JUSTICE SCALIA, THE NONDELEGATION DOCTRINE, AND CONSTITUTIONAL ARGUMENT

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Introduction

Justice Antonin Scalia wrote two major opinions applying the nondelegation doctrine: in *Mistretta v. United States*,[1] he wrote a lone dissent concluding that Congress's establishment of the United States Sentencing Commission was unconstitutional because the Commission had been assigned no function by Congress other than the making of rules, the Sentencing Guidelines. Such "pure" lawmaking by a "junior-varsity Congress," Justice Scalia concluded, was inconsistent with the Constitution's basic division of powers.[2] In *Whitman v. American Trucking Ass'ns*,[3] he wrote for a unanimous Court upholding a very broad delegation of rulemaking power to the Environmental Protection Agency (EPA), and along the way acknowledged that Congress's power to assign policymaking discretion to agencies extended to raw exercises of discretion from among a range of possibilities that was apparently genuinely unlimited. This Essay examines Justice Scalia's approach to the nondelegation doctrine through the lens of these two cases and how they reflect larger themes and tensions in his jurisprudence.

When Justice Scalia believed that the Constitution, properly understood, left a decision to the realm of discretionary judgment rather than the application of a legal rule, he was a fierce proponent of the Court's staying the hand of judicial power and deferring to the outcome of the political process. At the same time, however, he was equally confident in the exercise of judicial power when he concluded that the Constitution, again properly understood, ruled out of bounds the outcome of the political process. In this Essay, I argue that his nondelegation jurisprudence is best understood by examining the nature of the underlying arguments used in giving effect to these base-

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1 Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

2 *Id.* at 420, 427.

3 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

line commitments; these cases show great skepticism about balancing tests requiring judges to draw lines determining how much of something is "too much," and great confidence in structural or categorical constitutional arguments. Although critics have observed that this divide ultimately lacks substance—and that Justice Scalia's jurisprudence thus falls into troubling inconsistency between his behavior and his stated understanding of the judicial role—this Essay suggests that there might be reasons apart from inconsistency to explain his conduct.

Part I of this Essay canvasses Justice Scalia's approach to the nondelegation doctrine by examining his two most prominent opinions in that field, *Mistretta* and *Whitman*. Part II critically examines the nature of the arguments he makes in those cases, and what his approach has to tell us about his overall approach to the judicial role. Part III concludes.

I. Justice Scalia and the Nondelegation Doctrine: *Mistretta* and *Whitman*

A. Mistretta v. United States*: The Sentencing Commission as "Junior-Varsity" Congress*

The Supreme Court has had no fiercer defender of the nondelegation principle than Justice Antonin Scalia, and no more deferential implementer of that principle when it came to applying it in real cases. The nondelegation doctrine holds at its core that it "is a principle universally recognized as vital to the integrity and maintenance" of our constitutional system[4] that Congress simply cannot delegate the "legislative power" to anyone, while also recognizing that Congress "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."[5] In unpacking these propositions, I begin with *Mistretta v. United States*, the 1989 case that upheld the constitutionality of the United States Sentencing Commission and its function of issuing binding guidelines to govern criminal sentencing in federal courts.

The Sentencing Reform Act of 1984[6] was the product of a long policy debate about how best to accomplish the twin goals of individual justice and consistency across cases. The solution upon which Congress arrived was the creation of a commission that was charged with developing binding sentencing guidelines.[7] Litigation challenging this scheme's constitutionality on nondelegation grounds quickly followed, and *Mistretta* became the vehicle that the Court chose to decide whether Congress had gone too far in empowering the Commission to make binding rules on a matter of such great and far-reaching importance.

4 Field v. Clark, 143 U.S. 649, 692 (1892).

5 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 46 (1825).

6 Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.).

7 28 U.S.C. § 994 (2012).

As it turned out, the Court had little difficulty in upholding the constitutionality of the Commission and its power to issue the sentencing guidelines. Justice Blackmun wrote an opinion for eight Justices that rejected the nondelegation challenge in conventional doctrinal terms. The Court began by acknowledging, as it always has, "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."[8] The Court then noted, again as it always has, that this principle does not stand in the way of Congress's obtaining the assistance of the other branches "according to common sense and the inherent necessities" of the situation.[9] Justice Blackmun then stated what by then had long been—and continues to be—the canonical doctrinal formulation for determining whether Congress has gone so far in delegating power as to cross the line from invoking the Executive's assistance to authorizing the Executive to engage in pure legislation: "So long as Congress 'shall lay down by legislative act an intelligible principle to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power.'"[10]

The majority opinion in *Mistretta* then proceeded to analyze the constitutionality of the Sentencing Reform Act in purely conventional nondelegation terms. It wasn't, as these things go, a hard case. Congress had provided ample guidance to the Commission as to how to discharge its functions. Indeed, the Court "harbored no doubt" that the Act had provided unusually detailed guidance in delegating power, since it had made explicit the various policies to which the Commission was to give priority, as well as the factors that the Commission was to consider in implementing those priorities.[11] In addition, Congress had stated clearly the form that the exercise of delegated power must take—the promulgation of specific sentencing guidelines.[12] The Court did acknowledge that the Sentencing Commission had been given very broad power (the promulgation of binding sentencing rules) over something that was very important (all federal criminal sentencing). But the Court was untroubled by the breadth and importance of the delegation, and frankly acknowledged—as it often had before[13]—that broad delegations will often include room for the Executive to exercise significant policymaking discretion.[14] Finally the Court added that the labor-intensive, detailed work of developing guidelines to cover every federal crime, while also taking account

8 Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (quoting *Field*, 143 U.S. at 692); *see also* Loving v. United States, 517 U.S. 748, 758 (1996); Touby v. United States, 500 U.S. 160, 164–65 (1991).

9 *Mistretta*, 488 U.S. at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)).

10 *Id.* (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409.)

11 *Id.* at 374–77.

12 *Id.*

13 *See, e.g.*, Yakus v. United States, 321 U.S. 414 (1944); Nat'l Broad. Co. v. United States, 319 U.S. 190 (1943).

