key methods of avoiding tranny.

On the other side of the debate, formalist scholars believe in a complete separation among the three branches and posit that any delegation of legislative power is per se unconstitutional.<sup>25</sup> But the significant hurdle for the formalists is the very problem to which the functionalists have pointed: the difficulties of definition and application. To the formalists, everything turns on how one defines the terms "legislative" and "executive," and neither the definition nor application of this definitional dichotomy lends itself to the rigidity of formalist analysis.<sup>26</sup>

To enforce the nondelegation doctrine, I propose an alternative analytical model: "pragmatic formalism." The theory, which I previously developed in a broader constitutional context,<sup>27</sup> is grounded in the formalist rule that no branch may exercise any authority that does not fall within the categories of power constitutionally granted to it. I start with this principle because, on the most basic level, a formal understanding of the separation of powers is the only way to help assure the prevention of the onset of tyranny. Otherwise, the prophylactic interest in separation of powers will invariably be consumed by the competing interests of convenience and expertise. But unlike traditional formalist models, which often ignore the realities of the legislative process, pragmatic formalism takes practical considerations into account in defining the terms "legislative" and "executive." In doing so, the theory draws on the Framers' primary reason for creating an executive in the first place: the practical inability of Congress to make quick decisions when

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conditions under which delegation traditionally functions).

24. U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.").

25. See generally David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223 (1985).

26. For a formalist's approach to the nondelegation doctrine, see generally Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002).

27. See generally Martin H. Redish & Elizabeth J. Cisar, "If Angels Were to Govern": *The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L.J. 449 (1991) (proposing the theory of pragmatic formalism and applying it in the separation of powers context).



circumstances demand such action.<sup>28</sup>

To determine whether a statute impermissibly delegates legislative power or instead properly vests executive power in the executive branch, a court applying pragmatic formalism will engage in two inquiries. First, the court will ask whether Congress has made a sufficiently detailed political commitment to improve voters' ability to judge the values, ideology, or socio-political wisdom of their elected representatives. Congress provides sufficient guidance when it has made the necessary political commitment such that voters who learn how their representatives voted on the legislation in question would be better informed about their representatives' positions.<sup>29</sup> A legislator's vote for or against a blanket delegation of lawmaking power fails to achieve this constitutional goal. A sufficiently detailed political commitment constitutes a necessary condition to find that in enacting a law Congress has properly exercised its legislative power and has not simply delegated its lawmaking power to the executive branch.

I recognize one narrow qualification on this first tenet of pragmatic formalism. When Congress enacts a law addressing generic national emergencies, it is not feasible for Congress to make a political commitment with sufficient detail, for the simple reason that Congress cannot be expected to predict the shape of a future emergency. In such situations, I propose the following procedural modification to the rule that Congress must articulate a political commitment: Congress may enact statutes vesting broad, unguided discretion in the executive during times of genuine but unforeseen emergency when Congress itself cannot reasonably be expected to make the initial decision as to how to respond. The executive's discretion to act during these emergencies, it should be emphasized, is strictly limited to the period of time in which Congress itself lacks the practical ability to make the initial policy decision. As soon as Congress has had sufficient time to consider the situation and act, the executive may continue to act only if Congress approves of his or her actions through formal enactment of legislation. Both factual questions—i.e., whether a true emergency exists in the first place and how much time is needed for Congress to legislatively approve the emergency actions of the executive—are to be finally determined in the individual case by the judiciary as “constitutional facts.”<sup>30</sup>

The second inquiry under pragmatic formalism—consistent with the

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28. See *infra* Section II.A (discussing the reason the Framers' wanted to create the executive branch).

29. See MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 5–16 (1995) (explaining textualism, formalism, constitutional structure, and delegation of powers).

30. See *infra* note 181 and accompanying text (discussing the judiciary's final determination in “constitutional facts”).

“pragmatic” component of the theory—requires the court in defining the terms “legislative” and “executive” to keep in mind why the Framers decided to create the executive branch in the first place. If Congress could not have feasibly made the decision it vested in the executive branch due to the fact that execution of the congressional policy choice required an on-the-spot decision, that decision properly vests executive power. A decision cannot be considered legislative if Congress would not have a reasonable opportunity to make that decision the first place.

By adhering to the formalist directive that Congress cannot delegate its legislative power, but by defining the concepts of “legislative” and “executive” pragmatically, pragmatic formalism accomplishes what both the formalists and functionalists have failed to do. It provides a method for enforcing the nondelegation doctrine that will preserve the separation of powers while simultaneously providing Congress with the flexibility it needs to enable the executive branch to serve the purpose it was wisely created to serve. The purpose was to implement congressional policy choices in the real world and to act in situations requiring a response faster than could come from the legislative process.

This Article proceeds in four parts. Part I describes the development of the nondelegation doctrine to show how the doctrine has weakened over time to the point of virtual nonexistence, and to provide context for the discussion that follows. In Part II, I argue that the Court should revive the nondelegation doctrine and, in so doing, I respond to the primary arguments asserted by those who oppose the doctrine’s revival. In Part III, I contend that the Court should employ the theory of pragmatic formalism to interpret and enforce the nondelegation doctrine. This section explains the theory of pragmatic formalism and applies it to the facts presented in several of the Court’s most significant delegation cases. This application demonstrates that using pragmatic formalism to enforce the nondelegation doctrine does not require the Court to invalidate all prior delegations of discretion to the executive, as rigid formalist theories may come close to doing. In Part IV, I propose an important procedural modification of the constitutionally dictated directive that Congress is required to enact only those statutes that contain a sufficiently detailed political commitment: when Congress enacts statutes addressing the possibility of unforeseen national emergencies, as already noted, it will effectively be impossible for Congress to provide a clear normative directive, for the simple reason that it will be impossible for Congress to predict what the specific emergency will be. The executive will necessarily make the initial decision as to how to respond. There is simply no alternative. But in order to reconcile the practical realities of the need to deal with an emergent situation promptly with our constitutionally dictated system of separation of powers, I propose that the Constitution

be construed to dictate a procedural restriction. That limitation confines the executive's ability to deal with the emergency unguided by legislative directive to the time period it takes to obtain congressional approval. Absent such prompt legislative approval, the executive action is to be immediately rendered constitutionally invalid. After explaining the modification in more detail, I apply it to the National Emergencies Act and Section 232 of the Trade Expansion Act to illustrate both its benefits and scope.

## I. DEVELOPMENT OF THE NONDELEGATION DOCTRINE

The vesting clause of Article I provides that “[a]ll legislative Powers herein granted shall be vested in a Congress.”<sup>31</sup> Many years ago, the Court interpreted this provision, along with the Framers' decision to separate the three types of power into three distinct branches, as establishing the nondelegation doctrine: the rule that Congress cannot constitutionally delegate its legislative power to the executive branch.<sup>32</sup> This section traces the development of the nondelegation doctrine from the Court's first delegation cases in the early 1800s until today, in order to show how the doctrine has weakened over time and to provide the necessary context for the normative constitutional analysis that follows.

### A. Early Nondelegation Cases

Not long after the Constitution was ratified, the Court began to confront constitutional challenges to congressional delegations of power.<sup>33</sup> In these early cases, the Court unambiguously adopted the rule that Congress cannot delegate its legislative authority to the executive branch. For example, in *Marshall Field & Co. v. Clark*, the Court stated: “That Congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”<sup>34</sup>

Enforcement of this rule led to the difficult question of deciding when Congress has in fact delegated legislative power or simply exercised its legislative power, leaving to the executive branch solely the powers of

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31. U.S. CONST. art. I, § 1.

32. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

33. *See generally* *Cargo of the Brig Aurora v. United States*, 11 U.S. 382 (1813) (confronting a congressional delegation to the executive for the first time); *id.* at 382–83 (noting that Congress passed an Act providing that if the president finds that Great Britain or France violated US trade policy, the Act's prohibition on trade with those nations shall take effect); *id.* at 387–88 (finding that the Act did not delegate legislative power and provided the brief rationale that it “see[s] no sufficient reason[] why the legislature should not exercise its discretion in [passing] . . . the act . . . either expressly or conditionally, as their judgment should direct”). As will be seen, this deferential approach proved to be aberrational.

34. *Marshall Field*, 143 U.S. at 692.

implementation and enforcement. Defining legislative power would require the Court to wade into the murky distinction between legislative and executive authority and fashion a test for how to distinguish the two. In the 1825 case of *Wayman v. Southard*, Chief Justice Marshall began the opinion by stating:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.<sup>35</sup>

In an attempt to distinguish the legislative power from both executive and judicial powers, the Court articulated the following circular principle: Congress cannot delegate “important subjects” that are “strictly and exclusively legislative.” But, for subjects of “less interest,” Congress may articulate “a general provision” and allow another branch the power to “fill up the details.”<sup>36</sup> The Court did not provide any guidance as to which subjects are of “importance” or of “less interest.” Nor did it define legislative. Unsurprisingly, then, this abstract test did not reappear in subsequent cases.

The Court’s early cases took a largely pragmatic approach to evaluating delegations. In *Marshall Field & Co. v. Clark*, the Court addressed a challenge to an Act that allowed the president to suspend the duty-free status of certain goods if the president found that the nation exporting those goods imposed “reciprocally unequal and unreasonable” restrictions on American imports.<sup>37</sup> In the event that the president should decide to suspend the duty-free status, Congress prescribed in the Act that the duties should be levied on particular exports.<sup>38</sup> The Court upheld the Act, explaining that the statute allows the president to act as a “mere agent” of Congress when deciding whether to suspend the duty-free status of certain goods.<sup>39</sup> The Court further explained:

[The legislature] can make a law to delegate a power to determine some facts or state of things upon which the law makes, or intends to make, its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making

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35. *Wayman v. Southard*, 23 U.S. 1, 46 (1825).

36. *Id.* at 43.

37. *Marshall Field*, 143 U.S. at 692.

38. *Id.* at 692–93.

39. *Id.* at 693.

power, and, must, therefore, be a subject of inquiry and determination outside of the halls of legislation.<sup>40</sup>

Shortly after *Marshall Field*, the Court again took a common-sense approach to a nondelegation challenge in *Buttfield v. Stranahan*. There, the Court upheld the Tea Inspection Act, which gave the Secretary of the Treasury the power to establish standards of quality for all teas imported into the United States.<sup>41</sup> The Court interpreted the Act to establish the policy of prohibiting imports of the lowest grade of tea and found Congress's guidance to be sufficient.<sup>42</sup> As in *Marshall Field*, the Court in *Buttfield* recognized the practical limitations on Congress's ability to legislate. It explained: "Congress legislated on the subject as far as was *reasonably practicable*, and from the necessities of the case was compelled to leave to executive officials the duty of bringing about the result pointed out by the statute."<sup>43</sup> In both *Marshall Field* and *Buttfield*, then, the Court determined whether Congress had delegated legislative power by looking to the circumstances surrounding the legislation in question and asking whether Congress could have provided any additional guidance or whether it had to rely on the executive to implement its policy due to its inability to predict how the future would unfold.

In the 1929 landmark case of *J.W. Hampton, Jr. & Co. v. United States*, the Court first articulated the "intelligible principle" standard, one that, at least theoretically, continues to govern delegation cases today.<sup>44</sup> In *Hampton*, the Court upheld the flexible tariff provision of the 1922 Tariff Act, which vested in the president the authority to alter any tariff set in the Act when the president found that the amount set by Congress did not equalize the difference in cost of production between domestic and foreign producers.<sup>45</sup> In upholding the provision, the Court again took a pragmatic approach to the question of delegation. It explained that the "extent and character" of a congressional delegation must be evaluated according to "common sense" and the inherent necessity of coordination

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40. *Id.* at 694 (citing *Locke's Appeal*, 72 Pa. 491, 498–99 (1873)).

41. *Buttfield v. Stranahan*, 192 U.S. 470, 494, 496 (1904).

42. *Id.* at 495–96.

43. *Id.* at 496 (emphasis added).

44. *See, e.g.*, *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928)) ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'").

45. *Hampton*, 276 U.S. at 412–13. The Act also provided that the president could not increase or decrease the rate by more than 50 percent and identified factors for the president to consider when increasing or decreasing a tariff. *Id.* at 401–02.

among the branches.<sup>46</sup> The Court explained that because Congress could not feasibly set a new rate each time domestic or foreign prices shifted, Congress passed the flexible tariff provision to allow the president to decide whether a change in rate was necessary to carry out the goal of the Tariff Act.<sup>47</sup> The Court then articulated the following rule: “If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”<sup>48</sup> In the nondelegation cases that followed, this rule became known as the intelligible principle standard and remains, at least in theory, good law today. As I will show, the standard established in *Hampton* has served effectively as a license to Congress, giving it a free pass in delegating its lawmaking authority to the executive.<sup>49</sup> But this current version of the intelligible principle standard is by no means a proper reading of *Hampton*. In that decision, the Court was quite definitely seeking to draw a conceptual dichotomy between the legislative and executive powers. The fact remains, however, that the Court in *Hampton* was defining those concepts in a manner consistent with the highly pragmatic framework that the Framers transformed into a foundational conceptual framework in the Constitution.<sup>50</sup>

### B. Enforcement During the New Deal

In 1935, for the first time, the Court struck down a statutory provision as an unconstitutional delegation of legislative power. Exhibiting a resistance to President Roosevelt’s dramatic expansion of the executive branch during the New Deal, the Court invalidated two provisions of the National Industrial Recovery Act (NIRA). First, in *Panama Refining Co. v. Ryan*, the Court confronted a challenge to a section of the NIRA that authorized the president to prohibit the interstate transportation of “hot oil,” i.e., oil produced in excess of the quotas set by state law.<sup>51</sup> The Court found that the Act unconstitutionally delegated legislative power, reasoning that the question of whether to prohibit the transportation of hot oil is “obviously one of legislative policy” and that the NIRA did not

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46. *Id.* at 406.

