The Private Nondelegation Doctrine: Preventing the Delegation of Regulatory Authority to Private Parties and International Organizations

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Liberty requires accountability. When citizens cannot readily identify the source of legislation or regulation that affects their lives, Government officials can wield power without owning up to the consequences. One way the Government can regulate without accountability is by passing off a Government operation as an independent private concern.

—Justice Samuel Alito[1]

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1. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1234 (2015) (Alito, J., concurring).

INTRODUCTION

"[T]he lawmaking function belongs to Congress and may not be conveyed to another branch or entity."[2] Yet, since the New Deal, the Supreme Court has consistently held that the Constitution allows the delegation of regulatory authority to executive branch agencies.[3] Executive agencies promulgate thousands of regulations every year.[4] Indeed, "[t]here is now virtually no significant aspect of life that is not in some way regulated by the federal government."[5] These regulations bind courts, government officers, and the American people with the "force of law."[6]

Though common sense suggests that only government officials may exercise such regulatory power, the law is not so clear. Supreme Court jurisprudence has not clearly defined the extent to which the Constitution permits the delegation of regulatory power to entities outside the federal government. Eighty years ago, the Court in *Carter v. Carter Coal Company* struck down a statute that allowed private parties to set binding regulations on other parties in the industry.[7] Subsequent cases, however, have allowed private participation in

2. Loving v. United States, 517 U.S. 748, 758 (1996) (citation omitted).

3. *See* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 474–75 (2001).

4. *See* Anne Joseph O'Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 936 (2009) ("In 2007, Congress enacted 138 public laws. By contrast, in that same year, federal agencies finalized 2926 rules, of which 61 were labeled as major regulations.").

5. Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1236 (1994).

6. I.N.S. v. Chadha, 462 U.S. 919, 986 (1983) (White, J., dissenting); *see also* Batterton v. Francis, 432 U.S. 416, 425 (1977) (stating that an administrator's regulation is accorded "legislative effect").

7. 298 U.S. 238, 311 (1936).

the regulatory process, causing courts and scholars to question the scope of the *Carter Coal* holding.[8]

The continued vitality—and validity—of *Carter Coal* is crucial to ensuring that the federal government is responsible for its policy choices.[9] The use of regulatory power by private parties saps our political system of governmental accountability. The Court of Appeals for the District of Columbia Circuit has referred to this threat as "particularly dangerous where both Congress and the Executive can deflect blame for unpopular policies by attributing them to the choices of a private entity."[10]

Recognizing the tension between private delegations and principles of government accountability, the D.C. Circuit recently attempted to revive *Carter Coal*'s private nondelegation doctrine in *Association of American Railroads v. Department of Transportation*.[11] In *American Railroads*, Congress granted the National Railroad Passenger Corporation (Amtrak) the authority to develop metrics and standards governing the use of railroad tracks.[12] The D.C. Circuit held that this grant of authority was unconstitutional under the long-dormant private nondelegation doctrine of *Carter Coal*.[13] This revival of *Carter Coal*, however, was short lived. The Supreme Court granted certiorari and found that the private nondelegation doctrine did not apply because Amtrak was not a private entity.[14]

While the Supreme Court avoided many of the challenging questions surrounding the private nondelegation doctrine in *American Railroads*, the issue is not going away. Congress has expanded the administrative state to include a wide range of "boundary organizations" that "straddle the federal–private boundary."[15] These boundary organizations blur the distinction between public and private entities and lack the political accountability of agencies within the executive branch. As Justice Antonin Scalia's dissent in *Mistretta v. United States* recognized, Congress has an incentive to delegate regulatory power to entities that are not squarely within the executive branch to avoid responsibility for controversial policy decisions:

> If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various

8. *See infra* Part I.B.

9. Mich. Gambling Opposition v. Kempthorne, 525 F.3d 23, 34 (D.C. Cir. 2008) (Brown, J., dissenting) ("The nondelegation principle is integral to any notion of democratic accountability.").

10. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 675 (D.C. Cir. 2013), *vacated and remanded sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).