14 *Mistretta*, 488 U.S. at 378–79.

of the circumstances of individual defendants, was simply beyond Congress's practical ability to do itself.[15] This was just the sort of context calling for Congress to make the broad policy choices while leaving the detail work to experts.[16]

Justice Scalia dissented alone.[17] He began by asserting the central importance to his view of the Constitution of the nondelegation principle. Indeed, he said, "[i]t is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded."[18] The system depends on the fundamental proposition that Congress must make and be responsible for the basic policies that govern the nation—and it is simply incompatible with that baseline necessity to grant unbounded policymaking discretion to the Executive. Having emphasized the central importance of the nondelegation *principle*, however, Justice Scalia went on to acknowledge the inevitability of open-ended delegations to the Executive, and the absence of any principled way to draw a line between acceptable and unacceptable degrees of policymaking discretion. As he put it, the nondelegation principle is not "readily enforceable by the courts" because drawing that line is in reality not "a point of principle but [one] of degree."[19]

But Justice Scalia nonetheless dissented because he believed that the Sentencing Commission and the task assigned to it by Congress—the promulgation of binding sentencing guidelines—suffered from a basic structural constitutional defect. "Precisely because the scope of delegation is largely uncontrollable by the courts," he said it is all the more important that the Court "must be particularly rigorous in preserving the Constitution's structural restrictions that deter excessive delegation."[20]

How did the Sentencing Reform Act run afoul of those "structural restrictions"? Justice Scalia went back to basics. He argued that the constitutional basis for permitting delegation of authority to traditional agencies was that the use of delegated power—including the power to make binding rules and authoritatively resolve adjudications—was, as a matter of constitutional power, law execution. Indeed, it *must be*, for if an agency is *not* engaged in law execution, it is necessarily acting unconstitutionally because the only power vested in the second branch is the power to execute the law.[21] Because the Constitution's basic division of powers insists that only Congress

15 *Id.* at 379.

16 *Id.* After resolving the nondelegation question, the *Mistretta* Court proceeded to reject a series of additional constitutional challenges to the Act. *Id.* at 379–412.

17 *Id.* at 413 (Scalia, J., dissenting).

18 *Id.* at 415.

19 *Id.*

20 *Id.* at 416–17.

21 U.S. CONST. art. II, § 1. This is the standard account for why the constitutional location of agencies exercising rulemaking and adjudicatory power must be located in the executive branch. That account has been challenged, of course, both by academics (for a classic account see Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions–A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987)), and occasionally by

can legislate, it is simply beyond Congress's power to authorize any other actor actually to do so.[22] That is the very essence of the nondelegation doctrine—the Court has always understood the line between permissible and impermissible delegations to be the line between permitting broad discretion in fulfilling Congress's statutory commands (okay) and providing no limit at all on that discretion (not okay). That is what the "intelligible principle" doctrinal formulation is designed to capture: whether the Executive's instructions are sufficiently knowable that they provide instructions regarding how the law is to be executed, or whether Congress has given over discretion that is uncabined by law.

Pure delegations of lawmaking authority are categorically out of bounds. But how then are we to understand the broad rulemaking power of agencies? That power, and the discretion that inevitably comes with it, is justifiable as an ancillary aspect of the basic task of law execution.[23] Indeed, Justice Scalia said, "[s]trictly speaking, there is *no* acceptable delegation of legislative power."[24] On this view, what we have long termed "delegation" is not delegation at all, but only the byproduct of the discretion that inheres in the power to execute the law.[25] Thus, for Justice Scalia, broad rulemaking authority (and presumably adjudicative authority, too)—providing practically unbounded discretion to make binding rules governing private behavior—is unproblematic so long as it is part of a broader statutory scheme that the Executive is bound to execute.[26] If the grant of that authority is not part of a larger statutory scheme, however, Justice Scalia thought that that was simply a grant of pure lawmaking power. And if pure lawmaking is afoot, the Constitution cares very much who exercises it (Congress[27]) and how it is exercised (bicameralism and presentment[28])—none of which bears any resemblance to the standard agency process of rulemaking.[29]

In applying this analysis to the Sentencing Commission, Justice Scalia argued that the "lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudica-

judges. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Stevens, J., concurring in part and concurring in the judgment).

22 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714 (1986); Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

23 *Mistretta*, 488 U.S. at 418–20 (Scalia, J., dissenting).

24 *Id.* at 419.

25 As the first Justice Harlan put it, "[t]he true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made." Field v. Clark, 143 U.S. 649, 693–94 (1892) (internal quotation marks omitted) (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs. of Clinton Cty., 1 Ohio St. 77, 88–89 (1852)).

26 *Mistretta*, 488 U.S. at 419–20 (Scalia, J., dissenting).

27 U.S. Const. art. I, § 1.

28 *Id.* § 7; *see also* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

29 *See, e.g.*, 5 U.S.C. §§ 553, 556, 557 (2012).

tion of private rights under the law."[30] It followed, then, that because the Commission had no function but to issue the Sentencing Guidelines (and matters appurtenant to that not affecting private rights), the directions from Congress regarding the substance of the Guidelines were "not standards related to the exercise of executive or judicial powers," but were instead "plainly and simply, standards for further legislation."[31] The Sentencing Commission is a standalone agency, not charged with implementing any statutory program through traditional means such as bringing enforcement actions to carry into effect the law. Its only role, or at least its only role that affects private rights, is to promulgate the Sentencing Guidelines. For Justice Scalia, assigning this bare task to an agency in isolation is no different from assigning it to a committee of Congress.[32] Or as he memorably put it, in empowering the Sentencing Commission to make what he regarded as standalone laws, Congress had created a "sort of junior-varsity Congress."[33]

B. Whitman v. American Trucking Ass'ns*: A Limitless Nondelegation Doctrine?*

A little more than a decade later, the Supreme Court decided *Whitman v. American Trucking Ass'ns.*[34] In that case, Justice Scalia wrote for a unanimous Court, expressing the view that the nondelegation doctrine's traditional formulation—whether Congress has set forth an "intelligible principle" to guide and constrain the exercise of delegated power—was both a sound way to implement the Constitution and simultaneously judicially unenforceable.[35] Because Congress can never legislate with complete foresight and specificity, it is inevitable that laws will express their directions at levels of generality with a lack of precision that leaves room for interpretation in their implementation, which in turn requires the Executive to exercise some measure of discretion in executing the law.