47. *Id.* at 404–05, 407.

48. *Id.* at 409.

49. See *infra* Section II.C (analyzing the danger posed by Congress’s continued loss, and the executive’s usurpation, of political and legislative power).

50. See *infra* notes 154–56 and accompanying text (discussing the need for a pragmatic formalist approach to implement the nondelegation doctrine).

51. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 405–06 (1935); see also *id.* at 436 (Cardozo, J., dissenting).

provide any guidance as to whether or under what circumstances the president should do so.<sup>52</sup> Thus, the Court concluded, section 9(c) of the NIRA unconstitutionally gave the president “unlimited authority to determine the policy.”<sup>53</sup>

Later that same year, in *A.L.A. Schechter Poultry Corp. v. United States*, the Court struck down another provision of the NIRA.<sup>54</sup> In *Schechter*, the Court addressed section 3 of the NIRA, which gave the president the power to approve codes of fair competition for the “protection of consumers” and in “furtherance of the public interest” to effectuate the policy of the Act.<sup>55</sup> Like in *Panama Refining*, the Court held that section 3 impermissibly delegated legislative power. It found that the delegation in section 3 was even broader than the hot oil provision in section 9(c), which at least identified the subject that the president would regulate: hot oil. In section 3, however, Congress failed to provide any definition of “fair competition,” nor did it provide any guidance as to the subject matter that the codes should regulate.<sup>56</sup> The Court concluded that section 3 gave the president the “unfettered” discretion to adopt any code he found advisable for the rehabilitation of trade or industry, one of the broad general purposes Congress gave for passing the Act.<sup>57</sup>

The Court’s willingness to invalidate laws as unconstitutional delegations of legislative power did not last for long. To this day, *Panama Refining* and *Schechter* stand as the only two cases in which the Court invalidated a statute on nondelegation grounds.

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52. *Id.* at 415 (majority opinion).

53. *Id.* at 415, 433.

54. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935).

55. Congress’s stated policy for the NIRA was:

[T]o remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof; and to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices, to promote the fullest possible utilization of the present productive capacity of industries, to avoid undue restriction of production (except as may be temporarily required), to increase the consumption of industrial and agricultural products by increasing purchasing power, to reduce and relieve unemployment, to improve standards of labor; and otherwise to rehabilitate industry and conserve natural resources.

*Id.* at 534–35.

56. *Id.* at 535, 541.

57. *Id.* at 541–42.

### C. Post-New Deal Enforcement

Shortly after it decided *Panama Refining* and *Schechter*, the Court—quickly realigned due to the appointment of Pro-New Deal Justices—drastically altered its application of the nondelegation doctrine by upholding broad delegations in the name of a functionalist perspective on separation of powers.<sup>58</sup> For example, in *National Broadcasting Co. v. United States*, the Court upheld section 303 of the 1934 Communications Act, which authorized the Federal Communications Commission (FCC) to issue regulations to carry out the Act as “public interest, convenience, and necessity” requires.<sup>59</sup> The Court explained that Congress’s directive that the FCC regulate in the “public interest, convenience, or necessity” must be interpreted in the context of the complex and rapidly changing radio industry.<sup>60</sup> Evaluated in this context, the delegation was found to be “as concrete as the complicated factors for judgment in such a field of delegated authority permit.”<sup>61</sup> But of course, this was simply wrong. If Congress had done its job, it could have developed some basic normative guidelines to direct the executive agency’s enforcement. Instead, its directive to the FCC was nothing more than an authorization to make both law and policy.

One year later, in *Yakus v. United States*, the Court upheld an equally broad delegation of power to an administrative agency.<sup>62</sup> In the Emergency Price Control Act of 1942, Congress authorized a Price Administrator to fix prices of commodities that “in his judgment will be generally fair and equitable and will effectuate the purposes of the Act” when he finds that “prices ‘have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act.’”<sup>63</sup> The Court upheld the Act, reasoning that it provided a legislative objective, prescribed the method of achieving that objective, and articulated standards to guide the Administrator’s determination of when it should fix prices and how prices should be fixed.<sup>64</sup> The Court recognized the

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58. Some argue that this shift in the Court’s attitude can be attributed to President Roosevelt’s Court-packing plan. Frustrated by the Court’s resistance to the New Deal, President Roosevelt proposed a bill that would allow him to pack the Court. The plan never came to fruition, however, as the mere threat seemed to produce Roosevelt’s intended result. Beginning with *West Coast Hotel Co. v. Parrish*, a 1937 case upholding a state minimum wage law, the Court warmed up to the New Deal legislation. 300 U.S. 379. In the years that followed *West Coast Hotel*, the Court routinely upheld broad delegations of lawmaking power. See Zellmer, *supra* note 12 at 11154.

59. *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 215 (1943).

60. *Id.* at 216.

61. *Id.* (quoting *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940)).

62. *Yakus v. United States*, 321 U.S. 414, 423 (1944).

63. *Id.* at 420.

64. *Id.* at 423.



role that functional considerations played in its holding. It explained that “[t]he Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality . . . to perform its function.”<sup>65</sup> The Court then articulated the following rule:

[O]nly if we could say that there is an absence of standards for the guidance of the Administrator’s action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose of preventing inflation.<sup>66</sup>

Without formally overruling *Hampton*, the Court in *Yakus* effectively relaxed *Hampton*’s standard that Congress must provide an “intelligible principle” and instead required that Congress need only provide something more than a complete “absence” of guidance.

The Court continued to uphold broad delegations in the name of functionalism into the latter part of the twentieth century. In *Mistretta v. United States*, the Court upheld the United States Sentencing Commission’s promulgation of the Sentencing Guidelines as a valid use of executive power.<sup>67</sup> The Sentencing Reform Act established the United States Sentencing Commission and gave the Commission the power to devise sentencing guidelines for every federal criminal offense and “establish general policies . . . as are necessary to carry out the purposes” of the Act.<sup>68</sup> The Court upheld the Act, explaining that “[d]eveloping proportionate penalties for hundreds of different crimes by a virtually limitless array of offenders is precisely the sort of intricate, labor-intensive task for which delegation to an expert body is especially appropriate.”<sup>69</sup> The Court then reaffirmed its holding in *Yakus* that a delegation will stand unless there is an “absence of standards.”<sup>70</sup>

Puzzlingly, Justice Scalia began the majority opinion in *Mistretta* by recognizing that “‘the integrity and maintenance of the system of government ordained by the Constitution’ mandate that Congress generally cannot delegate its legislative power to another Branch.”<sup>71</sup> But the Court nevertheless pushed aside the foundational precept of American political and constitutional theory in the name of a “practical understanding” that “in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do

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65. *Id.* at 425 (internal quotations omitted).

66. *Id.* at 426.

67. *Mistretta v. United States*, 488 U.S. 361, 412 (1989).

68. *Id.* at 368–69.

69. *Id.* at 379.

70. *Id.*

71. *Id.* at 371–72 (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892)).

its job absent an ability to delegate power under broad general directives.”<sup>72</sup>

The Court’s application of the nondelegation doctrine during the mid to late twentieth century was characterized by the use of the naked functionalist approach adopted in *National Broadcasting* and *Mistretta*, where the Court upheld broad delegations of power in the name of convenience and expertise.<sup>73</sup> Since the Court’s invalidation of two provisions of the NIRA during the New Deal, the Court has watered down the nondelegation doctrine into a toothless relic of its former self. As a practical matter, as both its supporters and critics recognize, the nondelegation doctrine now exists in name only.

In one of the Court’s most recent nondelegation cases, *Whitman v. American Trucking Associations*, the Court continued the trend of allowing Congress to delegate broad swaths of power. In *Whitman*, the Court upheld § 109(b)(1) of the Clean Air Act, which requires that the EPA Administrator promulgate national ambient air quality standards, “the attainment and maintenance of which in the judgment of the Administrator . . . are requisite to protect the public health.”<sup>74</sup> Justice Scalia explained that the delegation was “well within the outer limits of our nondelegation precedents,” citing *Yakus* and *National Broadcasting*.<sup>75</sup> The Court’s opinion concluded with what some might have interpreted as the final nail in the nondelegation doctrine’s coffin. It stated: “In short, 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>76</sup>

In a separate opinion concurring in part and concurring in the judgment, Justice Stevens pulled back the curtain on majority’s approach. He explained:

The Court has two choices. We could choose to articulate our ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is “legislative” but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute. Alternatively, we could pretend, as the Court

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72. *Id.* at 372.

73. *See, e.g.*, *Lichter v. United States*, 334 U.S. 742, 785–86 (1948) (upholding delegation of authority to define “excessive profits”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946) (upholding delegation of authority to SEC to prevent “unfairly or inequitably distribut[ing] voting power among security holders”); *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 600 (1944) (upholding delegation to Federal Power Commission to determine “just and reasonable” rates).

74. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 472 (2001).

75. *Id.* at 474.

76. *Id.* at 474–75 (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

does, that the authority delegated to the EPA is somehow not “legislative power.” . . . 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.”<sup>77</sup>

Justice Stevens then opined that Congress may delegate “legislative” power so long as it provides an intelligible principle, though at no point in modern memory has the Court ever demanded inclusion of a *truly* intelligible principle.<sup>78</sup>

Justice Thomas joined the Court’s opinion but also wrote separately to express his concern that there may be a genuine constitutional problem with section 109(b)(1).<sup>79</sup> He noted that, although neither of the parties asked the Court to reconsider its delegation jurisprudence, he would be willing to address on a future day “the question [of] whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>80</sup>

The Court’s concession in *Whitman* that it has “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>81</sup> arguably confirmed what many had already claimed: the nondelegation doctrine is dead.

The scholarly debate over whether the Court should return to a robust application of the nondelegation doctrine is hotly contested. Some argue for the revival of the nondelegation doctrine on originalist grounds.<sup>82</sup> Others take a functionalist approach to the issue of delegation, arguing that Congress should be able to delegate its legislative power given the size of the federal government and the necessity of delegation under the current administrative state.<sup>83</sup> The debate over the nondelegation doctrine

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77. *Id.* at 488 (Stevens, J., concurring).

78. *Id.* at 488–90. It is worth noting the blatant inconsistency in Justice Stevens’ statement. It is unclear how the power vested in the EPA could be defined as “legislative” despite being “adequately limited” by the authorizing statute. *Id.* at 488. The entire purpose of the “intelligible principle” standard is that if a statute provides an intelligible principle, this guidance makes it such that the statute does not delegate legislative power.

79. *Id.* at 486–87 (Thomas, J., concurring).

80. *Id.* at 487.

81. *Id.* at 474–75 (majority opinion) (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting)).

82. See 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, 270–72 (2001) (arguing that the original meaning of the Constitution supports a strict version of the doctrine in most areas of the law and that the doctrine does not apply to areas of the law where executives traditionally received broad delegations).

83. See Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1415–16 (2000) (arguing that Congress should be able to delegate its lawmaking authority so long as the administrative agency issues rules containing reasonable limits on their discretion); Merrill, *supra* note 12, at 2164 (arguing that

has focused on two questions: first, whether the Court should revive the nondelegation doctrine and second, if so, what method the Court should employ to determine when a delegation is of legislative power.

In *Gundy v. United States*, decided last term, the Court found that Congress's delegation to the Attorney General to "specify the applicability" of the Sex Offender Registration and Notification Act (SORNA) registration requirements to offenders convicted before SORNA's enactment does not violate the nondelegation doctrine.<sup>84</sup> In a plurality opinion written by Justice Kagan,<sup>85</sup> the Court first resolved the issue of whether SORNA gives the Attorney General the ability to decide if the Act should apply retroactively or whether the Act required a retroactive application.

Petitioner Gundy, a pre-Act offender, argued that SORNA empowers the Attorney General to decide *if* the Act's registration requirements apply to pre-Act offenders, but the Court rejected this argument and instead found that Congress made clear that SORNA's registration requirements must apply to pre-Act offenders. In reaching this conclusion, the Court first cited its 2012 decision in *Reynolds v. United States* as having already decided this issue.<sup>86</sup> It then reaffirmed the rationale given in *Reynolds*, namely that SORNA's purpose and history revealed Congress's intent for the Act's registration requirements to cover pre-Act offenders.<sup>87</sup> The Court explained that Congress merely delegated to the Attorney General the task of implementing the Act's registration requirements to pre-Act offenders as soon as was feasible.<sup>88</sup>

Having resolved the issue of how the Act ought to be interpreted, the

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Congress should be permitted to delegate its legislative power as long as it chooses which body shall exercise the power because "as a body of generalists whose principal area of expertise is politics, [Congress] should be able to resolve such questions of institutional choice more effectively than determining the substance of specific policies").

84. See *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019) (plurality opinion). 34 U.S.C. § 20913(d) provides:

The Attorney General shall have the authority to specify the applicability of the requirements of this subchapter to sex offenders convicted before the enactment of this chapter or its implementation in a particular jurisdiction, and to prescribe rules for the registration of any such sex offenders and for other categories of sex offenders who are unable to comply with subsection (b) [which lays out registration requirements].