11. *Id.*

12. *Id.* at 668.

13. *Id.* at 673–77.

14. *Am. R.Rs.*, 135 S. Ct. at 1228.

15. Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 855–61 (2014) (listing a number of agencies that exist at the boundary between the federal government and the private sector).

> portions of its lawmaking responsibility. How tempting to create an expert Medical Commission (mostly M.D.'s, with perhaps a few Ph.D.'s in moral philosophy) to dispose of such thorny, 'no-win' political issues as the withholding of life-support systems in federally funded hospitals, or the use of fetal tissue for research.[16]

The existence of boundary organizations and the strong congressional incentives to delegate regulatory power to these organizations highlight the need for a private nondelegation doctrine that maintains clear lines of responsibility within the federal government.

Moreover, as Justice Stephen Breyer has noted, similar issues involving the delegation of regulatory power are "likely to arise with increasing frequency" in the context of international delegations.[17] The number of international governmental organizations is growing to support coordination among nations in an increasingly global society.[18] These international organizations "govern to an ever greater extent the daily lives of citizens of interdependent nations" by promulgating regulations that bind participating nations.[19] The U.S. Government Manual indicates that the United States participates in over two hundred of these international organizations through treaties, international agreements, legislation, or executive arrangements.[20] A number of these organizations—including the World Trade Organization and the International Monetary Fund—have the power to bind the United States and other participating nations.[21] These delegations raise difficult questions about the extent to which the government may transfer regulatory power outside the three branches.

Delegations to international organizations have already caused controversy. For example, section 15 of the Clean Diamond Trade Act (Act) stated that the legislation would not take effect until the President certified that the World Trade Organization or United Nations Security Council had approved it.[22] President George W. Bush believed that predicating the Act's effective date

16. Mistretta v. United States, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).

17. STEPHEN BREYER, THE COURT AND THE WORLD: AMERICAN LAW AND THE NEW GLOBAL REALITIES 227 (2015).

18. *See id.* at 197 ("[T]here were 123 international governmental organizations (IGOs) in 1951, about double that figure (242) in 1971, and about fifteen times as many in 2012, which saw 1,993 IGOs.").

19. *Id.*

20. OFFICE OF THE FED. REGISTER, NAT'L ARCHIVES & RECORDS ADMIN., THE UNITED STATES GOVERNMENT MANUAL 531–45 (rev. 2014). The Union of International Associations reports that the United States participates in 423 international organizations. *See* BREYER, *supra* note 17, at 197 (citing 5 YEARBOOK OF INTERNATIONAL ORGANIZATIONS 2012–2013, at 54 fig.3.3 (49th ed. 2013)).

21. *See* BREYER, *supra* note 17, at 228 (providing examples of international organizations that can set binding regulations on participating nations); *see also* Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1567–81 (2003) (noting that organizations such as the International Monetary Fund and the World Trade Organization have the power to adopt binding interpretations of the various trade agreements).

22. Statement on Signing the Clean Diamond Trade Act, 39 Weekly Comp. Pres. Doc. 491 (Apr. 25, 2003).

on permission from these organizations would "unconstitutionally delegate[] legislative power to international bodies," so he construed the certification as wholly discretionary.[23]

Circuit courts have also begun to question delegations to international organizations. In *Natural Resources Defense Council v. Environmental Protection Agency*, the D.C. Circuit evaluated the requirements of a treaty and cautioned that "assigning lawmaking functions to international bodies" would "raise serious constitutional questions in light of the nondelegation doctrine, numerous constitutional procedural requirements for making law, and the separation of powers."[24] These issues will continue to arise, and the Supreme Court will inevitably have to address whether Congress has delegated "too much rule-making authority to unsupervised international bodies."[25]

Fundamental principles of government accountability demand a rigorous analysis of the constitutional limitations on delegations of regulatory power to private parties and international organizations. Scholars have examined such delegations under the Due Process Clause[26] and the Appointments Clause.[27] However, the structural constraints of the Vesting Clauses add constitutional limitations beyond those previously identified, providing an additional constraint to private delegation. The Due Process Clause focuses on fairness, rather than governmental structure, and would allow private parties or international organizations to exercise regulatory power so long as they did so in a neutral manner.[28] The Appointments Clause prevents nongovernmental actors from exercising "*significant* authority pursuant to the laws of the United States."[29] But not all uses of regulatory power by private entities and international organizations (which may be found unconstitutional under the private nondelegation doctrine) necessarily rise to the level of "significant authority" the

23. *Id.*

24. 464 F.3d 1, 9 (D.C. Cir. 2006).