The eternal puzzle[36] for the courts is how to draw the line between permissible and impermissible grants of discretion in executing the law. The particulars of the puzzle before the Court in *Whitman* involved Environmental Protection Agency rules setting emissions levels of particulate matter and ozone under that agency's Clean Air Act[37] program to establish National Ambient Air Quality Standards (NAAQS).[38] Under section 109(b) of the Clean Air Act, the agency was bound to set ambient air quality standards "the

30 *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting).

31 *Id.*

32 *Id.* at 420–21.

33 *Id.* at 427.

34 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001).

35 *See id.* at 472–75.

36 *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825).

37 42 U.S.C. §§ 7401–671 (2012).

38 *See* National Ambient Air Quality Standards for Particulate Matter, 62 Fed. Reg. 38,652 (July 18, 1997) (codified at 40 C.F.R. § 50.7 (1999)); National Ambient Air Quality Standards for Ozone, *id.* at 38,856 (codified at 40 C.F.R. § 50.9, 50.10).

attainment and maintenance of which . . . are requisite to protect the public health" with "an adequate margin of safety."[39] After going through the standard notice and comment rulemaking process the EPA settled upon emissions levels for particulate matter that did not take account of the costs of attaining the mandated emissions levels. Justice Scalia's opinion affirming that decision concluded as a matter of statutory construction that the statute not only did not require the agency to take account of economic costs, it affirmatively prohibited the agency from doing so.[40] The statute, Justice Scalia said, "unambiguously bars cost considerations from the NAAQS-setting process, and thus ends the matter for us as well as the EPA."[41] The Court's resolution of the statutory question, however, raised a nondelegation question.

The court of appeals had concluded that the EPA's approach to setting the emissions levels of particulate matter was based on a construction of the agency's power that violated the nondelegation doctrine.[42] While the court acknowledged that the agency had considered the relevant factors (such as the health effects of exposure and the size of the populations affected), the agency had not provided an adequate explanation of how the statute directed it to decide how much exposure is too much.[43] In other words, the agency construed the statute to consider relevant factors, but not to guide the agency adequately—really at all, in the view of the court of appeals—in balancing among those factors and choosing an actual value.[44] For the court of appeals, the agency's choice of .08 parts per million was an arbitrary outcome from among the possible levels, all of which would protect public health.[45] A range from zero on up would protect health to some degree, and the agency had no account for its decision to choose .08 parts per million instead of .09 or .07.[46] If the agency did not construe the statute to direct it toward an outcome from among those in the possible range, the court of appeals concluded, that was akin to acknowledging the absence of any "intelligible principle" to channel the agency's exercise of delegated power.[47] While the EPA had concluded that for particulate matter the maximum emissions level would be .08 parts per million, it did not provide any account for why that level was "requisite" to protect public health rather than alternatives both more generous and more restrictive than the one that it chose.[48] The court said that the agency's own account of its regulatory deliberations therefore revealed that the agency considered Congress not to have guided its

39 Clean Air Act, 42 U.S.C. § 7409(b)(1).

40 *Am. Trucking Ass'ns*, 531 U.S. at 465–71.

41 *Id.* at 471.

42 Am. Trucking Ass'ns v. Envtl. Prot. Agency, 175 F.3d 1027 (D.C. Cir. 1999), *rev'd*, *Am. Trucking Ass'ns*, 531 U.S. 457.

43 *Id.* at 1035.

44 *Id.* at 1035–36.

45 *Id.* at 1035–37.

46 *Id.* at 1036.

47 *Id.* at 1036–37.

48 *Id.* at 1035.

choice from among possible alternative regulations. Rather than striking down section 109 of the Clean Air Act, however, the court of appeals thought that it was possible to read the statute as providing the required intelligible principle, and therefore remanded for the agency to adopt a construction of the statute that would sufficiently cabin its own discretion to pass constitutional muster.[49]

The Supreme Court unanimously reversed the nondelegation holding of the court of appeals. Justice Scalia's opinion had little trouble rejecting the court of appeals's effort to avoid actually striking down section 109(b) by remanding to the EPA for the agency to adopt a limiting construction.[50] The Court has "never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute."[51] In Justice Scalia's view, the choice of a limiting construction to avert a nondelegation defect in a statute—even as a constitutional avoidance device—would independently violate the nondelegation doctrine.[52] If Congress had not provided sufficient direction in the statute in the first place, "[t]he very choice of which portion of the power to exercise—that is to say, the prescription of the standard that Congress had omitted—would *itself* be an exercise of the forbidden legislative authority."[53] For the Supreme Court, then, the question was whether section 109 of the Clean Air Act (as interpreted by the courts, and not the agency) failed to supply an "intelligible principle" to constrain the agency as required by the nondelegation doctrine.

The statute easily passed that standard, Justice Scalia said, because it plainly set the terms on which the agency was to exercise power. In setting the emissions levels of the relevant materials, the "EPA must establish uniform national standards at a level that is requisite to protect public health from the adverse effects of the pollutant in the ambient air."[54] And "[r]equisite, in turn 'mean[s] sufficient, but not more than necessary.'"[55] The Court then compared the breadth of that language, and the degree to which it channeled agency discretion, to other "strikingly similar" statutory delegations that it had recently upheld.[56] In traditional nondelegation

49 *Id.* at 1038–40.

50 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001).

51 *Id.*

52 *Id.* at 472–73.

53 *Id.* at 473.

54 *Id.* (internal quotation marks omitted) (quoting Transcript of Oral Argument at 5, *Am. Trucking Ass'ns*, 531 U.S. 457 (No. 99-1257)).

55 *Id.* (quoting Transcript of Oral Argument at 7, *Am. Trucking Ass'ns*, 531 U.S. 457 (No. 99-1257)).

56 *Id.* (discussing *Touby v. United States*, 500 U.S. 160, 163 (1991) (upholding a delegation to the Attorney General to designate a drug as a controlled substance for purposes of criminal drug enforcement if doing so was "necessary to avoid an imminent hazard to the public safety" (internal quotation marks omitted) (quoting 21 U.S.C. § 811(h)(1) (2012))), and *AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 646 (1980) (upholding a delegation under the Occupational Safety and Health Act of 1970 instructing the agency to "set the standard which most adequately assures, to the extent feasible, on the basis of

terms, Justice Scalia found, section 109 of the Clean Air Act was "well within the outer limits of our nondelegation precedents."[57] The Court acknowledged that the scope and significance of the delegation at issue required Congress to "provide substantial guidance on setting air standards that [like these] affect the entire national economy."[58] "But even in sweeping regulatory schemes we have never demanded, as the Court of Appeals did here, that statutes provide a 'determinate criterion' for saying 'how much [of the regulated harm] is too much.'"[59] The choice from among emissions levels that would serve the statutory scheme was of course a discretionary one, but that is part of what agencies get when Congress assigns to them the task of implementing statutory schemes—even ones, like the NAAQS at issue, that are very important and have significant impact.

II. Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument

Justice Scalia's treatment of the nondelegation doctrine in *Mistretta* and *Whitman* provides a window into his methods of constitutional argument. Overall, of course, his jurisprudence was marked most prominently by his methodological commitments to originalism in constitutional interpretation and textualism in statutory interpretation. But the judicial craft calls for the judge to deploy modes of argument to implement those methodological commitments.[60] Justice Scalia's nondelegation opinions reflect two competing themes in his jurisprudence: a deep suspicion of judicial power when it is deployed through balancing tests or discretionary judgments of degree, and an understanding of the constitutional structure that enables judges dispassionately to implement the separation of powers established by the document itself.

A. *Judicial Power and Questions of Degree*

In both *Mistretta* and *Whitman,* Justice Scalia was strikingly deferential to Congress in his nondelegation analysis. Indeed, his *Mistretta* dissent reflects what might be the most deferential approach to the nondelegation doctrine in the whole United States Reports. He frankly acknowledged the immense scope of discretion that the nondelegation doctrine tolerates in administrators. Statutes will inevitably leave gaps to be filled in during law execution, and—crucially—those gaps will inevitably involve policy judgments as to how

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the best available evidence, that no employee will suffer . . . impairment of health" (quoting 29 U.S.C. § 655(b)(5) (2012) (internal quotation marks omitted)))).

57 *Id.* at 474.

58 *Id.* at 475.

59 *Id.* (alteration in original) (quoting Am. Trucking Ass'ns v. Envtl. Prot. Agency, 175 F.3d 1027, 1034 (D.C. Cir. 1999)).

60 For the classic treatment of this point, see Philip Bobbitt, Constitutional Fate: Theory of the Constitution (1984).

best to make effective the statutory scheme.[61] Since that is the case, Justice Scalia said, "the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree."[62] And on questions of degree, Justice Scalia was, to put it mildly, skeptical about the ability of judges to reason dispassionately. This point reflects a central theme in Justice Scalia's jurisprudence throughout his tenure on the Court.

The examples of this skepticism in Justice Scalia's jurisprudence are legion, but for present purposes it is sufficient to harken back to perhaps the most famous example—his dissent in *Morrison v. Olson*.[63] In that early opinion, Justice Scalia sounded a theme that was to be an important part of his jurisprudence: he was suspicious of judges' resolving questions using what he termed "totality of the circumstances" tests, which empowered judges just to announce their conclusion without reference to any legal "rule."[64] He deemed this "ad hoc approach to constitutional adjudication"—the Court will tell the political branches on a case-by-case basis how much is too much and how far is too far—–to be inconsistent with the rule of law.[65] Rather than requiring judges to decide cases based on legal rules external to their own preferences, he said, this approach was designed to "produce a result, in every case, that will make a majority of the Court happy with the law."[66]

Drawing on this theme from his *Morrison* dissent, the next year Justice Scalia delivered the Holmes Lecture at Harvard Law School that was then published as *The Rule of Law as a Law of Rules*.[67] In that lecture, Justice Scalia expanded upon the notion that judging on a case-by-case basis according to the judge's sense of justice is not judging at all—that it is instead merely ad hoc decisionmaking untethered to law. That was true, he thought, at least for federal courts exercising the judicial power of the United States;[68] for federal judges to exercise common-law powers on a case-by-case basis threatened to disrupt the Constitution's structure of separate, enumerated powers that are divided among three branches. Without a legal rule to guide (and therefore control) a court's decisionmaking, that court is dangerously free simply to reach results that it finds congenial.

As Professor John Manning has shown, this "anti-discretion" impulse characterized much of Justice Scalia's career.[69] He was suspicious of judges'

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61 Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

62 *Id.*

63 Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting).

64 *Id.* at 733.

65 *Id.* at 734.

66 *Id.*

67 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

68 *See* U.S. CONST. art. III, § 1.

69 John F. Manning, *Justice Scalia and the Idea of Judicial Restraint*, 115 MICH. L. REV. 747, 749 (2017) (book review). Scholars recognized early in Justice Scalia's tenure the central importance that the quest for rules rather than standards played in his jurisprudence. *See* Kathleen M. Sullivan, *Foreword: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 82 (1992) ("[F]or Justice Scalia, the enterprise of rationalizing constitutional interpretation is dominated by favoritism for rules.")

deploying a kind of freestanding judicial discretion—the sort one sees in opinions whose outcomes seem to be the product of little more than the morals, conscience, or policy sense of five (unelected) Members of his Court.[70] Thus he searched for legal rules drawn from the texts of statutes and the Constitution in an effort to cabin his own discretion. As Professor Manning shows, the success of his efforts to do so did not necessarily match that ambition.[71] At bottom, though, and most of all, Justice Scalia wanted to avoid the law's becoming "by definition, precisely what the [judge] thinks, taking all things into account, it *ought* to be."[72]

In the particular context of the nondelegation doctrine, Justice Scalia responded to the absence of clear rules guiding judicial reasoning by frankly accepting that it was not part of the judicial role actually to draw the lines called for by the Court's doctrines. Yes, he said, the nondelegation doctrine flatly prohibits Congress from delegating the legislative power. "Strictly speaking, there is *no* acceptable delegation of legislative power."[73] Again, though, the very nature of legislation—its imprecise language, its inability to foresee all the circumstances in which it will apply, and the reality that it will be written at a higher level of generality than will clearly answer specific real-world questions—will inevitably leave gaps to be filled. From the time of John Marshall the Supreme Court has recognized that that gap filling is the stuff of law execution.[74] As Justice Scalia put it, "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive . . . action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."[75] The test of the nondelegation doctrine is thus a practical one: How does a court draw the line between acceptable (indeed, inevitable) levels of discretion and unacceptable pure delegations of legislative power?