34 U.S.C. § 20913(d) (2017).

85. Justices Breyer, Sotomayor, and Ginsburg joined in the plurality opinion. *Gundy*, 139 S. Ct. at 2121 (plurality opinion). Justice Alito, who concurred in the judgment, provided the fifth vote. *Id.* at 2130 (Alito, J., concurring). He wrote separately to add that he would support an effort to reconsider the Court's nondelegation jurisprudence at a future time. *Id.* at 2131.

86. See generally *Reynolds v. United States*, 565 U.S. 432 (2012).

87. *Gundy*, 139 S. Ct. at 2124 (plurality opinion).

88. *Id.* at 2125.

Court held that section 20913(d) does not violate the nondelegation doctrine. The Court described the “intelligible principle” standard as “not demanding” and, citing to *National Broadcasting, Yakus*, and *Whitman*, explained that it has “over and over upheld even very broad delegations.”<sup>89</sup> It recognized that although Congress may not transfer powers which are “strictly and exclusively legislative,”<sup>90</sup> Congress may “confer substantial discretion on executive agencies to implement and enforce the laws.”<sup>91</sup> Echoing the functionalist approach adopted in *Mistretta*, the Court stated: “if SORNA’s delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”<sup>92</sup> The Court concluded by explaining that giving the Attorney General discretion in applying the registration requirements is precisely the type of judgment often left to executive officials.<sup>93</sup> Thus, nothing in *Gundy* in any way altered the widely held view that the nondelegation doctrine is effectively moribund.

## II. REVIVING THE NONDELEGATION DOCTRINE

In one sense, the thesis of this Article is all too simple: The Court should revive the nondelegation doctrine because of the doctrine’s vital importance to both the structure and operation of the American government. Enforcement of the doctrine preserves the separation of powers established by the Constitution, serves as a prophylactic measure against tyranny, and promotes democratic accountability. As I already have made clear, however, there is far more to it than simple acceptance of these foundational normative principles of American political theory. But while acceptance of these theoretical precepts may not constitute a sufficient condition for acceptance of the pragmatic formalist approach to the nondelegation doctrine, it surely does constitute a necessary condition. My first task, then, is to convince the reader of the centrality of these precepts to the core premise of American political and constitutional thought. It is therefore to this initial task that I now turn.

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89. *Id.* at 2129.

90. *See* *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825) (“It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”).

91. *Gundy*, 139 S. Ct. at 2123 (plurality opinion) (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989)).

92. *Id.* at 2130.

93. *Id.* at 2130.

A. *The Importance of the Nondelegation Doctrine in American Political Theory*

In drafting the Constitution, the Framers for the most part vested the legislative and executive power in separate and distinct branches of the federal government,<sup>94</sup> and they did so for very important reasons. Article I, Section 1 reads: “All legislative Powers herein granted shall be vested in a Congress of the United States . . . .”<sup>95</sup> In Article II, the Constitution vests “[t]he executive Power” in a president of the United States.<sup>96</sup> This separation of political power was no accident. Based on their experiences, both with England and the several states, the Framers knew of the danger that arises when the same body of government houses the power both to formulate and execute the law. Quoting Montesquieu, James Madison wrote: “When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the *same* monarch or senate should *enact* tyrannical laws to *execute* them in a tyrannical manner.”<sup>97</sup>

Madison noted that the plan of the Convention adopted a nondelegation principle.<sup>98</sup> He recognized that each branch could not be kept “totally separate and distinct” from the others—for example the president has the power to make treaties with other nations, which have the force of law—but explained that the “whole” power of one branch cannot be exercised by another department.<sup>99</sup> When Congress delegates its legislative power to the executive branch, the Constitution’s separation

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94. In what constituted a rather dramatic departure from traditional separation-of-power theory, the Framers chose to incorporate the president into the legislative process through the presentment requirement and the potential exercise of the veto power. They obviously concluded that such an observation was justified by the need for checks and balances. However, this does not alter the fact that social policy choices are to be made in the first instance by the approval of both Houses of Congress.

95. U.S. CONST. art. I, § 1.

96. *Id.* art. II, § 1, cl. 1.

97. THE FEDERALIST NO. 47, *supra* note 13, at 246.

98. Madison pointed to the Constitution of Massachusetts, which declared “that the legislative department shall never exercise the executive and judicial powers, or either of them: The executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them.” *Id.* at 247. He then stated: “This declaration . . . is not in a single point violated by the plan of the Convention.” *Id.*

99. *Id.* at 249, 245. The Court has repeatedly recognized the separation of powers rationale for the nondelegation doctrine. For example, in *Mistretta v. United States*, the Court explained: “The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.” 488 U.S. 361, 371 (1989). Likewise, in *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, Justice Rehnquist, in his concurrence, referred to the doctrine as “the nondelegation principle of separation of powers,” 448 U.S. 607, 674 (1980), and in *Loving v. United States*, the Court recognized the nondelegation doctrine as a “strand of [the Court’s] separation-of-powers jurisprudence.” 517 U.S. 748, 758 (1996).

of powers collapses, as the same body can both proscribe and enforce the law. Judicial enforcement of the nondelegation doctrine is thus essential to preserving the Constitution's separation of powers.

By preserving the separation of powers, judicial enforcement of the nondelegation doctrine protects the fundamental goal that the Framers sought to achieve: the avoidance of tyranny. The Framers wisely understood tyranny not simply as the *abuse* of power but as the *accumulation* of power in the same hands. In Madison's words: "The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny."<sup>100</sup> Recognizing that "power is of an encroaching nature," the Framers knew that the time to stop an accumulation of power was *before it had begun*.<sup>101</sup> As Jefferson stated in his Notes on the State of Virginia: "The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered."<sup>102</sup>

To prevent the aggregation of power in the same hands, the Framers vested the legislative power in "a Congress," the executive power in "a President," and the judicial power in "one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."<sup>103</sup> The Framers could have resorted to other methods of dividing power among the branches. They could, for example, have established a system where the branches would be free to exercise any type of power they saw fit, until that power reached a level deemed by a designated authority to border on tyranny or, more cautiously, reached a level presenting the clear and present danger of tyranny. But because of the Framers' focus on the importance of *preventing* tyranny, they rejected such approaches and instead chose a structure of government that would stop an accumulation of power before enough time had passed to allow for that accumulation to turn into tyrannical abuse of power.

Enforcement of the nondelegation doctrine would also promote democratic accountability, as it would force Congress to make difficult policy decisions instead of punting those choices to the executive branch. It is true, of course, that the president is elected, as are the members of Congress.<sup>104</sup> But members of Congress are, of course, far more

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100. THE FEDERALIST NO. 47, *supra* note 13, at 244.

101. THE FEDERALIST NO. 48, at 250 (James Madison) (Buccaneer Books 1992).

102. THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 121 (William Peden ed., 1955).

103. U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

104. It should be noted, however, that because of the Electoral College, in two of the last five elections, the victorious candidate for president won the presidency despite the fact that he lost the popular vote.

responsive to those whom they represent than the president. In any event, legislative delegations are only rarely exercised by the president directly. Rather, most are exercised by administrative agencies, whose accountability to either the president or the electorate is at best limited.<sup>105</sup> Congress rightly relies on administrative agencies to implement its policy judgments since it is their constitutionally dictated function to do so. However, since the rise of the administrative state during the New Deal, Congress has allowed administrative agencies to take center stage as the primary lawmakers by drafting statutes with all but totally unlimited directives that allow the agencies to regulate with virtually no guidance.

When Congress enacts a statute that gives little or no guidance to an agency, the American system of government ceases to function in the manner contemplated by the Constitution. Under our system of representative democracy, “we the people” vote to elect representatives and those representatives vote for laws on behalf of the people they represent. Unlike a direct democracy, where laws are passed by a direct and popular vote, the only way American citizens have any say in the laws that govern them is through their elected representatives. If citizens disapprove of how their elected representative voted on a particular law, they can vote to replace that representative the following term. But when Congress enacts a law allowing federal agencies to promulgate binding rules without giving guidance as to what or how those rules should regulate, the American people lack any means to properly assess their elected representatives. In other words, when Congress passes a law allowing an agency to regulate “in the public interest,” our elected representatives might as well be exercising a secret ballot.

Congressional delegations of lawmaking authority to administrative agencies might not be as concerning from the perspective of democratic theory if the voting public could hold administrative agencies accountable. But while the president oversees administrative agencies in theory, this presidential oversight does not make the agencies publicly accountable in practice. First, the massive size of the administrative state makes it difficult for the president to oversee all decisions made at the agency level.<sup>106</sup> Second, a subset of agencies—so-called “independent agencies”—are further insulated from presidential oversight because the president may only remove the members of independent agencies for

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105. See REDISH, *supra* note 29, at 143 (“This indirect accountability comes, then, at best in an extremely diluted form.”).

106. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2250 (2001) (“[N]o President (or his executive office staff) could, and presumably none would wish to, supervise so broad a swath of regulatory activity.”).



good cause.<sup>107</sup> Judicial enforcement of the nondelegation doctrine would force Congress to make policy decisions, thus restoring democratic accountability. In contrast, citizens frustrated with a representative's legislative choices could elect a new representative the following term.<sup>108</sup>

*B. Arguments Against Reviving the Nondelegation Doctrine*

Those who oppose meaningful application of the nondelegation doctrine, the so-called “functionalists,” provide a number of reasons why Congress should be permitted to delegate its legislative power. This section articulates those arguments. The section that follows responds to them.

i. Institutional Competency: Expertise and Accountability

One argument often advanced by functionalists is that Congress should be able to delegate its legislative power because the executive branch, as an institution, is more capable than Congress at making laws. They argue that federal agencies have superior access to information and subject matter expertise, gained through the use of experts, and thus are better positioned than Congress to make the laws that govern the American people.<sup>109</sup>

One of the leading advocates of this nakedly functionalist approach is Professor Thomas Merrill, who asserts that Congress is better situated to decide *who* should make the law than to actually make the law itself. In other words, Merrill argues that Congress's expertise lies in deciding whether to delegate authority, not in policymaking. In his words: “Congress, as a body of generalists whose principal area of expertise is politics, should be able to resolve such questions of institutional choice more effectively than determining the substance of specific policies.”<sup>110</sup>

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107. *Id.* at 2247.

108. Others have similarly argued for the revival of the nondelegation doctrine as a means of promoting democratic accountability. *See, e.g.*, JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132 (1980) (stating that the failure of legislators to legislate is one of the major obstacles to a truly representative democracy); Schoenbrod, *supra* note 25, at 1243–46 (arguing that the nondelegation doctrine is essential to promoting responsibility among elected officials); Marci A. Hamilton, *Representation and Nondelegation: Back to Basics*, 20 *CARDOZO L. REV.* 807, 821–22 (1999) (listing citizen apathy, arbitrariness, corruption, and a lack of accountability as the costs of the Court's failure to enforce the nondelegation doctrine).

109. *See, e.g.*, David B. Spence & Frank Cross, *A Public Choice Case for the Administrative State*, 89 *GEO. L.J.* 97, 124–26 (2000) (defending congressional delegations of lawmaking power to administrative agencies in part because agencies have superior access to information).

110. Merrill, *supra* note 12, at 2164. Merrill argues that Article I, § 1 should be construed to mandate the “exclusive delegation doctrine” instead of the nondelegation doctrine. *Id.* at 2163. Under the exclusive delegation doctrine, the executive branch may exercise legislative power as long as Congress clearly authorized the agency to make legislative rules. *Id.* at 2100. Although

He attributes this institutional incompetence to Congress's decline in political power after the New Deal. Merrill explains that although the Framers understood Congress to be the most important branch of the federal government, the massive growth in scale and complexity of the government that occurred during the New Deal elevated the executive to the forefront as the primary political power.<sup>111</sup> He argues that the decline in Congress's power has created a "quiet crisis in constitutional law" since the Constitution presupposes that Congress is the most important policy-maker.<sup>112</sup> He therefore asserts that the Court should resolve this crisis by recognizing that Congress can delegate legislative power.<sup>113</sup>

Similarly, Professor Peter Schuck has argued that public participation in lawmaking is most accessible, most meaningful, and most effective within administrative agencies, not Congress, thus making the executive branch much better suited for lawmaking.<sup>114</sup> He writes:

The agency is often a more meaningful site for public participation than Congress, because the policy stakes for individuals and interests groups are most immediate, transparent, and well-defined at the agency level. . . . After all, it is only at the agency level that the generalities of legislation are broken down and concretized into discrete, specific issues with which affected parties can hope to deal. It is there that the agency commits itself to a particular course of action . . . . In short, it is only at the agency level that the citizen can know precisely what the statute means to her . . . .<sup>115</sup>

Professor Schuck also argues that public participation is most effective at the agency level because the agency is where the public can best educate the government about the nature of the problem Congress wanted to address.<sup>116</sup> To support his proposition that political participation is

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Merrill recognizes that the executive branch does not inherently possess the power to act with the force of law, he argues that Congress may give it this power. *Id.* at 2101.

111. *Id.* at 2159.

Today . . . [o]n virtually all matters of legislative policy, the Executive leads, and Congress follows. Sometimes Congress can frustrate or impede the Executive by refusing to enact legislation sought by the President, rejecting presidential appointments, or modifying presidential appropriations requests. But only rarely does Congress take the initiative in setting national policy.

*Id.*

112. *Id.* at 2162.

113. *Id.* at 2163. Merrill also attributes Congress's decline in political power to the "persistence of war in the modern era" which enhances the power of the president, "imperfect campaign finance laws" which drive members of Congress to focus their attention on fundraising instead of lawmaking, and the "growth of the national news media" which tends to magnify the president's power. *Id.* at 2159-60.