25. *See* BREYER, *supra* note 17, at 235; *see also* Julian G. Ku, *The Delegation of Federal Power to International Organizations: New Problems with Old Solutions*, 85 MINN. L. REV. 71 (2000) (analyzing the constitutional problems posed by the delegation of constitutional federal powers to international organizations); Edward T. Swaine, *The Constitutionality of International Delegations*, 104 COLUM. L. REV. 1492 (2004) (proposing that while some international delegations advance constitutional goals, certain forms of international delegation remain constitutionally problematic).

26. *See, e.g.*, David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647, 672–94 (1986); George W. Liebmann, *Delegation to Private Parties in American Constitutional Law*, 50 IND. L.J. 650, 660–67 (1975); Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940–53 (2014).

27. *See* John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 CONST. COMMENT 87, 116–30 (1998) (arguing that the Chemical Weapons Convention is unconstitutional because international officers exercise federal authority without being validly appointed).

28. *See infra* Part II.B.

29. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (emphasis added).

Appointments Clause requires.[30] The Vesting Clauses provide a more stringent restriction on the delegation of federal power to private and international organizations and could play a vital role in maintaining the structural integrity of the U.S. government. This Note attempts to address shortcomings in case law and academic literature by suggesting a legal framework that should be applied to private and international delegations.

At the outset, it should be noted that courts use the term "delegation" in a variety of contexts. "When the Court speaks of Congress improperly delegating power, what it means is Congress'[s] authorizing an entity to exercise power in a manner inconsistent with the Constitution."[31] This Note does not purport to tackle all delegation issues.[32] Instead, it presents a framework for applying the private nondelegation doctrine to future delegations of *regulatory* power to private entities and international organizations.

While this Note generally refers to "private entities," the analysis extends to international organizations that exercise authority pursuant to a federal statute, executive agreement, or international treaty. International organizations are generally viewed as existing separately from the countries that contribute financial support and personnel.[33] Delegations of regulatory power to states and Native American Indian Tribes may raise unique federalism considerations that this analysis does not address.[34]

This Note proceeds in three Parts. Part I describes the history of both the public and private nondelegation doctrines. Part II explains why the private nondelegation doctrine should be treated as distinct from a due process approach and argues that the private nondelegation doctrine is rooted in the Constitution's Vesting Clauses. Part III develops a means for courts to evaluate nondelegation claims when Congress authorizes an entity, public or private, to promulgate regulations.

30. *See* Yoo, *New Sovereignty*, *supra* note 27, at 125 ("These cases at the outer edges of federal authority provide examples of the arguable exercise of governmental power that do not appear to rise to the level where they must be carried out by Officers of the United States.").

31. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment).

32. For example, in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, Justice Kennedy stated that "[d]ifficult and fundamental questions" about "the delegation of Executive power" are raised when Congress authorizes citizen suits. 528 U.S. 167, 197 (2000) (Kennedy, J., concurring). This type of delegation deals with the executive branch's power to enforce the law, which is outside of the scope of this Note.

33. *See* Andrew Stumer, *Liability of Member States for Acts of International Organizations: Reconsidering the Policy Objections*, 48 HARV. INT'L L.J. 553, 555 (2007).

34. *See* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 106–10 (1990) (pointing out that federalism values must be taken into account when evaluating delegations to states and Indian Tribes).