For Justice Scalia this was a doctrinal field in which the Court had basically gotten things right. The Court's long-established doctrinal answer is that the line is not one of principle but of practicality. The question is whether Congress has provided an "intelligible principle" to guide and constrain law execution.[76] And of course, as Professor Cass Sunstein put it, the nondelegation doctrine has had one good year—when it twice struck down New Deal measures as violative of the nondelegation doctrine—and by now some 227 (and counting) bad ones.[77] The short of it is that throughout its history the Court has been extraordinarily deferential to Congress's judgments on how much discretion to leave to law execution. In both *Mistretta*

70 Manning, *supra* note 69, at 749.

71 *Id.* at 754–71.

72 Morrison v. Olson, 487 U.S. 654, 734 (1988) (Scalia, J., dissenting).

73 Mistretta v. United States, 488 U.S. 361, 419 (1988) (Scalia, J., dissenting).

74 *See, e.g.*, Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 21 (1825).

75 *Mistretta*, 488 U.S. at 417.

76 Chief Justice Taft first laid down the "intelligible principle" test in *J.W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394, 409 (1928).

77 Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000).

and *Whitman* Justice Scalia rehearsed the litany of those broad delegations that the Court has upheld. "What legislated standard," he wondered, "can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?"[78] And Justice Scalia made explicit what underlay the Court's deferential approach:

> Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the "necessities" of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.[79]

In light of that, he concluded, "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[80] In other words, Justice Scalia all but came out and said that the nondelegation doctrine is nonjusticiable—that the line drawing it requires is not a legal analysis at all, but is instead political (because it is discretionary) at its core.[81]

We can see, then, that Justice Scalia's approach to the nondelegation doctrine fit naturally within his general aversion to arguments from degree.[82] He did, after all, hold that the rule of law requires legal rules. But it is not at all clear that his anti-discretion commitment actually comported with the law that he was bound to apply, which was of course the Constitution. Professors Steven Calabresi and Gary Lawson have argued that Justice Scalia's larger jurisprudential commitment to rules over standards sometimes put him at odds with the Constitution itself; that the law of the Constitution is sometimes, indeed often, a law of standards rather than determinate rules.[83] In the particular context of the nondelegation doctrine they argue—as Professor Lawson has before[84]—that the nondelegation doctrine's original mean-

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78 *Mistretta*, 488 U.S. at 416.

79 *Id.*

80 *Id.* at 415.

81 Justice Scalia did on occasion continue to at least threaten to invoke the nondelegation doctrine. *See, e.g.*, Reynolds v. United States, 132 S. Ct. 975, 986 (2012) (Scalia, J., dissenting) (noting that it is doubtful whether "Congress can constitutionally leave it to the Attorney General to decide—with no statutory standard whatever governing his discretion—whether a criminal statute will or will not apply to certain individuals. That seems to me sailing close to the wind with regard to the principle that legislative powers are nondelegable").

82 *See* Manning, *supra* note 69, at 755.

83 *See* Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483 (2014).

84 *See* Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231 (1994).

ing is administrable, and requires the application of standards and not rules.[85]

Thus, it is a fair question whether Justice Scalia's commitment to originalism was overtaken by his aversion to deciding questions of degree. It is indeed conspicuously absent in Justice Scalia's nondelegation jurisprudence that he never took the occasion independently to consider the original meaning of the nondelegation doctrine. The essence of the nondelegation doctrine is at bottom the essence of the separation of powers: How do we tell what constitutional power an actor is deploying? As Calabresi and Lawson note, both James Madison and John Marshall recognized the delicacy and difficulty of that task.[86] And commentators have long (and seemingly endlessly) studied the legitimacy and scope of the nondelegation doctrine.[87] For purposes of this Essay, that debate is beside the point. Here we are concerned with Justice Scalia's approach to constitutional argument, and it is clear that in the context of the nondelegation doctrine he was quite unwilling for judges to intervene in drawing the lines between acceptable and excessive levels of delegated discretion. But he never provided his own account of why the Constitution's original meaning led him to that outcome.

As noted, Justice Scalia was doubtless attracted to that position of extreme deference by the nature of the question. But an additional factor is also worth observing: in this context Justice Scalia was a committed doctrinalist. He took the Court's nondelegation cases as he found them, and applied them as he saw best. Early in his tenure (in fact, the same year as his Holmes Lecture), he published his first extrajudicial defense of originalism in constitutional interpretation, *Originalism: The Lesser Evil*.[88] It was in that piece that Justice Scalia famously termed himself a "faint-hearted originalist,"[89] an appellation he later recanted.[90] His initial confession of faint-heartedness rested at least in part on his concession that he would deem unacceptable

85 Calabresi & Lawson, *supra* note 83, at 489–90 (arguing that the Constitution requires Congress to make the policy decisions that are important enough that Congress should be required to make them).

86 *Id.* at 489 (discussing THE FEDERALIST NO. 37, at 183 (James Madison) (George W. Carey & James McClellan eds., 2001), and *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (Marshall, C.J.)).

87 For just a few examples, compare PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014), and DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002), and Adrian Vermeule, *No*, 93 TEX. L. REV. 1547 (2015) (reviewing HAMBURGER, *supra*); *see also* Philip Hamburger, *Vermeule Unbound*, 94 TEX. L. REV. 205 (2015) (responding to Vermeule, *supra*).

88 Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

89 *Id.* at 864 (stating that "I hasten to confess that in a crunch I may prove a faint-hearted originalist"); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 140 (Amy Gutmann ed., 1997).