114. Schuck, *supra* note 23, at 781.

115. *Id.* at 781-82.

116. *Id.* at 782-83. Schuck attributes this phenomenon to both the "growing social complexity,"

most meaningful at the agency level, Professor Schuck rejects the argument that the agencies lack oversight and are shielded from public accountability. He argues that while the agencies might not be directly responsive to the voting public, they are nevertheless accountable to diverse and powerful institutions, such as interest groups and the media, which surround federal agencies like “watchdogs with sharp, penetrating teeth” that restrain the agencies’ discretion.<sup>117</sup>

Professor Jerry Mashaw, in contrast, argues that executive agencies are more accountable than Congress because they respond to the president.<sup>118</sup> He explains that while voters select members of Congress based on the representative’s effectiveness in providing goods and services to the voter’s local district rather than based on the representative’s position on various issues, voters elect a president based on the impact the president will have on national policies.<sup>119</sup> Thus, Professor Mashaw argues, the president’s oversight of administrative agencies gives the voting public an indirect say on agency action.<sup>120</sup>

#### ii. Delegation as Self-Policing

Functionalists also argue that Congress should be able to delegate its legislative power because Congress is free to give its constitutionally-vested power away. After all, the argument goes, if Article I, Section 1 of the Constitution vests *all* the legislative power in Congress, Congress should be free to do with that power whatever it chooses.<sup>121</sup> Justice Stevens articulated this position in his *Whitman* concurrence. There he argued that Congress’s delegation to the EPA to set national ambient air quality standards, “the attainment and maintenance of which . . . are requisite to protect the public health,” was plainly a delegation of legislative power, but this does not make the delegation unconstitutional, because Article I, Section 1 does not attempt to limit Congress’s ability

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which he says has made it more difficult for congressional representatives “to accurately predict the consequences of their choices so that they can reason their way to a conclusion as to the best policy choice.” *Id.* at 778. He also attributes this trend to the fact that looming reelections incentivize representatives “to think so obsessively about their immediate electoral prospects” that they “may neglect longer term social problems whose solutions require immediate sacrifices for delayed gains, problems that demand as much of the legislators’ attention, prudence, and political courage as they can muster.” *Id.* at 777.

117. *Id.* at 783–84.

118. Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON. & ORG. 81, 95–96 (1985).

119. *Id.* at 95.

120. *Id.* at 95–96.

121. See Merrill, *supra* note 12, at 2129–30 (arguing that the Necessary and Proper Clause gives Congress the authority to transfer legislative power to other branches of government to “carry[] into execution” the enumerated power granted to Congress).

to delegate its duty to make the law.<sup>122</sup>

Some who argue that Congress should be able to delegate its legislative power if it so chooses justify this position by positing that delegation is a self-regulating system. Jesse Choper, for example, argues that the political branches will effectively police separation of powers violations and because of this, “the ultimate constitutional issues of whether executive action . . . violates the prerogatives of Congress . . . should be held to be nonjusticiable . . . .”<sup>123</sup> Others have expanded on this argument by positing that because Congress will not want to give too much power to the executive, it will rarely delegate without constraints.<sup>124</sup>

### iii. Compatibility with the Modern Administrative State

Lastly, some functionalists argue that any rule that prohibits Congress from delegating its legislative power should be rejected because it would be incompatible with the modern administrative state.<sup>125</sup> Indeed, the Court echoed this position in *Mistretta v. United States*, when it stated: “Congress simply cannot do its job absent an ability to delegate power under broad general directives.”<sup>126</sup> One commentator has gone so far as to argue that the administrative state falls outside the scope of the Constitution’s structure. Professor E. Donald Elliott describes the administrative state as a quasi-constitutional “fourth” branch, the rise of which has “transformed the nature and functions of existing institutions . . . .”<sup>127</sup> Thus, he argues, it is “child’s play” to raise questions

122. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457 (2001); *see also id.* at 488 (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.’”).

123. JESSE H. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* 263 (1980).

124. *See* David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 *CARDOZO L. REV.* 947, 950 (1999) (“Congress is . . . wary . . . of ceding too much authority to executive branch actors who may pursue their own policy goals rather than those of the enacting legislative coalition. Legislators therefore set the limits of executive branch discretion so that these costs and benefits of delegation balance at the margin. Thus, legislators may well delegate authority to executive actors, but they will rarely, if ever, do so without constraints. Moreover, legislators will delegate those issue areas where the normal legislative process is least efficient relative to regulatory policymaking by executive agencies.”).

125. *See* Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 *HARV. J.L. & PUB. POL’Y* 147, 192 (2017) (“Restrictions on delegation . . . seem to some observers incompatible with our current, large-scale, powerful administrative operations, and (in the more jaundiced view of this) efforts to revive a doctrine that would work to constrain delegations are explicable as based primarily in hostility to the modern administrative state.”); Kathryn A. Watts, *Rulemaking as Legislating*, 103 *GEO. L.J.* 1003, 1014 (2015) (“[T]he importance of agency regulations in our legal system is hard to overstate.”).

126. *Mistretta v. United States*, 488 U.S. 361, 372. (1989).

127. Elliott, *supra* note 23, at 167.

about the constitutional validity of administrative actions when the existing Constitution was only made to accommodate three branches.<sup>128</sup>

Despite their superficial appeal, these functionalist justifications are seriously flawed. In the section that follows, I will explain why the stark inconsistency of the functionalist model with the purposes and structure of our constitutional framework dictates its categorical rejection.

### C. *A Response to the Functionalists*

Each of these functionalist arguments ignores the very sensible reasons why the Framers separated the legislative and executive powers in the first place: to prevent the dangerous accumulation of power in one branch, the very existence of which they characterized as the essence of tyranny. The threat of tyranny—understood as the aggregation of power in a single branch—is just as real today, if not even more so than it was at the time of the framing. Congress’s continued loss of political power, coupled with the current president’s blatant disregard of Congress’s constitutionally authorized role, shows the looming danger caused by the executive usurpation of legislative power.<sup>129</sup> If Congress can delegate its legislative power to the executive in the name of convenience or expertise, the separation of powers established in the Constitution to prevent tyranny collapses. And, as Jefferson wisely recognized, once power has accumulated, it will be too late to stop it from degenerating further.<sup>130</sup>

This vitally important point underscores how dangerously misguided the functionalist arguments are. Let us assume, solely for purposes of argument, the correctness of all of the functionalist defenses of unlimited legislative delegation, grounded entirely in considerations of efficiency. The fact remains that such arguments would still be misguided because they totally ignore the foundational purpose of our constitutional structure: preservation of representative democracy and prevention of the accumulation of power, amounting to tyranny. A system grounded purely in the values of efficiency would at best be agnostic in the choice between democracy and tyranny. Indeed, a strong argument can be made that an exclusive focus on the need for efficiency would point more toward the

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128. *Id.* at 168. Professor Elliot may find support for his troubling position in *Humphrey's Executor v. United States*, where the Court’s categorization of the Federal Trade Commission as a “quasi legislative” agency free from executive control seemed to recognize that the administrative agencies can exist outside the existing three-branch constitutional structure. 295 U.S. 602, 628 (1935).

129. *See supra* notes 15–22 and accompanying text (discussing why the Constitution allocated power to both the legislative and the executive branch).

130. JEFFERSON, *supra* note 102, at 123–25 (“The time to guard against corruption and tyranny, is before they shall have gotten hold on us. It is better to keep the wolf out of the fold, than to trust to drawing his teeth and talons after he shall have entered.”).

choice of an authoritarian form of government than toward a democratic one. After all, we know that the trains ran on time in Mussolini's fascist Italy. Our entire constitutional framework, however, is premised on the primary goal of avoiding tyranny, regardless of the potential costs to efficiency.

Perhaps one could respond that the concentration of political power in the hands of the executive branch is wholly consistent with representative democracy. But the Framers clearly disagreed, as is made evident by even a cursory examination of unambiguous constitutional text. The very concept of separation of powers is grounded in the importance of prophylactic protection against tyranny.

Ultimately, any test that serves to balance separation-of-powers interests in avoiding tyranny against the far more tangible interests of convenience and expertise will never give the separation of powers sufficient weight. Comparing the interest in avoiding tyranny to the more tangible and immediate needs of convenience and expertise will not assure that the foundational interests in avoiding tyranny will be adequately protected. Justice Brennan recognized the unfairness of such a comparison in the context of Article III's prophylactic protections of tenure and salary. In his dissent in *Commodity Futures Trading Commission v. Schor*, Justice Brennan explained:

The Court requires that the legislative interest in convenience and efficiency be weighed against the competing interest in judicial independence. In doing so, the Court pits an interest the benefits of which are immediate, concrete, and easily understood against one, the benefits of which are almost entirely prophylactic, and thus often seem remote and not worth the cost in any single case. Thus, while this balancing creates the illusion of objectivity and ineluctability, in fact the result was foreordained, because the balance is weighted against judicial independence.<sup>131</sup>

It should be recalled that I have already rejected the argument that delegations of legislative power to administrative agencies in no way threaten democracy. This is so because these agencies are generally not under the control of the elected president.<sup>132</sup> But if that is true, then one might question my argument that legislative delegations dangerously empower the president by concentrating all political power in his hands.

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131. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 863 (1986) (Brennan, J., dissenting).

132. See *supra* notes 97–98 and accompanying text (quoting THE FEDERALIST NO. 47, *supra* note 13, at 246) (“When the legislative and executive powers are united in the same person or body . . . there can be no liberty, because apprehensions may arise lest the *same* monarch or senate should enact tyrannical laws to execute them in a tyrannical manner.”).

It could be suggested that we cannot have it both ways. But this would be a flawed critique. First of all, not all legislative delegations go to administrative agencies. Many are just as likely to go directly to the executive.<sup>133</sup> But democratic accountability is undermined even when they go to administrative agencies because of agencies' separation from the electoral process.<sup>134</sup> Finally, I categorically reject the suggestion that Congress is free to delegate its own power. Separation of powers is not designed to protect the individual branch; it is designed, rather, to protect the people from the onset of tyranny. It is therefore not Congress's protection to waive.

Functionalists might well respond to my critique by pointing out the obvious: despite the all but total absence of a meaningful nondelegation doctrine, our system has not yet degenerated into tyranny. But such an argument ignores the reason the Framers chose to view accumulation of power as the equivalent of tyranny: once the accumulated power is in fact abused, it is too late to stop the process. Indeed, we can understand the danger of power accumulation simply by seeing how the current president's abuses of power were facilitated, if not caused, by the atrophy of congressional authority.

In sum, each of the nakedly functionalist arguments advanced by scholars as to why Congress should be permitted to delegate its legislative power fails to rebut my thesis that the doctrine serves a vital role in preserving the democratic structure and operation of the American government. Those who reject the nondelegation doctrine argue that the interests of convenience or expertise are more important than the Constitution's separation of powers. To accept this position would be to accept the ominous risk of tyranny that comes with allowing Congress to delegate its legislative power.

### III. ARTICULATING A MODEL FOR ENFORCEMENT OF THE NONDELEGATION DOCTRINE: PRAGMATIC FORMALISM

In the prior section, I established that the functionalist attacks on the nondelegation doctrine are, for the most part, dangerous and misguided. Perhaps the strongest offense of the functionalist attack, however, focuses on the difficulty of fashioning a guiding constitutional approach to distinguish constitutionally legitimate exercises of congressional lawmaking authority from unconstitutional delegations of that power.<sup>135</sup>

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133. See *infra* Part IV (analyzing how pragmatic formalism handles the problem of national emergencies).

134. See *supra* notes 95–96 and accompanying text (identifying the powers the Constitution vests in Congress and the president).

135. See REDISH, *supra* note 29, at 135–61 (discussing when a congressional delegation is permissible and when it is impermissible).

It is, to be sure, a complex and frustrating task. But if, as I have argued, the nondelegation doctrine is centered in the fundamental constitutional precepts of separation of powers, then the difficulty of setting a constitutional standard for implementing the doctrine should certainly not be deemed a justification for abandonment.

Admittedly, fashioning a standard that distinguishes legislative from executive authority is no easy task. To be sure, it will often be relatively easy to characterize certain actions as either lawmaking or the implementation of a law, on a purely conceptual level. But the divide between these functions becomes murky in situations where the executive's use of implementational discretion begins to blend into policymaking. As Chief Justice Marshall aptly noted, distinguishing legislative from executive authority is a "delicate and difficult inquiry."<sup>136</sup> James Madison recognized this as well, writing that "[e]xperience has instructed us that no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces the legislative, executive, and judiciary; or even the privileges and powers of the different legislative branches."<sup>137</sup>

#### A. *Insufficiency of Existing Models*

For reasons already explained, functionalist approaches to separation of powers must be categorically rejected because they would permit the legislative and executive powers to fall into the same hands.<sup>138</sup> To preserve the separation of powers, then, a standard for judicial enforcement of the nondelegation doctrine must begin from the formalist perspective that Congress may not delegate its legislative power. But the formalists, too, have failed to articulate a workable standard for enforcement.

While I agree with the basic premise underlying formalist models—namely, that Congress is not constitutionally authorized to delegate its legislative power—the strict formalist theories adopt an overly rigid definition of legislative and executive power and, as a result, ignore the reality that because lawmaking is a complex process, Congress cannot be expected to make every choice involving the exercise of discretion. For example, one such formalist, Professor David Schoenbrod, argues that Congress is constitutionally permitted to enact "rules statutes," which tell

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136. *Wayman v. Southard*, 23 U.S. 1, 46 (1825).