I.
BACKGROUND: LIMITED ENFORCEMENT OF THE NONDELEGATION DOCTRINE

Scholars generally view the nondelegation doctrine as having two distinct forms, one familiar and the other less understood: the public nondelegation doctrine and the private nondelegation doctrine. The public nondelegation doctrine limits Congress's ability to delegate regulatory authority to the executive branch, while the private nondelegation doctrine limits Congress's ability to delegate regulatory authority to nongovernmental actors. This Section briefly introduces the public nondelegation doctrine and presents the limited Supreme Court jurisprudence addressing the private nondelegation doctrine.

A. The Public Nondelegation Doctrine

Article I of the U.S. Constitution begins by stating that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."[35] The Supreme Court has interpreted this language as prohibiting Congress from delegating its legislative function to other branches of the government—the public nondelegation doctrine.[36] The doctrine is based on separation-of-powers principles, which limit the ability of a single branch to aggrandize power beyond its constitutional limitations or to encroach upon the powers of another branch.[37]

At the federal level,[38] the public nondelegation doctrine is not strict. So long as Congress provides an "intelligible principle" to govern its delegation of authority, the recipient of the delegated power is not exercising "legislative power."[39] Though promulgation of regulations by executive agencies sometimes resemble legislative power, the Supreme Court has stated that "they are exercises

35. U.S. CONST. art. I, § 1.

36. *See* Field v. Clark, 143 U.S. 649, 692 (1892) ("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."); Shankland v. Mayor, Alderman & Common Council of Wash., 30 U.S. 390, 395 (1831) ("[T]he general rule of law is, that a delegated authority cannot be delegated."); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002) (arguing that the Constitution contains a textually grounded nondelegation principle). *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487–90 (2001) (Stevens, J., concurring in part and concurring in the judgment) (arguing that the Vesting Clauses "do not purport to limit the authority of either recipient of power to delegate authority to others"); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002) (arguing that the Constitution does not support the nondelegation doctrine).

37. Mistretta v. United States, 488 U.S. 361, 371 (1989) (Scalia, J., dissenting) ("The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government.").

38. The public nondelegation doctrine derives from Article I of the U.S. Constitution so it does not constrain state delegations. Numerous states, however, have their own nondelegation doctrines. *See* Gary J. Greco, Note, *Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 ADMIN. L.J. 567, 580–88 (1994) (assimilating and evaluating state nondelegation doctrines).

39. J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928) ("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."); *see also Whitman*, 531 U.S. at 472.

of—indeed, under our constitutional structure they *must be* exercises of—the 'executive Power.'"[40] In theory, when the statute contains an intelligible principle, Congress merely confers bounded discretion to promulgate regulations that accomplish the ends articulated by Congress.[41] In other words, Congress authorizes executive agencies to "fill up the details" of a statutory scheme.[42]

This lax intelligible principle standard recognizes that "no statute can be entirely precise," meaning that "some judgments involving policy considerations . . . must be left to the officers executing the law and to the judges applying it."[43] The Supreme Court 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."[44] The Court struck down two federal statutes that failed the intelligible principle test in 1935,[45] but it has not utilized the doctrine since, which has led many to conclude that the public nondelegation doctrine is dead.[46] Cass Sunstein, who served as Administrator of the Office of Information and Regulatory Affairs for President Barack Obama's administration, quipped that the nondelegation doctrine "has had one good year, and 211 bad ones (and counting)."[47]

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40. Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) (slip op. at 13–14 n.4) (citing Art. II, § 1, cl. 1); *see also Field*, 143 U.S. at 693 ("Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law.").

41. *But see* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION 10 (1993) ("[D]elegation allows legislators to claim credit for the benefits which a regulatory statute promises yet escape the blame for the burdens it will impose, because they do not issue the laws needed to achieve those benefits. The public inevitably must suffer regulatory burdens to realize regulatory benefits, but the laws will come from an agency that legislators can then criticize for imposing excessive burdens on their constituents.").

42. Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

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

44. *Id.* at 416 (Scalia, J., dissenting).