90 *See* Jennifer Senior, *In Conversation: Antonin Scalia*, N.Y. MAG. (Oct. 6, 2013), http://nymag.com/news/features/antonin-scalia-2013-10/; *see also* MARCIA COYLE, THE ROBERTS COURT: THE STRUGGLE FOR THE CONSTITUTION 165 (2013).

some judicial outcomes, no matter how grounded they were in original meaning.[91] As he put it, originalism would prove to be "medicine . . . too strong to swallow" if the Court were to be confronted by a state's effort to impose flogging or hand-branding as a criminal punishment.[92] He was quick to point out, however, that such extreme cases are unlikely to arise in the real world, so it remained safe as a general matter for the judge to adhere to originalism (especially in preference to competing constitutional theories).[93]

As I mentioned, Justice Scalia later recanted his originalism hedge, and claimed to be faint-hearted no more.[94] He surely did attempt to follow the original meaning where it led, and did not throw over his best understanding of the Constitution because he was unwilling to live with the consequences of a decision.[95] In truth, however, one aspect of his faint-heartedness did persist throughout his tenure on the Court: he acceded to the claims of precedent and followed the doctrine of stare decisis.[96]

And here the nondelegation doctrine returns. As mentioned above, Justice Scalia has been criticized in applying the nondelegation doctrine for not examining, and then following, the original meaning. It seems, however, that the best way to understand his nondelegation jurisprudence is that he was simply following precedent. If we look at the opinions in *Mistretta* and *Whitman* through that lens, we see that they rely heavily, and in detail, on the Court's prior treatments of the nondelegation doctrine. Indeed, Justice Scalia engages in traditional analogical reasoning, comparing the terms and scopes of prior delegations that the Court had upheld to the ones before it, and concluding that if the prior delegations were lawful, the current ones must be, too. That is simply following precedent. He did not feel the need to reconsider the basic doctrinal design of the nondelegation doctrine (delegation is inevitable, how much is too much is a discretionary judgment, is there an intelligible principle) and simply went about the task of applying those precedents to the circumstances before him.

To be sure, Justice Scalia did read those precedents broadly. For example, the prior cases had not gone so far as to suggest that the question of excessive delegation was beyond judicial competence. But he assuredly did not understand himself to be saying anything contrary to or different from existing nondelegation law in either *Mistretta* or *Whitman*. Indeed, he was explicit about it. As he put it in the latter case, the "scope of discretion" delegated to the EPA by the statute in question (instructing the EPA to set emissions levels "requisite" to protect public health "with an adequate margin

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91 *See* Scalia, *supra* note 88, at 861.

92 *Id.*

93 *Id.* at 861–65.

94 *See supra* note 90.

95 Whether he *succeeded* in doing so, on either count, is of course a topic that has long occupied commentators, and long will.

96 For more on the relationship between originalism and stare decisis, and particularly Justice Scalia's approach to both, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

of safety") was "well within the outer limits of our nondelegation precedents."[97]

Might Justice Scalia have taken it upon himself to open up the Court's precedents to reconsideration in arriving upon his own nondelegation jurisprudence? Justice Thomas suggested as much in *Whitman*. In a concurring opinion, he expressed his "willing[ness] to address the question whether [the Court's] delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[98] At the least, then, the suggestion was on the table for the Court to examine the original meaning of the nondelegation doctrine and its consistency with the Court's doctrine. Justice Scalia did not respond to Justice Thomas's suggestion, so we cannot say what he thought about the matter. We do know as a general matter, however, that Justice Scalia had a stronger attachment to stare decisis than does Justice Thomas, and regularly failed to join the latter's calls to reconsider precedent.[99]

Some might say that this makes Justice Thomas's originalism more pure than Justice Scalia's, but the disjunction between them turned not on their relative views of originalism but on their differing views of the claims of precedent. A strong insistence that originalism demands that every doctrine be reconsidered anew obviously requires the rejection, or the drastic watering down, of the doctrine of stare decisis in constitutional adjudication. Some do think that is the proper course,[100] but no Justice—not even Justice Thomas—has gone that far.[101] Instead the Court, with Justice Scalia's going along in the main, treats stare decisis as "the preferred course," since it promotes "evenhanded, predictable, and consistent development of legal principles."[102] Of course, the Court regularly reconsiders and overrules precedents. Justice Scalia, in particular, took the strong view that serious error could be sufficient justification in itself to reconsider a precedent.[103] It is fair to infer, then, that Justice Scalia's willing, even enthusiastic, applica-

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97 Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 474, 476 (2001).

98 *Id.* at 487 (Thomas, J., concurring).

99 *See, e.g.*, United States v. Lopez, 514 U.S. 549, 584 (1995) (Thomas, J., concurring) (suggesting that the Court reconsider its Commerce Clause precedents).

100 *See, e.g.*, Gary Lawson, *The Constitutional Case Against Precedent*, 17 HARV. J.L. & PUB. POL'Y. 23 (1994) (arguing that judges are bound by the judicial oath to correct errors of constitutional interpretation); Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1166 n.3 (2008) (collecting examples of scholarship rejecting the legitimacy of stare decisis in constitutional cases).

101 Judge Robert Bork, an early and influential judicial originalist, also subscribed to the doctrine of stare decisis. *See* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 155–59 (1990).

102 Payne v. Tennessee, 501 U.S. 808, 827 (1991).

103 *Id.* at 834–35 (Scalia, J., concurring); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 982–83 (1992) (Scalia, J., dissenting in part) (arguing that serious error in a prior case can be sufficient reason to overrule it); Barrett, *supra* note 96 (discussing Justice Scalia and stare decisis).

tions of the Court's nondelegation precedents reflect a judgment that they were not seriously wrong. It is at least clear that no delegation—no matter its breadth—ever moved him to call for reconsidering those precedents as an original matter. And for him to do so would have required him to act outside the Court's usual case-deciding norms. If litigants do not seek the overruling of precedent, and the Court can resolve the case without reconsidering its cases, then the question whether a precedent (or even an important line of cases) is inconsistent with the Constitution's original meaning simply does not come up.

Doubtless, Justice Scalia's methodological commitment to staying the judicial hand when discretionary matters of degree were at issue made it easy for him to overlook the possibility that the Constitution's original meaning might have called for a more interventionist course in policing the lines of delegation. But that is a different proposition from claiming that his nondelegation jurisprudence was a betrayal of his originalist commitments.