137. THE FEDERALIST NO. 37, at 179 (James Madison) (Buccaneer Books 1992).

138. See THE FEDERALIST NO. 47, *supra* note 13, at 244 ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.").



a party what they can and cannot do, but may not enact “goals statutes,” which provide a policy goal but authorize executive branch discretion in determining how best to achieve that goal.<sup>139</sup> He believes that “goals statutes” unconstitutionally delegate legislative power.<sup>140</sup> Professor Schoenbrod argues that “the statute itself must speak to what people cannot do; the statute may not merely recite regulatory goals and leave it to an agency to promulgate the rules to achieve those goals.”<sup>141</sup> In other words, under Professor Schoenbrod’s test, the executive branch cannot decide how to implement Congress’s policy decisions.

Professor Ronald Cass offers an alternative formalist model for judicial enforcement of the nondelegation doctrine. Defining legislative authority as the power “to prescribe rules for the regulation of the society,”<sup>142</sup> Professor Cass argues that the ability to make rules that apply to settings in which executive officials traditionally have acted looks less like “rules for the regulation of the society.”<sup>143</sup> Thus, he argues, the Court should distinguish legislative from executive power by asking whether the authority conferred in a statute falls within the realm of the constitutionally-prescribed executive power.<sup>144</sup>

Professor Cass’s model permits the executive branch to use its discretion when implementing congressional policies, but only when the task conferred in the statute falls within the range of responsibilities typically handled by the executive. In this sense, Professor Cass’s model defines executive power more broadly than Professor Schoenbrod would. However, if Congress enacted a law articulating a policy regarding commerce or immigration, for example, under Cass’s model an

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139. Schoenbrod, *supra* note 25, at 1253.

140. *Id.*

141. *Id.* at 1227. To illustrate the distinction between “rules” and “goals” statutes, Professor Schoenbrod provides two examples. First, a statute establishing a tax at a given rate would be a “rule statute,” as it provides a rule of conduct: to pay the tax at the specified rate. But a statute that empowers the Commissioner of Internal Revenue to raise a certain amount of money by imposing taxes as necessary to achieve that goal would be a “goal statute,” as the agency could decide how to achieve Congress’s stated goal of raising revenues. Second, a statute limiting air pollution from power plants at a given rate of emission would be a “rule statute” because it delineates permissible from impermissible conduct. A statute that allows an agency to set controls on power plants in order to reduce the total emissions from all power plants to a certain level, however, would be a “goal statute,” as it allows the agency to decide how to achieve Congress’s goal of reducing total emissions. *Id.* at 1253.

142. Cass, *supra* note 125, at 186 (quoting THE FEDERALIST NO. 75, at 380 (Alexander Hamilton) (Buccaneer Books 1992)).

143. Cass, *supra* note 125, at 186–87. He writes: “Attaching the policy decision to the exercise of other tasks within the constitutionally prescribed missions of the other branches—deciding a case or managing governmental resources—limits the likelihood that it will be an exercise of legislative power.” *Id.* at 185.

144. *Id.* at 185.

administrative agency implementing Congress's policy could not promulgate rules to achieve that policy goal.

The problem with each of these formalist articulations of the nondelegation doctrine is that both theories offer a definition of executive power that is too rigidly limited to function realistically in practice. Professors Cass and Schoenbrod fail to recognize that it is often not feasible for Congress to make all decisions involving some level of policy choice. In these situations, Congress must rely on the executive branch to make an on-the-spot determination as long as those choices are guided by foundational normative policy directives determined by Congress.

One might be puzzled by what appears to be a functionalist critique of these formalist theories, in light of my criticism of functionalist approaches to separation of powers.<sup>145</sup> But pragmatic formalism rejects *both* functionalist *and* strict formalist separation-of-powers theories. It rejects functionalist theories because they blatantly ignore the textually-grounded prophylactic branch separation dictated by the Constitution. But it also rejects strict formalist approaches to separation of powers, because they ignore the fundamental pragmatic ether that surrounds the Framers' structuring of separation of powers in the first place. More specifically, strict formalist theories ignore the foundationally pragmatic reasons why the Framers chose to depart from the governmental structure established by the Articles of Confederation by creating an executive branch in the first place: to function as an arm of the federal government designed to act swiftly and decisively when Congress itself could not respond with sufficient speed. Under the Articles of Confederation, the newly-formed federal government consisted of one political branch: a Congress.<sup>146</sup> In reflecting on the weaknesses of the Articles of

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145. See *supra* notes 19–22 and accompanying text (expressing skepticism with the functionalist approach to separation of powers, in light of the current presidential administration's refusal to comply with Congress).

146. While scholars disagree about the reason why the Articles of Confederation lacked an executive branch, two reasons seem most likely. On one hand, some have argued that the States already had strong governments and the delegates feared that any centralized national government would look too much like the British Monarch. JENNINGS B. SANDERS, *EVOLUTION OF THE EXECUTIVE DEPARTMENTS OF THE CONTINENTAL CONGRESS, 1774–1789*, at 4 (1935) (“Any attempt to create a permanent executive outside Congress smacked of monarchical tendencies and would not be tolerated.”). Some have also argued that other, more pressing issues took priority. This seems plausible, as the Articles of Confederation were not so much a constitution as a mutual defense treaty establishing a “firm league of friendship” among newly-formed, co-equal states. See Maggs, *supra* note 16, at 402–03. The debate at the time the delegates drafted the Articles did not center on the relative strength of a centralized federal government but instead focused on the more urgent issues of fighting the war and how to deal with public land in the West, Native American relations, taxation, and representation. See Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution From the Confederation Period: The Case of the Drafting of the Articles of the Confederation*, 60 TENN. L. REV. 783, 787,

Confederation, the Framers realized that while Congress could pass laws governing the conduct of the several states, it had no way to ensure compliance with its laws.<sup>147</sup>

The Framers recognized another problem with the government established under the Articles: Congress could not act with sufficient speed in times of urgency. As Alexander Hamilton explained, Congress, “numerous as it is, constantly fluctuating, [could not] act with sufficient decision.”<sup>148</sup> The executive branch established in Article II of the Constitution thus filled the need for a body that could enforce Congress’s laws quickly and decisively. In short, the Framers established the formalistic framework of the federal government with a full understanding of the pragmatic implications of their chosen structure.

The Framers intended lawmaking to be an arduous, time-consuming process. This was not by accident, given the express requirement in Article I, Section 7 that enacting a law requires the approval of both the House of Representatives and the Senate.<sup>149</sup> To balance the intentionally time-consuming process of legislation against the need for the federal government to act quickly when it needed to do so, the Framers structured the executive branch to include a single “magistrate” so that it could function in a more nimble and fast-acting manner than Congress could. As Hamilton explained:

In the legislature, promptitude of decision is oftener an evil than a benefit. The differences of opinion . . . may sometimes obstruct salutary plans, yet often promote deliberation and circumspection; and serve to check excesses in the majority. . . . But [these circumstances] constantly counteract those qualities in the executive, which are the most necessary ingredients in its composition[:] vigor and expedition . . .<sup>150</sup>

The Framers understood “vigor,” “energy,” and “expedition” to be the most necessary ingredients in the executive branch, which was created to facilitate the “steady administration of the laws.”<sup>151</sup> Indeed, the need for

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816–27 (1993) (discussing how the Articles of Confederation emerged not from an ideological conflict regarding the strength of the federal government, but instead from a convergence of other debates).

147. THE FEDERALIST NO. 15, *supra* note 17, at 74 (“In our case, the concurrence of thirteen distinct sovereign wills is requisite under the confederation to the complete execution of every important measure, that proceeds from the Union. It has happened as was to have been foreseen. The measures of the Union have not been executed.”).

148. Letter to James Duane, *supra* note 17, at 404.

149. See U.S. CONST. art. I, § 7, cl. 2 (“Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States.”); see also *INS. v. Chadha*, 462 U.S. 919, 951 (1983) (interpreting the Constitution as requiring bicameralism and presentment for all legislation).

150. THE FEDERALIST NO. 70, at 358 (Alexander Hamilton) (Buccaneer Books 1992).

151. See *id.* at 355 (“Energy in the executive is a leading character in the definition of good

quick decision making is the reason the Framers rejected a joint-presidency.<sup>152</sup>

This history is instructive, not merely from an originalist perspective, but also as a matter of common sense. Any theory for enforcement of separation of powers in general or the nondelegation doctrine in particular that ignores the pragmatic essence of the Constitution's formalist structure misses the fundamental conceptual subtlety of that structure.

Thus, neither functionalist nor formalist approaches articulate an appropriate model for judicial enforcement of the nondelegation doctrine. Instead, the Court needs to fashion a doctrinal model that carves a path between these two extremes, one that preserves the separation of powers by infusing pragmatic consideration into the definitional framework of governmental structure.

### B. *Pragmatic Formalism and the Nondelegation Doctrine*

The preceding analysis leads to the conclusion that the appropriate means to implement the nondelegation doctrine is by use of "pragmatic formalism"—a theory I originally developed as a broad theory of separation of powers.<sup>153</sup> Pragmatic formalism is grounded in the formalist rule that because no branch may exercise any authority that falls outside its constitutionally-granted powers, Congress is not permitted to delegate its legislative power.<sup>154</sup> This formalist approach to the separation of powers is the only way to ensure the nondelegation doctrine

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government. It is essential to the protection of the community against foreign attacks: It is not less essential to the steady administration of the laws . . . ."); THE FEDERALIST NO. 37, *supra* note 137, at 177 ("Energy in Government is essential to that security against external and internal danger, and to that prompt and salutary execution of the laws, which enter into the very definition of good Government.").

152. See THE FEDERALIST NO. 70, *supra* note 150, at 356.

This unity may be destroyed in two ways; either by vesting the power in two or more magistrates of equal dignity and authority; or by vesting it ostensibly in one man, subject in whole or in part to the controul and co-operation of others, in the capacity of counsellors to him.

*Id.*

153. See Redish & Cisar, *supra* note 27, at 452–53 (proposing "pragmatic formalism" and applying it in the separation of powers context).

154. Gary Lawson articulated this "formalist" approach to the separation of powers when he stated:

Any exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories [legislative, executive, or judicial] . . . or find explicit constitutional authorization for such deviation. The separation of powers principle is violated whenever the categorizations of the exercised power and the exercising institution do not match and the Constitution does not specifically permit such blending.

Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CAL. L. REV. 853, 858 (1990).

will serve the vital function of preventing the accumulation of both legislative and executive powers in one branch. Accordingly, a court applying pragmatic formalism does not wait until an accumulation of power has occurred to decide whether the accumulation is “undue.” Nor does it consider potentially competing policy rationales, such as convenience and expertise, as would a functionalist model. Those considerations ignore the outer linguistic limitations imposed by the concept of legislative power: the argument that executive agencies may possess more expertise in policymaking, even if assumed to be true, does not alter the fundamental fact that the Constitution explicitly vests that policymaking authority in Congress. Rather, under pragmatic formalism, the Court has the exclusive role of determining whether Congress has delegated its legislative power. If Congress has delegated legislative power, the delegation is unconstitutional, and the inquiry ends there. No competing policy reason can justify such a delegation.

Pragmatic formalism’s similarity to formalism, however, ends with the adoption of this broad definitional framework. Unlike traditional formalist approaches, which would invalidate nearly any exercise of discretion by the executive branch as unconstitutional policymaking, I advocate use of the “pragmatic” formalist model. Pragmatic formalism adheres to the formal rule that Congress cannot delegate its legislative power but defines “legislative” and “executive” pragmatically, by resolving “twilight zone” definitional questions through reference to the Framers’ reason for creating an executive in the first place: the need for one branch of government to be able to make on-the-spot decisions in order to meet the pressing needs of current events. But to be constitutional, such decisions must be designed to implement a normative policy choice made by Congress. Anything beyond that would constitute an unconstitutional delegation of legislative authority.

Under the doctrinal framework I propose, a court determining whether a governmental power being exercised is legislative or executive will use two rules to guide its inquiry. First, in order for Congress to have legislated (thereby complying with the restrictions of the nondelegation doctrine), it must have made a political commitment that enables the electorate to judge its elected representatives by examining how these representatives voted on the legislation in question. With one narrow but important exception discussed below,<sup>155</sup> the existence of a political commitment is a necessary condition for a court to find that Congress has legislated. This is so because Congress performs its lawmaking role when it enacts laws with enough specificity that voters can decide whether or

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155. *See infra* Part IV.

not they approve of a representative's decision.<sup>156</sup> For each branch to have acted within its constitutionally-prescribed power, Congress must provide the executive with a preexisting policy choice to execute. When Congress enacts statutes containing overly broad directives, the executive acts with freestanding legislative power, in violation of the nondelegation doctrine.

Absent at least a minimum level of political commitment, a law must be categorically deemed an unconstitutional delegation of legislative power. But even when a law satisfies this minimal standard, ambiguous situations will arise in which it will be unclear whether a particular policy choice in deciding how to apply or interpret the broad legislative directive should be characterized as legislative or executive. Many of these decisions will require the exercise of an unguided discretion. To determine whether these individualized decisions should be deemed legislative or executive requires further refinement, above and beyond the "political commitment" standard. Thus, second, consistent with the pragmatic component of the theory, in close cases the Court will decide whether an action is legislative or executive by reference to the circumstances warranting that action. If Congress has made a proper political commitment in enacting legislation, communicating to the electorate a normative policy choice, discretionary implementational decisions that demand immediate determination are properly defined as executive. The legislation in question therefore properly vests executive power. The crucial variable in this second inquiry is the extent to which decision-making immediacy is required. If Congress realistically has the opportunity to consider and make a legislative decision on the matter in question, Congress cannot delegate that decision to the executive. Congress can, however, vest in the executive the authority to make on-the-spot decisions that Congress itself, as a practical matter, would not be capable of making in the time required. These decisions are properly defined as executive in nature, for a decision cannot be considered legislative if Congress could not have realistically been expected to make that decision in the first place.