45. *See* Panama Ref. Co. v. Ryan, 293 U.S. 388, 430 (1935) (finding that a delegation to the President failed to include an "intelligible principle" for regulating the transportation of petroleum products in violation of state law); A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935) (striking down the delegation of authority to approve "codes of fair competition").

46. *See* Fed. Power Comm'n v. New Eng. Power Co., 415 U.S. 345, 352–53 (1974) (concluding that the public nondelegation doctrine "has been virtually abandoned by the Court for all practical purposes"); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1630 (2009) ("[T]he nondelegation doctrine is largely moribund at the level of constitutional law."). *But see* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (arguing that the public nondelegation doctrine continues to play an important role as an avoidance canon during statutory interpretation); Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 646 (1980) (construing the statute to avoid a "'sweeping delegation of legislative power'" that might have violated the public nondelegation doctrine).

47. Sunstein, *supra* note 46, at 322.

B. The Private Nondelegation Doctrine

1. History of the Private Nondelegation Doctrine

Although the private nondelegation doctrine is thought to have originated in the *Carter Coal* decision, the Supreme Court first discussed the concept one year before in *A.L.A. Schechter Poultry Corporation v. United States.*[48] *Schechter Poultry* involved a challenge to Congress's decision to grant the President authority to approve "codes of fair competition" proposed by trade or industry groups.[49] The Court held that this authorization was unconstitutional because it gave the President "unfettered discretion to make whatever laws he thinks may be needed."[50] While it is unclear whether it was central to its holding, the Court was clearly concerned with the ability of private parties to wield legislative power:

> But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? . . . The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.[51]

Scholars disagree as to whether this language was dictum or an extension of the public nondelegation doctrine.[52]

One year later, in *Carter Coal*, the Supreme Court struck down a statute that allowed one group of coal producers to set binding regulations applicable to the entire industry.[53] Justice George Sutherland, writing for the majority, explained that the regulation of coal production was "necessarily a governmental function," and that Congress's transfer of regulatory power to a private entity represented "legislative delegation in its most obnoxious form."[54] He continued by stating that the delegation was "so clearly arbitrary, and so clearly a denial of rights safeguarded by the Due Process Clause of the Fifth Amendment, that it is

48. 295 U.S. 495 (1935).
49. *Id.* at 521–22.
50. *Id.* at 537–38.
51. *Id.* at 537.
52. *See* Volokh, *supra* note 26, at 958 (arguing the language was dictum); Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751, 763 (2013). *But see* A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 147 (2000) (concluding that "[t]he Schechter Poultry case involved both public and private delegation issues"); David N. Wecht, Note, *Breaking the Code of Deference: Judicial Review of Private Prisons*, 96 YALE L.J. 815, 824 (1987).
53. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).
54. *Id.*

unnecessary to do more than refer to decisions of this court which foreclose the question," citing *Schechter Poultry* as well as two due process cases.[55]

Nevertheless, in a series of cases following *Carter Coal*, the Court allowed private parties to participate in—but not control—the regulatory process. First, the Court held that Congress may give private entities the power to determine whether government regulations will go into effect. For example, in *Currin v. Wallace*, the Supreme Court upheld a regulatory scheme that authorized the Secretary of Agriculture to impose binding standards on tobacco sales in certain markets only if two-thirds of growers in the affected market approved the regulations.[56] The Court expressly distinguished *Carter Coal* by reasoning that "[t]his is not a case where a group of producers may make the law and force it upon a minority. . . . Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application."[57] Accordingly, the Court held that the growers' approval did not "involve any delegation of legislative authority."[58] In a case involving a similar statute, *United States v. Rock Royal Co-Operative, Inc.*, the Court reaffirmed this holding.[59]

In the following term, the Court allowed private entities to participate in determining the content of binding regulations in *Sunshine Anthracite Coal Company v. Adkins*.[60] In *Adkins*, local coal producers serving on regional coal boards acted "as an aid" to the government agency by proposing regulations setting prices for coal producers.[61] In contrast to *Carter Coal*, the coal boards functioned "subordinately" to the government agency, which had "authority and surveillance over the activities" of the boards.[62] Because a government agency had the power to modify the proposed regulations and determine the final prices, the Court held that Congress had not "delegated its legislative authority to the industry."[63]