B. Mistretta *and Structural Argument*

Justice Scalia was a big fan of structural argument in constitutional law. Indeed, some of his most famous opinions rely heavily on the structural principles of separation of powers and federalism.[104] He believed that the Constitution, properly understood, divided power between the states and the United States, and among the three branches of the United States government. And for the most part those divisions of power were not ones of degree, but of principle. As he put it in *Morrison* in insisting that Congress could not dilute the executive power by imposing limits on the President's ability to control law execution: the Constitution assigned not "*some of* the executive power, but *all of* the executive power" to the President.[105] That in turn means that the Constitution's structure—its assignment of power to one actor and not another—forbids Congress from diminishing the President's capacity to control law execution.[106]

A canvassing and evaluation of Justice Scalia's (and the Court's) structural arguments in constitutional law, and the massive commentary on that subject, are beyond the scope of this Essay. Here I will focus more narrowly on structural argument in the exercise of legislative power. In *Mistretta*, Justice Scalia set forth the basics of the Constitution's division of power. A government actor affecting private rights needs a source of constitutional power to do so.[107] For Congress, that is and must only be the legislative power,[108]

104 *See, e.g.*, Printz v. United States, 521 U.S. 898 (1997) (federalism); Morrison v. Olson, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting) (separation of powers).

105 *Morrison*, 487 U.S. at 705.

106 Strictly speaking, Justice Scalia limited his analysis to "purely executive" power, a category drawn from the Court's analytic categories in *Humphrey's Executor v. United States*, 295 U.S. 602, 603 (1935). It is a notable absence from Justice Scalia's *Morrison* dissent why he felt the need to narrow his analysis in that way, especially in an opinion in which he otherwise excoriated *Humphrey's Executor*.

107 *See* Mistretta v. United States, 488 U.S. 361, 413 (1989) (Scalia, J., dissenting).

and for the President that is and must be only the executive power.[109] It is a routine part of the administrative state that agencies do things that look like legislating or deciding cases, because the gap filling that inheres in law execution in turn inevitably takes forms that look like those functions. And Congress formalizes that by authorizing agencies to engage in rulemaking and adjudication,[110] which is part of how the legislature sets the statutory terms on which law execution is to take place. In the ordinary course, Justice Scalia emphasized, agencies charged with law execution will affect private rights by interpreting and applying the law to private actors, and bringing enforcement actions to make the law effective.[111]

But the Sentencing Commission had no power to apply the law to private actors or otherwise determine their liability under the law.[112] For Justice Scalia this appeared to make the Sentencing Commission unique. Unlike other agencies, the Sentencing Commission's only function was to make rules. That exclusive function was to promulgate sentencing guidelines, which were binding (at that time[113]) rules governing all federal criminal sentences. Because the Sentencing Commission had no function but to issue the guidelines, Justice Scalia concluded, it had no function but lawmaking.[114] It had no law otherwise to execute.

For Justice Scalia, a government agency that exercises no power but the power to make rules is simply a lawmaker. If all that the Sentencing Commission was charged with doing was making rules with statutory effect, then Justice Scalia's position fit comfortably with the Court's structural jurisprudence regarding lawmaking. The decade or so prior to *Mistretta* had witnessed several landmark precedents interpreting the Constitution's treatment of lawmaking and law execution. First, and most importantly, in *Immigration & Naturalization Service v. Chadha*,[115] the Court held unconstitutional the legislative veto in its various forms, and in the course of doing so said important things about the fundamental nature of the legislative power. For the *Chadha* Court, when Congress does something that purports to change the rights, duties, and obligations of actors outside of it (either private actors or other parts of the government), that counts as an exercise of power with which the Constitution is concerned. And the terms of Article I, Section 7 insist that Congress, and only Congress, observe the norms of bicameralism and presentment if it is to legislate.[116] It follows, of course, that the text and

108 U.S. CONST. art. I, § 1.

109 *Id.* art. II, § 1. And of course the same is true of the Article III courts—they are vested with, and can exercise only, the judicial power of the United States. *Id.* art. III, § 1.

110 It does this, of course, in the terms of the statutes creating and empowering agencies. The default procedural norms for how these tasks are to be accomplished are set by the Administrative Procedure Act, 5 U.S.C. §§ 553–54, 556–57 (2012).

111 *See Mistretta*, 488 U.S. at 420.

112 *See id.*

113 *See* United States v. Booker, 543 U.S. 220 (2005).

114 *Mistretta*, 488 U.S. at 420.

115 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919 (1983).

116 *See* U.S. CONST. art. I, § 7.

the structure of the Constitution rule out any entity's doing that but Congress. The Court had also established similar structural norms of exclusivity regarding the executive[117] and judicial powers.[118]

But was it true that the Sentencing Commission was doomed by its not being part of a larger law-execution enterprise? If rulemaking is law execution—if it is just filling in the gaps left by Congress—it is not clear what principle requires that to be combined with other functions *in the same actor* for it to be constitutional. Congress quite frequently divides up law execution of the same scheme among multiple actors answerable to different parts of the executive branch. For example, the Occupational Safety and Health Act[119] divides rulemaking and adjudication between two entirely different agencies: the Secretary of Labor is charged with making rules and bringing enforcement actions pursuant to those rules.[120] And a separate, standalone Occupational Safety and Health Review Commission, comprised of three members who answer only to the President, is charged with adjudicating the enforcement actions brought by the Secretary.[121] The Commission's only function is to adjudicate enforcement actions brought pursuant to the statute. It is at least worth wondering whether Justice Scalia's *Mistretta* theory should doom a standalone adjudicatory agency. It is clear that agency adjudication, which has a long history of regulatory impact, is (and must be) law execution.[122] Multiple agencies, including the National Labor Relations Board and the Federal Communications Commission, accomplish a great deal of their regulatory mission via adjudication.[123] They certainly implement statutes by setting the rights and duties of private parties in adjudications.

Justice Scalia never expressed a view on the constitutional status of adjudication-only agencies. In the case of the Occupational Safety and Health Review Commission, he did sit on a case raising the question whether the

117 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 721–27 (1986); Buckley v. Valeo, 424 U.S. 1, 118–37 (1976) (per curiam).

118 *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). This is not to suggest that the Court believed that the structural lines protecting the judicial power from encroachment are clear. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850–51 (1986); *see also* Crowell v. Benson, 285 U.S. 22 (1932).

119 29 U.S.C. §§ 651–78 (2012).

120 *See id.* §§ 658–59, 665–66.

121 *See id.* §§ 651, 659, 661.

122 *See, e.g.*, Sec. & Exch. Comm'n v. Chenery Corp., 332 U.S. 194 (1947) (holding that an agency's choice to regulate using adjudication rather than rulemaking is within its discretion).