This pragmatic inquiry recognizes that lawmaking is necessarily a time-consuming process and, because of this, Congress cannot feasibly make all discretionary governing decisions.

Applying the pragmatic formalist model to the facts of the Supreme Court's well-known decision in *United States v. Curtiss-Wright* helps to illustrate the theory's application. There, Congress had enacted the following Joint Resolution:

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156. See REDISH, *supra* note 29, at 5–16 (discussing the importance of popular sovereignty and how Congress can ensure that citizens are well-informed when exercising their franchise).

[I]f the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if . . . he makes proclamation to that effect, it shall be unlawful to sell [any arms to those countries], except under such limitations and exceptions as the President prescribes . . . .<sup>157</sup>

Though the resolution was challenged as an unconstitutional delegation of legislative power, the Court upheld it on the grounds that the president possessed unlimited constitutional authority over foreign affairs.<sup>158</sup> The Court's reasoning finds absolutely no basis in either constitutional text or structure. Indeed, Article I, Section 8 vests numerous powers in Congress that implicate matters involving foreign affairs.<sup>159</sup> But while I reject the Court's reason for finding the Joint Resolution constitutional,<sup>160</sup> I nevertheless agree with the Court's outcome. Viewed through the lens of pragmatic formalism, the decision-making power vested by the resolution in the president is properly defined as "executive."

A court applying the pragmatic formalist model to the Joint Resolution would first ask whether Congress articulated a policy decision appropriately characterized as a political commitment and provided sufficient guidance in the Joint Resolution to the executive as to what the goal to be reached actually was;<sup>161</sup> Congress did just that. It articulated a policy goal—achieve peace between the countries engaged in the armed conflict in the Chaco. Furthermore, it delegated authority to the president to take a specific action—prohibiting the sale of arms to those nations engaged in the conflict—if the president determined, in light of surrounding events, that such action would further attainment of Congress's expressly stated goal.

The next step for a court applying the pragmatic formalist model would be to ask whether Congress itself could have feasibly made the decision it chose to vest in the executive, i.e., whether it had the time to legislate a ban on arms sales, or whether instead carrying out the policy decision required an on-the-spot decision that could only feasibly be made by the executive. Because the volatility of the situation in the Chaco might well

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157. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 312 (1936) (quoting H.R.J. Res. 347, 73d Cong., 2d Sess., 48 Stat. 811 (1934)).

158. *Id.* at 320.

159. *See, e.g.*, U.S. CONST. art. I, § 8, cl. 3 (granting Congress power to regulate commerce with foreign nations); *id.* art. I, § 8, cl. 11 (granting Congress power to declare war).

160. In upholding the Joint Resolution, the Court reasoned that the power to control foreign policy was an inherently executive function. *Curtiss-Wright*, 299 U.S. at 319–21.

161. *See supra* note 141 and accompanying text.

require a decision to impose an immediate ban on the sale of arms, the decision to ban arm sales could not have feasibly been expected to come from Congress. Thus, Congress properly vested this executive authority in the president.<sup>162</sup> Such a pragmatically-grounded definitional analysis harkens back to the Framers' decision to create an executive position, despite their fear that creation of such a position might lead to tyranny. The nation's experience under the Articles of Confederation without an executive had proven unworkable. Congress was simply unable to govern day to day, given its severely limited powers. The situation involved in *Curtiss-Wright* represents a more modern illustration of the exact same pragmatic difficulty foreseen by the Framers.

### C. *Applying the Pragmatic Formalist Model*

Applying the pragmatic formalist model to several of the Court's most prominent nondelegation cases demonstrates that, unlike the strict formalist models, application of pragmatic formalism would not result in the invalidation of nearly every legislative grant of decision-making authority to the executive branch. Rather, as long as Congress has made a sufficient political commitment in the controlling legislation, pragmatic formalism affords the executive branch discretion in implementing congressional policy choices when it would be infeasible for Congress itself to make the decision in question.

#### i. *Marshall Field & Co. v. Clark*

In *Marshall Field & Co. v. Clark*, the Court confronted a challenge to an Act that allowed the president to suspend the duty-free status of certain goods if the president found that the nation exporting those goods imposed "reciprocally unequal and unreasonable" restrictions on American imports.<sup>163</sup> The Act also listed the amount of duties to be collected for certain exports in the event that the president suspended a product's duty-free status.<sup>164</sup>

The first step in applying pragmatic formalism to the Act in order to decide whether the statute unconstitutionally delegates legislative power would be to ask whether Congress made a policy commitment with sufficient detail as to constitute a political commitment. Here, Congress did indeed make such a commitment and thus carried out its duty to

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162. Under Professor Schoenbrod's theory, the Joint Resolution in *Curtiss-Wright* would be an unconstitutional delegation of legislative power because the Resolution articulated a goal and allowed the president to use his discretion in carrying out the goal. But, if Congress could not have feasibly made a policy commitment itself because of the need for a quick response, that decision is not an exercise of legislative power.

163. *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892).

164. *Id.* at 692-93.



legislate. It decided that if a trading partner placed unreasonable restrictions on American imports, the United States should respond by similarly imposing duties on that nation's exports. While the Act vested in the president discretion to determine whether a nation's restrictions were "unequal and unreasonable," it gave this discretion only to accomplish Congress's stated policy goal. The Act did not give the president the freedom to decide whether to suspend the duty-free status of goods whenever he chooses, which would amount to an unconstitutional freestanding exercise of lawmaking power.

The second step in applying the pragmatic formalist model is to ask whether, as a practical matter, Congress could have reasonably been expected to make the decision it chose to delegate to the executive at the time the decision needed to be made. If Congress's chosen policy required an on-the-spot determination that Congress itself could not make, that determination may properly be defined as an executive function. The circumstances of *Marshall Field* indicate that it would not have been feasible for Congress to make the decision to suspend the duty-free status of certain goods. Given that the duties imposed on goods constantly fluctuate, it would not have been practical to expect Congress to enact a new law each time another country imposed an unreasonable restriction on American imports. Thus, under the pragmatic formalist approach, Congress properly vested the president with the power to execute its stated policy decision.

ii. *J.W. Hampton, Jr., & Co. v. United States*

At issue in *Hampton* was a statute that granted the president the authority to increase or decrease any tariff set by Congress if the president found that the amount set by Congress did not equalize the difference in cost of production between domestic and foreign producers. The Act also provided that the president could not increase or decrease the rate by more than fifty percent and provided four factors for the president to consider when increasing or decreasing a rate.<sup>165</sup> The Court upheld the Tariff Act, reasoning that it provided "an intelligible principle" to the president.<sup>166</sup>

When viewed through the lens of pragmatic formalism, the Tariff Act properly allows the president to execute a preexisting legislative policy decision. In the Act, Congress articulated a policy with sufficient guidance—i.e., that tariff rates should be set such that domestic producers can compete on equal footing with foreign producers—and gave the president the discretion to decide how to adjust the rates to achieve this policy goal. The fact that the Act allowed the president to set rates does

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165. *J.W. Hampton, Jr., & Co., v. United States*, 276 U.S. 394, 401–02 (1928).

166. *Id.* at 409.

not render the president's actions legislative. Practically speaking, it would not have been feasible for Congress to pass a new law each time the cost of an export increased or decreased so as to warrant a change in rate.<sup>167</sup> Thus, because Congress could not, as a practical matter, have set each rate itself, delegating this task to the president is not appropriately characterized as a grant of legislative power.

iii. *Panama Refining Co. v. Ryan*

In *Panama Refining*, the Court found that section 9(c) of the National Industrial Recovery Act (NIRA), which authorized the president to prohibit the interstate transportation of "hot oil," improperly delegated legislative power to the president.<sup>168</sup> A court applying a pragmatic formalist model would arrive at the same conclusion. In section 9(c), Congress did not state whether or under what circumstances the president should prohibit the transportation of hot oil. Thus, because section 9(c) failed to make a true political commitment, it was properly found to have unconstitutionally delegated legislative power. Pragmatic considerations do not alter this categorization. As a practical matter, nothing prevented Congress from deciding whether the transportation of hot oil should or should not be banned. This was not a situation requiring a prompt, on-the-spot decision such that only the president could make it. Unlike the Joint Resolution in *Curtiss-Wright*, where Congress articulated a policy goal but could not be reasonably expected to act quickly enough to decide whether to ban arms sales as a means of achieving peace in the region, Congress encountered no such difficulty here. Congress's delegation of authority to the president to decide whether to ban hot oil therefore constitutes an unconstitutional delegation of lawmaking authority.

iv. *A.L.A. Schechter Poultry Corp. v. United States*

In *Schechter*, the Court invalidated section 3 of the NIRA, which allowed the president to approve codes of fair competition when the president found the codes necessary to effectuate the policy of the Act.<sup>169</sup> Congress's stated policy reason for the Act was, in part, to "provide for the general welfare," "eliminate unfair competitive practices," and "otherwise to rehabilitate industry."<sup>170</sup>

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167. Indeed, the Court recognized this when it stated: "[i]f Congress were to be required to fix every rate, it would be impossible to exercise the power at all." *Id.* at 407.

168. *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

169. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–23 (1935). Section 3 of the NIRA also provided that the president can only approve a code of fair competition if the president finds that the group advocating for the code does not unfairly restrict membership and that the code does not promote monopoly. *Id.*

170. *Id.* at 534–35.

Viewed through the lens of pragmatic formalism, section 3 unconstitutionally delegates legislative power. Congress gave the president the power to approve fair codes of competition without making a political commitment as to what the codes should or should not prohibit, facilitate, or regulate. Although Congress articulated the goals of promoting the general welfare and eliminating unfair competitive practices for the president to follow in deciding whether or not to approve a code of fair competition, these goals are far too vague to provide the electorate with any guidance in judging their elected representatives. Congress provides sufficient guidance when it makes the necessary political commitment such that voters who learn how their representatives voted would be better informed about their representatives' positions.<sup>171</sup> But here, Congress did not commit to any concrete policy such that its constituents could hold their representative accountable. Nor do pragmatic considerations suggest that Congress properly allowed the president to execute the law. Surrounding circumstances in no way prevented Congress from giving the president more direction as to the types of codes he should approve or the specific types of evils the codes should remedy.

v. *Yakus v. United States*

The Emergency Price Control Act of 1942 delegated to the Price Administrator the power to set the prices of commodities if, in the Administrator's judgment, "prices have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act."<sup>172</sup> The asserted purpose of the Emergency Price Control Act was, among other things, to stabilize prices, eliminate disruptive practices resulting from abnormal market conditions, and to prevent a post-emergency collapse of values.<sup>173</sup> The Court upheld the Act against a challenge under the nondelegation doctrine.<sup>174</sup>

Under the pragmatic formalist model, the Emergency Price Control Act properly allowed the Price Administrator to execute Congress's preexisting policy decision. Here, Congress made the policy decision that prices should be fixed *if* prices rise enough to threaten a collapse of value. The Act gave the Price Administrator the discretion to decide *when* prices have risen enough to threaten a collapse in value, but this discretion cannot be viewed as legislative power because the decision is part of the Administrator's execution of Congress's policy decision that constituted

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171. See REDISH, *supra* note 29, at 5–16 (providing background on the political theories of textualism and formalism in determining how the Constitution delegates governmental powers).

172. *Yakus v. United States*, 321 U.S. 414, 420 (1944).

173. *Id.*

174. *Id.* at 423.

a clear political commitment. Contrast this discretion to hypothetical legislation allowing the Price Administrator to decide *whether* prices shall be fixed to prevent a collapse in value. Such an act would unconstitutionally delegate legislative power. Additionally, pragmatic factors further show that, in deciding whether to fix prices, the Administrator executes the law. In the event of a threatened price collapse, it would not have been feasible for Congress to legislate quickly enough to remedy the problem. Thus, the ability to decide when to control prices cannot be defined as legislative power.

vi. *Mistretta v. United States*

In *Mistretta*, the Court considered the constitutionality of the Sentencing Reform Act, which gave a Sentencing Commission the power to devise sentencing guidelines for every federal criminal offense.<sup>175</sup> In delegating this task to the Commission, Congress provided seven factors for the Commission to consider in setting sentencing ranges,<sup>176</sup> mandated that sentences could not exceed the statutorily established maximum, provided that the maximum of a particular range could not exceed the minimum by twenty-five percent or six months, and directed the Commission to use the current average sentences as a starting point for the new ranges.<sup>177</sup> The Court upheld the Act against a nondelegation challenge.<sup>178</sup>

Contrary to the Court's conclusion, an evaluation under pragmatic formalism demonstrates that the Sentencing Reform Act unconstitutionally delegates legislative power. Although Congress gave the Commission factors to consider in setting sentencing ranges, Congress vested in the Commission the power to decide substantive policy matters, such as the relative severity of federal crimes, whether certain crimes have been punished too leniently or severely, and which types of criminals should be treated similarly for the purposes of sentencing. In establishing a sentencing range for federal crimes, the Commission does not implement a pre-existing policy decision. On these important issues of substantive social policy, Congress made no political commitment. Instead, the Commission was authorized to make fundamental policy decisions in deciding how to punish offenders.

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175. *Mistretta v. United States*, 488 U.S. 361, 371-74 (1989).

176. The seven factors provided in the Act are: (1) the grade of the offense; (2) the aggravating and mitigating circumstances of the crime; (3) the nature and degree of the harm caused by the crime; (4) the community view of the gravity of the offense; (5) the public concern generated by the crime; (6) the deterrent effect that a particular sentence may have on others; and (7) the current incidence of the offense. *Id.* at 375.

177. *Id.* at 374-77.

178. *Id.* at 379.

Although establishing sentencing guidelines requires time, expertise, and resources, mere inconvenience does not transform a naked exercise of lawmaking power into an executive task. Indeed, Congress could have sought the advice and expertise of the Sentencing Commission as long as it set the ranges itself. Practically speaking, there was no need for Congress to vest the power to establish sentencing guidelines in the executive branch, as this task did not require an on-the-spot decision.

vii. *Whitman v. American Trucking Associations, Inc.*

In *Whitman*, the Court upheld section 109(b)(1) of the Clean Air Act, which requires that the EPA Administrator set national ambient air quality standards, “the attainment and maintenance of which . . . are requisite to protect the public health.”<sup>179</sup> Contrary to the Court’s conclusion, this delegation is clearly one of legislative power, and therefore unconstitutional. First, Congress did not make any preexisting policy decision for the Administrator to execute. Congress did not, for example, decide under what circumstances an air pollutant harms the public health, at what level of harm the Administrator should regulate a pollutant, or what factors to consider when defining “health.” Examination of practical considerations further show that this delegation is legislative: nothing prevented Congress from providing additional parameters as to the types of air quality rules the Administrator should promulgate or when it should promulgate those rules.

As seen through its application to many of the Court’s most prominent delegation cases, the pragmatic formalist model does not require Congress to make every decision on its own, nor does it limit the executive branch to purely ministerial tasks. To the contrary, the model recognizes the need for executive discretion and creativity in numerous contexts. Because the theory takes pragmatic factors into account in defining the terms “legislative” and “executive” it allows the executive branch to exercise discretion when that discretion facilitates its implementation of congressional policies. This is true even when that discretion involves some degree of policy choice because the exigencies of the surrounding circumstances make it impractical for Congress to make a decision itself. This was true in both *Hampton* and *Yakus*, where Congress delegated the task of setting a rate or tariff to the executive because the unwieldy nature of the legislative process effectively prevented Congress from carrying out this task itself. Pragmatic formalism thus differs from traditional formalist methods, which ignore the practical realities of the legislative process. Importantly, the model maintains the formal definitional inquiry by adhering to the constitutional

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179. *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 465 (2001).

dictate that Congress cannot delegate its legislative power. By doing so, the pragmatic formalist model performs the vital functions of the nondelegation doctrine: to preserve the separation of powers, prevent tyranny, and preserve democratic accountability.

#### IV. THE PROBLEM OF NATIONAL EMERGENCIES: THE PRAGMATIC FORMALIST ANSWER

##### *A. Pragmatic Formalism and National Emergencies*

It should now be clear that, in order for a statute to be constitutional under pragmatic formalism, the theory's foundational requirement is that Congress has legislated, i.e., articulated a policy decision in the form of a directive that constitutes a political commitment, enabling the voters to make a judgment, up or down, about their elected representative on the basis of how they voted on the law. As necessary as this formalist rule is in preventing Congress from delegating its legislative power, this rule requires a creative modification in the rare situations when it is simply not feasible for Congress either to make such a political commitment or provide meaningful guidance to the enforcing executive.

Most of the laws enacted by Congress are designed to correct a preexisting problem. Typically, Congress knows of the issue it seeks to address with legislation and can make a policy decision and shape a directive after considering all of the surrounding facts and circumstances. For example, if Congress wants to limit carbon emissions from factories, it can gather information about the situation and draft a law providing the EPA with specific guidance as to how to remedy the problem. But when Congress enacts a statute providing actions the executive branch can take during generic times of emergency, it is, for the most part, infeasible for Congress to legislate with any degree of particularity, because Congress of course cannot predict how the future will unfold or the specific nature of the future emergency.

Under an ordinary application of pragmatic formalism, Congress's failure to provide a detailed political commitment would dictate that the statute unconstitutionally delegates legislative power. This result, however, would unnecessarily prevent Congress from utilizing the executive for the wise reasons the branch was created in the first place: to act swiftly and decisively during times when Congress itself does not have a reasonable opportunity to enact applicable legislative directives.<sup>180</sup> Thus, when enacting laws addressing generic future national emergencies, Congress finds itself in a bind. If the Court were to

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180. *See supra* Section III.A. (noting the importance of the executive branch, which can act efficiently when Congress is unable).

construe the nondelegation doctrine to require that all statutes articulate a political commitment with sufficient guidance, Congress could not enact laws giving broad, undefined directives to the executive during times of emergency. And, once an emergency occurs, Congress cannot act to respond to the immediate problem. In other words, in emergency situations, adherence to the first tenet of pragmatic formalism would tie Congress's hands behind its back: Congress could neither respond to the crisis, nor give even broad guidance to the executive as to how to respond. To give Congress the flexibility it needs to utilize the executive branch as intended, I propose that courts apply the pragmatic formalist model in times of unforeseen emergency in a procedural manner.

Creative use of pragmatic formalism can provide a solution to this seemingly intractable dilemma. On the one hand, the pragmatic element of the model recognizes the practical reality that (1) the nation must be able to respond immediately to unforeseen emergencies, and (2) as a practical matter, the only branch in a position to deal with such a situation immediately is the executive branch. Indeed, as previously noted, it is for this very reason that the executive branch was established. On the other hand, the formalist element of the analysis recognizes that allowing the executive to exercise legislatively unguided emergency authority gives rise to a prohibitive danger of an accumulation of power that threatens tyranny. Hence I propose a procedural permutation of the pragmatic formalist model: Congress may authorize the president to exercise unguided policymaking power in the face of a true, unforeseen emergency,<sup>181</sup> but only for a period of time long enough to allow Congress to legislate approval of the president's actions (a period to be determined in the individual case by the judiciary). If, within that time period, Congress has not enacted legislation expressly approving the president's actions, his continuation of those actions is rendered unconstitutional.

The period in which the executive may act during these emergencies must be strictly limited. The executive may act only up until the point when enough time has elapsed since the emergency began so that Congress has had a realistic opportunity to affirm or reject the executive's response. But because the congressional role is so important as a matter

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181. Pursuant to the so-called "constitutional fact" doctrine, factual issues on which the constitutionality of governmental actions depends must be determined independently by the judiciary. See generally Martin H. Redish & William D. Gohl, *The Wandering Doctrine of Constitutional Fact*, 59 ARIZ. L. REV. 289, 290 (2017) (explaining the development of the "constitutional fact" doctrine). Therefore, the issue of whether or not a true emergency exists must be determined by the courts as a constitutional fact.

of constitutional theory,<sup>182</sup> the procedural version of the pragmatic formalist model would require Congress to expressly approve that response through the process of bicameral legislative action.<sup>183</sup> Note that this procedural modification does not require merely that Congress has affirmatively rejected the executive's chosen response to the emergency. Rather, if enough time has passed so that it is reasonable to expect Congress to have acted, the executive must receive congressional approval to continue his or her chosen course of action. At that point, if Congress is capable of acting, but has not formally approved the executive's actions, continuation of the executive action would be deemed an unconstitutional exercise of freestanding legislative power.<sup>184</sup>

I recognize that this procedural modification of the rule that Congress must have articulated a policy decision with sufficient guidance to have legislated will be seen as radical. At first glance, the argument that a statute can satisfy the nondelegation doctrine as a proper grant of executive power when Congress has failed to articulate a policy choice providing guidance to the executive seems to undermine any theory rooted in formalism. The approach is not completely novel, however, as it resembles the limits, properly understood, on the president's discretion to act under the Commander-in-Chief power during times of war.

The relationship between the president and Congress during times of international military conflict basically follows an established framework: Article I, Section 8 vests the power to declare war in Congress.<sup>185</sup> However, as the commander-in-chief, the president can deploy the military before Congress has formally declared war *if* exigent circumstances require immediate action. As the War Powers Act provides:

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182. See *supra* Section II.A (providing the framers' theory in creating the legislative branch).

183. While this window of time will vary depending on the circumstances, it typically will not exceed a couple of weeks.

184. In this sense, my theory can be contrasted to the approaches proposed by Justices Jackson and Frankfurter in their *Youngstown* concurrences. In Justice Jackson's famous concurrence, he explained that in the absence of a congressional grant or denial of authority, "congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring). Justice Jackson likewise suggested that the president may acquire the power to act after a "long-continued acquiescence of Congress." *Id.* at 613. Contrary to both these positions, under my theory, the inertia is *against*, not in favor of, the president. This is the only way to adequately prevent tyranny. Congress may be incentivized to wait and allow the executive to act, for fear of upsetting its constituents with a difficult political decision. The proposed procedural modification curtails the president's discretion to act, even if Congress is complacent. As discussed above, Congress cannot waive its duty to legislate. See *supra* Section II.B (explaining that Congress cannot delegate its legislative power).

185. U.S. CONST. art. I, § 8, cl. 11.



The constitutional powers of the President as Commander-in-Chief to introduce United States Armed Forces into hostilities . . . are exercised only pursuant to (1) a declaration of war, (2) specific statutory authorization, or (3) a national emergency created by attack upon the United States, its territories or possessions, or its armed forces.<sup>186</sup>

Under the Act, the president is permitted to function as commander-in-chief absent congressional approval—via a declaration of war or some other statutory authorization—*only* in the case of a national emergency created by an attack. While in recent years formal declarations of war have not been required for extended use of the military, there does seem to be an understanding and practice requiring some form of congressional authorization. For example, during the Vietnam War, Congress enacted the Gulf of Tonkin Resolution, which was widely construed to authorize President Johnson to employ military forces in Southeast Asia, absent a formal declaration of war.<sup>187</sup> Similarly, during both Gulf wars, and three days after the terrorist attacks on September 11, 2001, Congress passed an Authorization of Use of Military Force (AUMF), authorizing the president’s extended use of the armed forces.<sup>188</sup>

The War Powers Act thus imposes a limit on the president’s power, similar to the one imposed by the proposed procedural modification of pragmatic formalism. Under the Act, the president can decide whether to engage the nation’s armed forces absent congressional approval only within the limited period before Congress has had time to act. After the emergency has lapsed,<sup>189</sup> the president may continue to act only with congressional approval. Likewise, under the procedural modification of pragmatic formalism, the executive can act to “take care that the laws be faithfully executed,”<sup>190</sup> absent congressional approval, *only* until the point in time when Congress has had time to consider the executive’s actions.<sup>191</sup>

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186. 50 U.S.C. § 1541(c) (2018).

187. See Gulf of Tonkin Resolution, Pub. L. No. 88-408, 78 Stat. 384 (1964) (authorizing the use of armed forces in Southeast Asia).

188. See Authorization for Use of Military Force, Pub. L. No. 102-1, 105 Stat. 3 (1991) (authorizing the use of armed forces against Iraq); Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (authorizing the use of armed forces against terrorist groups involved in the September 11 attacks).

189. See *supra* note 169 (explaining that Section 3 of the NIRA was invalidated because the president does not have the power to approve codes of fair competition).

190. U.S. CONST. art. II, § 3.

191. I analogize to the War Powers Act only to show that the relationship contemplated between the president and Congress in the procedural modification to pragmatic formalism is not wholly novel. I do not root the theory in the Act itself, as I argue that pragmatic formalism and the procedural modification are mandated by the Constitution, not any particular statute.

*B. Applying Procedural Pragmatic Formalism: The National  
Emergencies Act*

Applying this procedural modification of pragmatic formalism to the National Emergencies Act (NEA) illustrates how the modification gives Congress the flexibility it needs to use the executive to serve its intended function of dealing with situations for which Congress is not structurally suited, yet still prevents the executive from usurping legislative power. Unfortunately, in its present form, the current version of the Act fails to satisfy these constitutional requirements.

Enacted in 1976, the NEA sets out procedures that the president must follow when declaring a national emergency. Prior to the passage of the Act, no statute gave the president the authority to declare a national emergency, so presidents who declared national emergencies did so without any oversight from Congress.<sup>192</sup> To restrict the president's discretion when declaring a national emergency, the NEA requires that the president must notify Congress immediately after declaring a national emergency and that the president must specify the statute authorizing the emergency power he seeks to exercise.<sup>193</sup> Congress can terminate a national emergency only by passing a Joint Resolution and enacting it into law, which requires the president's approval or a vote of two-thirds of both houses.<sup>194</sup>

The NEA itself does not authorize any specific action the president can take during an emergency. Rather, it simply authorizes the president to declare a national emergency and provides procedures that the president

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192. Patrick A. Thronson, Note, *Toward Comprehensive Reform of America's Emergency Law Regime*, 46 U. MICH. J.L. REFORM 737, 745–46 (2013).