123 *See, e.g.*, Universal Camera Corp. v. Nat'l Labor Relations Bd., 340 U.S. 474 (1951) (concerning NLRB adjudication); Qwest Servs. Corp. v. Fed. Commc'ns Comm'n, 509 F.3d 531, 536 (D.C. Cir. 2007) (deciding a case about FCC adjudication and stating "[t]here is no such general principle [that broadly applicable orders can only take the form of a rule]. Most norms that emerge from a rulemaking are equally capable of emerging (legitimately) from an adjudication, and accordingly agencies have 'very broad discretion whether to proceed by way of adjudication or rulemaking'" (internal citations omitted) (quoting Time Warner Entm't Co. v. Fed. Commc'ns Comm'n, 240 F.3d 1126, 1141 (D.C. Cir. 2001))).

Commission or the Secretary of Labor "administered" the relevant statutes for purposes of determining which was entitled to deference under the *Chevron*[124] doctrine. Just two years after *Mistretta*, the Court held unanimously in *Martin v. Occupational Safety & Health Review Commission*[125] that the Secretary of Labor, and not the Commission, administered the statute for purposes of the *Chevron* doctrine. For our purposes the interesting point about *Martin* is that Justice Scalia joined the Court's opinion without writing separately. He was apparently untroubled by the single-function nature of the Commission. If adjudication is regulatory action that binds private actors, though, it is not clear why *Martin* is different from *Mistretta*.

The *Chadha* Court was principally concerned with each branch's staying in the lane of power assigned to it by the text and structure of the Constitution. While it insisted that Congress could legislate (that is, change the rights and duties of actors outside of it) only via the specific textual commands of Article I, Section 7, it was untroubled by the same substantive outcomes being accomplished by the Executive with the stroke of a pen.[126] The difference was, of course, both that Congress delegated that authority to the Executive and the Constitution's text is indifferent as to the forms that law execution can take. It is otherwise clear in the Court's precedents, moreover, that the Constitution's text and structure care very much about the lines of accountability between the branches.[127] Thus, Congress can have no role in removing (and hence controlling) those whose power includes law execution,[128] and the nondelegation doctrine holds, of course, that nobody whose role includes law execution can legislate.

This suggests that the constitutional structure is concerned primarily with maintaining the integrity of interbranch relations, rather than how Congress organizes the executive branch and divvies up power within it. It is not easy to see why it makes a constitutional difference whether the Sentencing Commission stands alone or whether it was made, for instance, part of the Department of Justice. In either instance, it was answerable ultimately to the President, and its members owed no allegiance to Congress. And its functions would have been exactly the same. In the end, Justice Scalia's structural argument suffers from the reality that the effect on the constitutional structure of the Commission's standalone nature appeared to be nil. To be sure, it mattered a great deal that the Commission was ultimately answerable (through removal) to the President, and not to Congress or the courts. But the functions of the Commission in the real world were the same, whether or

124 *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (establishing that courts will defer to reasonable agency constructions of ambiguous statutes that the agency has been charged with administering).

125 Martin v. Occupational Safety & Health Review Comm'n, 499 U.S. 144 (1991).

126 *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 953 n.16 (1983).

127 *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 732 (1986) ("[B]ecause Congress has retained removal authority over the Comptroller General, he may not be entrusted with executive powers.").

128 *See id.* at 726–27.

not Congress had assigned to it additional law-execution tasks or folded it into another agency.

What does this say about the use of structural argument in constitutional law? Is it after all ultimately and inevitably a matter of standards and not rules? I suggest here that the failure of Justice Scalia's structural argument in *Mistretta* does not undermine the utility of structural argument. Of course, structural argument has always been a mainstay of constitutional law.[129] The reason why the *Mistretta* dissent ultimately fails, though, is that it was just a misapplication of structural argument. That is, contrary to what Justice Scalia thought, it makes no structural difference whether an agency stands alone so long as the constitutional lines are otherwise observed. Considered this way, as far as the constitutional structure is concerned it does not matter whether the Occupational Health and Safety Review Commission is within the Department of Labor or whether it stands alone. It might well matter a great deal as a practical matter whether the commissioners answer to the Secretary of Labor (and then to the President), or whether they answer only to the President (as the statute provided). While that legislative choice by Congress does not have structural significance, it would be a different thing altogether if Congress made the Commission answerable to one of its committees or attempted some other innovative accountability scheme. The former arrangement is structurally insignificant as a matter of constitutional law; the latter would be decisively inconsistent with the constitutional structure.

Conclusion

In the end, Justice Scalia's nondelegation jurisprudence was conventional. His disdain for deploying the judicial power to decide questions of degree—which was part of his career-long fight against standards and in favor of rules—fit easily with applying the Court's longstanding method for applying the nondelegation doctrine. At the same time, his rhetoric reflected his devotion, again career-long, to maintaining the structures established by the Constitution. Hence in *Mistretta* he insisted that in fact *no* actual delegation of the "legislative power" is ever permissible, because that power was vested exclusively in Congress.[130] He held this as he simultaneously acknowledged that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be."[131] But once the Constitution's structure was violated, as he believed was the case

129 An early and important example of the Court's use of structural argument is in the second holding of *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 425–37 (1819), that it was unconstitutional for Maryland (a state) to impose a tax on the Bank of the United States (an instrumentality of the United States). *See also* Charles L. Black, Jr., Structure and Relationship in Constitutional Law (1969); Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321 (2001).

130 *See* Mistretta v. United States, 488 U.S. 361, 415–19 (1989) (Scalia, J., dissenting).

131 *Id.* at 417.

with the Sentencing Commission's single-function delegation, then there was no balancing to be done, no questions of degree to be decided—it was just unconstitutional.

It is a fair question whether Justice Scalia's nondelegation jurisprudence was consistent with his larger commitment to originalism. Important scholars have argued that it was not,[132] and he never took the occasion to rethink that doctrine from first principles. As I have argued, that failure can be chalked up not only to his preference for deferring to political actors when the question at hand is not one of principle but of degree, but also his commitment to stare decisis in constitutional adjudication. For Justice Scalia, stare decisis was not so much about leaving in place precedents he thought were wrong, but was much more about not reconsidering their rightness or wrongness in the first place. His default was to take the United States Reports as he found them, which is what he did when it came to the nondelegation doctrine.

132 *See supra* notes 82–83 and accompanying text.