193. See 50 U.S.C. § 1621(a) (2018) (“With respect to Acts of Congress authorizing the exercise, during the period of a national emergency, of any special or extraordinary power, the President is authorized to declare such national emergency. Such proclamation shall immediately be transmitted to the Congress and published in the Federal Register.”); 50 U.S.C. § 1631 (2018) (“When the President declares a national emergency, no powers or authorities made available by statute for use in the event of an emergency shall be exercised unless and until the President specifies the provisions of law under which he proposes that he, or other officers will act.”). The NEA also provides that a national emergency may be terminated by a joint resolution enacted into law, or by the president's proclamation terminating the emergency, or, if the president fails to give Congress notice that the emergency will continue, one year after its declaration. 50 U.S.C. § 1622(a) (2018); § 1622(d).

194. See 50 U.S.C. § 1622(a)(1) (stating that a joint resolution terminates a national emergency). As originally passed, the NEA gave Congress a meaningful check on the president by providing that Congress could terminate a national emergency via a concurrent resolution. National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (“Any national emergency declared by the President in accordance with this title shall terminate if . . . Congress terminates the emergency by concurrent resolution . . .”). In 1983, however, the Supreme Court's decision in *INS v. Chadha* that all binding legislation requires bicameralism and presentment required Congress to amend this check on the president. *INS v. Chadha*, 462 U.S. 919, 959 (1983).

must follow when making such a declaration. Once the president has declared a national emergency pursuant to these procedures, the Act unlocks over one hundred statutes giving him or her legal authority to take specified actions during times of emergency.<sup>195</sup> But the NEA does not give the president a blank check to act however he or she sees fit during times of emergency, since any action the president takes must fall within one of the codified emergency powers.<sup>196</sup>

Under a straightforward application of pragmatic formalism, a court would find that the NEA impermissibly delegates legislative power, since the Act makes no political commitment and fails to provide sufficient guidance to the executive.<sup>197</sup> At no point in the Act does Congress even attempt to define “emergency,” nor does it provide any guidance as to the types of circumstances that would constitute an emergency. Comparing Congress’s directive in the NEA to the Joint Resolution at issue in *Curtiss-Wright* illustrates this point. In the Joint Resolution, Congress provided that if the president found that banning the sale of arms would contribute to the reestablishment of peace in the Chaco, the president could ban the sale of arms.<sup>198</sup> The Resolution provided a specific action the president can take—ban the sale of arms—only if the president found that a specified event had occurred, and Congress’s choice of that particular event simultaneously guided the president’s available actions and informed the electorate of its policy decision.

In contrast, although the codified emergency power statutes provide specific actions that the president is allowed to take, the NEA itself fails to identify, even in broad terms, the specific types of events that must occur in order to trigger availability of those actions. The only guidance Congress gave the executive is that the president can act pursuant to the codified emergency powers in the event of a “national emergency,”<sup>199</sup> a term that is vague to say the least, and therefore susceptible to a wide range of unchecked interpretations.

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195. See 50 U.S.C. § 1621(b) (“Any provisions of law conferring powers and authorities to be exercised during a national emergency shall be effective and remain in effect (1) only when the President (in accordance with subsection (a) of this section), specifically declares a national emergency, and (2) only in accordance with this chapter . . .”).

196. For this reason, a court considering whether the president acted constitutionally during times of emergency must consider both the NEA *and* the codified emergency power under which the president acted. The codified emergency powers vary in terms of the amount of guidance given to the president so one could attack the statute granting the emergency power as lacking sufficient guidance in violation of the nondelegation doctrine.

197. The first question a court applying pragmatic formalism asks to decide whether a statute confers legislative or executive power is whether the statute contains a political commitment with sufficient guidance. See *supra* Section III.B.

198. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 312 (1936).

199. 50 U.S.C. § 1621(a).

Given the differing circumstances warranting the Joint Resolution involved in *Curtiss-Wright* and the NEA, Congress's lack of sufficient guidance in the NEA makes sense. When enacting the Joint Resolution, Congress was aware of the subject of its policy decision: the armed conflict in the Chaco region. Even more importantly, Congress made clear its normative policy choice in favor of peace, rather than, for example, in favor of victory for one or the other of the warring participants. But when drafting the NEA, Congress could not possibly predict what emergencies would arise and thus could not articulate with specificity the types of events that will trigger the emergency powers. Although Congress surely could have provided more guidance in the NEA—for example, by defining emergency as “an immediate and present threat to the public safety requiring an urgent response”—even this additional guidance would have failed to provide the requisite detailed political commitment.

The proposed procedural modification of the pragmatic formalist directive that Congress must articulate a political commitment with sufficient detail solves this problem in the most practical manner possible. A court applying the pragmatic formalist procedural modification would not automatically invalidate the NEA as unconstitutional under the nondelegation doctrine. Instead, as long as the president exercises the codified emergency powers only during times of genuine emergency (as determined by the judiciary as a constitutional fact) when Congress itself could not have had sufficient time to make the initial policy decision responding to the new situation, the NEA properly vests executive power in the president. This solution gives Congress the flexibility it needs to rely on the executive during times of emergency, yet restricts the executive's actions to prevent a dangerous accumulation of power. The president's authority to act, however, dissipates absent congressional legislative action approving his or her actions.

Measured by this standard, there are significant constitutional problems with the NEA as currently structured. For one thing, the proposed procedural modification applies only if Congress cannot feasibly make an initial policy decision. If the president used the NEA to make a policy decision at a time when Congress itself could have decided whether or not to act, the procedural modification to pragmatic formalism would not save such an application of the NEA.

One of President Trump's recent actions serves as a perfect illustration of an improper use of the NEA. In February 2019, frustrated by Congress's refusal to support his plan to build a wall along the United States-Mexico border, President Trump resorted to his emergency powers to obtain funding without congressional approval. Pursuant to the procedures outlined in the National Emergencies Act, President Trump

declared a national emergency to unlock the codified emergency power that permits the Secretary of Defense to undertake military construction projects not otherwise authorized by law.<sup>200</sup> In the months leading up to his declaration of emergency, President Trump had been negotiating with Congress over funding for the wall. Once these negotiations failed, Trump resorted to his emergency powers.<sup>201</sup> Indeed, the president admitted the non-urgent nature of the circumstances. During his declaration speech he stated: “I could [build] the wall over a longer period of time. I didn’t need to do this, but I’d rather do it much faster.”<sup>202</sup>

A court applying pragmatic formalism would find the president’s actions under the NEA unconstitutional. Because the NEA governs only those actions the executive branch can take during times of true emergency, the lack of sufficient guidance in the NEA renders the statute constitutionally vulnerable. In any event, President Trump’s use of the NEA on this particular occasion, violates the nondelegation doctrine under pragmatic formalism because there were no circumstances requiring the president to act at a time when Congress itself was not capable of acting. As seen through the ongoing negotiations between Congress and the president, Congress had the time to address this issue with legislation. Thus, by declaring a national emergency when there was no genuine emergency, President Trump weaponized the NEA to vest in him freestanding legislative power.

An even more important constitutional problem with the NEA is its failure to comply with the formalist requirements of the procedural modification. Under the terms of the procedural model, Congress, through a process of bicameralism, would have to affirmatively approve the executive action. It is only through this process that the constitutional requirements of the formalist legislative process may be satisfied.<sup>203</sup> As

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200. See 10 U.S.C. § 2808(a) (2019).

In the event of a declaration of war or the declaration by the President of a national emergency in accordance with the National Emergencies Act . . . that requires use of the armed forces, the Secretary of Defense, without regard to any other provision of law, may undertake military construction projects, and may authorize the Secretaries of the military departments to undertake military construction projects, not otherwise authorized by law that are necessary to support such use of the armed forces. Such projects may be undertaken only within the total amount of funds that have been appropriated for military construction, including funds appropriated for family housing, that have not been obligated.

*Id.*

201. See Baker, *supra* note 20 (explaining that President Trump declared the border a “national security crisis” because of the “invasion” of drugs and criminals).

202. *Id.*

203. See generally *INS v. Chadha*, 462 U.S. 919 (1983) (holding that Congressional checks on presidential powers are fundamental to the constitution).

currently structured, however, the NEA requires a vote of two-thirds of both houses of Congress to *disapprove* the president's emergency response.<sup>204</sup> As a result, the inertia caused by the lack of legislative response is in favor of the continuation of the president's policy. Pragmatic formalism, in contrast, demands compliance with the formalist requirements of the legislative process. It is only in this way that we can simultaneously preserve the separation of powers and accommodate the practical needs of the modern world.

*C. Applying Procedural Pragmatic Formalism: Section 232 of the Trade Expansion Act*

Applying pragmatic formalism to section 232 of the Trade Expansion Act and contrasting that provision to the NEA further illustrates the limited application of the proposed procedural modification to emergency circumstances. Section 232 authorizes the Secretary of Commerce to “determine the effects on the national security of imports” of any article and to advise a course of action to the president if the Secretary determines that an article “is being imported into the United States in such quantities or under such circumstances as to threaten to impair the national security.”<sup>205</sup> If the president agrees that a threat exists, he or she shall “determine the nature and duration of the action that, in the judgment of the president, must be taken to adjust the imports of the article and its derivatives so that such imports will not threaten to impair the national security.”<sup>206</sup> The Act lists factors that the president must consider in deciding whether the import threatens the national security—for example the domestic production needed for projected national defense requirements—but does not define “national security.”<sup>207</sup> Under the Act, the president has the ultimate authority to decide whether to impose a tariff; any decision the president makes need not be approved by Congress.<sup>208</sup>

Like the NEA, section 232 lacks a detailed political commitment on the part of Congress. At no point in the statute does Congress define “national security.” Although the provision lists factors that the president must consider when making the determination, the statute gives the president the ultimate authority to decide whether an import threatens national security. However, unlike the NEA, which governs situations

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204. 50 U.S.C. § 1622(a).

205. 19 U.S.C. § 1862(a)(1)(A) (2018); § 1862(b)(3)(A).

206. § 1862(c)(1)(A)(ii).

207. § 1862(d).

208. CONG. RESEARCH SERV., R45249, SECTION 232 INVESTIGATIONS: OVERVIEW AND ISSUES FOR CONGRESS 32 (2019).

where Congress cannot act quickly enough to decide how to respond to an emergency, there is no reason, practically speaking, why Congress cannot be the body to decide whether the United States should impose a tariff on certain goods. The imposition of a tariff is not typically a response to an emergency requiring instant action. In contrast, one of the codified emergency statutes that the NEA unlocks allows the president to take control of public airports,<sup>209</sup> another permits the president to halt the exportation of any agricultural commodity,<sup>210</sup> and a third permits the president to suspend citizenship and nationality requirements for officers on United States vessels.<sup>211</sup> These actions are the types of responses to an emergency that might need to go into effect immediately. When faced with an emergency, Congress could not feasibly be expected to enact a law to carry out any of these actions within the time required to enact legislation. The imposition of a tariff, on the other hand, even if for national safety, is typically a response to a far less-urgent problem, not requiring immediate response, and thus Congress can make this decision by resort to the traditional legislative process.

By their very nature, emergencies are unforeseeable events. The fact that Congress cannot predict the future should not prevent Congress from enacting broadly framed directives instructing the executive how to act during these times. Indeed, one of the purposes of having an executive branch in the first place is to ensure that the federal government is able to respond quickly to urgent circumstances. The proposed procedural modification of pragmatic formalism provides a creative solution to this conundrum by allowing Congress to give broad directives to the executive during times of emergency but at the same time preventing an accumulation of power by strictly limiting the time in which the president can act without formal legislative approval.

#### CONCLUSION

The ominous threat of tyranny that drove the Framers to separate the legislative and executive powers has not dissipated since the time of the Constitution's creation. With the rise of the administrative state, the executive branch has emerged as the dominant lawmaking force in America. Meanwhile, Congress has continued to weaken. Coupled with this aggregation of lawmaking power in the executive branch is the

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209. *See* 49 U.S.C. § 47152(5) (2018) (authorizing government use of public airports without charge during a national emergency).

210. *See* 7 U.S.C. § 5712(c) (2019) (authorizing the president to “prohibit or curtail the export of any agricultural commodity” during a national emergency).

211. *See* 46 U.S.C. § 8103(h)(1) (2018) (authorizing the president to suspend Navy Reserve citizenship requirements during a national emergency).

current dysfunctional relationship between the president and Congress. Over two hundred years after the Framers wisely allocated the powers of the Federal Government to separate branches, this safeguard embedded in the structure and text of the Constitution remains just as important today as it was at the system's inception. And as the Framers wisely recognized, "power is of an encroaching nature"; the time to stop the accumulation is before it begins.<sup>212</sup>

Judicial enforcement of the nondelegation doctrine preserves the separation of powers and, in so doing, helps us avoid the path to tyranny. It is therefore imperative that the Court revisit the nondelegation doctrine, in order to recognize the doctrine's pivotal role in maintaining the American structure of government. The constitutional mandate vesting the legislative power in Congress cannot be overridden by the interests of convenience and expertise. If the Court continues to uphold broad delegations of legislative power in the name of functionalism, it will leave the American democratic structure of government vulnerable to attack or atrophy.

My goal in this Article has been to propose a method that will enable the Court to enforce the nondelegation doctrine in a way that does not require Congress to make every decision, but nevertheless adheres to the rule that Congress may not delegate its legislative power. The pragmatic formalist model fills a void left by the insufficiencies of both the nakedly functionalist and strict formalist models. This proposed model of separation of powers bridges the gap between these two theories by adhering to the formalist rule that Congress cannot delegate its legislative power but by defining "legislative" and "executive" pragmatically. If adopted, pragmatic formalism would help achieve the central purposes of the nondelegation doctrine: to preserve the separation of powers, to prevent tyranny, and to promote democratic accountability.

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212. THE FEDERALIST NO. 48, *supra* note 101, at 250.