After *Adkins*, the private nondelegation doctrine articulated in *Carter Coal* was dormant until the D.C. Circuit's attempt to revive it in 2013.[64]

2. The Attempted Revival of the Private Nondelegation Doctrine

In *Association of American Railroads v. Department of Transportation*, the D.C. Circuit struck down a statute that it determined impermissibly delegated

55. *Id.* at 311–12.
56. 306 U.S. 1, 15–16 (1939).
57. *Id.*
58. *Id.* at 15.
59. 307 U.S. 533, 577–78 (1939) (upholding a statute that authorized the Secretary of Agriculture to fix milk prices only if two-thirds of milk producers consented to the price).
60. 310 U.S. 381, 388 (1940).
61. *Id.*
62. *Id.* at 399.
63. *Id.*
64. Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1438–40 (2003) ("[W]hile *Carter*'s constitutional prohibition on private delegations thus remains alive in theory, it is all but dead in practice.").

regulatory authority to a private entity.[65] In section 207 of the Passenger Rail Investment and Improvement Act, Congress granted Amtrak and the Federal Railroad Administration (FRA)[66] authority to "jointly develop" metrics and standards to evaluate the quality of services of passenger railways.[67] Under section 207(d), if the FRA and Amtrak disagreed on the content of these metrics and standards, either party could petition the Surface Transportation Board to "appoint an arbitrator to assist the parties in resolving their disputes through binding arbitration."[68] The Association of American Railroads (Association) brought suit against the Department of Transportation and FRA, alleging that section 207 was unconstitutional. The Association argued that section 207 violated the Fifth Amendment Due Process Clause by giving governmental power to an interested private party and violated the private nondelegation doctrine by placing legislative authority in a private entity.[69] The district court granted summary judgment in favor of the government,[70] and the Association appealed to the D.C. Circuit.[71]

On appeal, the court opened its discussion by citing *Carter Coal* to support the proposition that "[f]ederal lawmakers cannot delegate regulatory authority to a private entity."[72] The court distinguished between the legitimate power of Congress to delegate regulatory authority to executive agencies (so long as it provides an intelligible principle) and the unauthorized delegation of regulatory authority to a private entity.[73] The court explained that "[e]ven an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority" because "the Constitution commits no executive power" to private entities.[74]

After summarizing the private nondelegation doctrine, the court analyzed (1) "how much involvement . . . a private entity [may] have in the administrative process before its advisory role trespasses into an unconstitutional delegation"[75] and (2) whether Amtrak should be considered a public entity or private corporation.[76]

65. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 673–77 (D.C. Cir. 2013).

66. The FRA is a federal agency within the U.S. Department of Transportation. OFFICE OF THE FED. REGISTER, *supra* note 20, at 285.

67. *Am. R.Rs.*, 721 F.3d at 668.

68. *Id.* at 673 (quoting section 207(d) of the Passenger Railroad Investment and Improvement Act of 2008) (internal quotation marks omitted).

69. *Id.* at 670.

70. Ass'n of Am. R.Rs. v. Dep't of Transp., 865 F. Supp. 2d 22, 35 (D.D.C. 2012), *rev'd sub nom.* Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666 (D.C. Cir. 2013), *vacated and remanded sub nom.* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015).

71. *Am. R.Rs.*, 721 F.3d at 666.

72. *Id.* at 670.

73. *Id.*

74. *Id.* at 670–71.

75. *Id.* at 671.

76. *Id.* at 674.

First, to determine how much involvement a private entity may have in the regulatory process before that involvement becomes unconstitutional, the court compared the regulatory power granted in section 207 to the level of control exercised by private parties in *Currin* and *Adkins*:

> Like the private parties in *Currin*, Amtrak has an effective veto over regulations developed by the FRA. And like those in *Adkins*, Amtrak has a role in filling the content of regulations. But the similarities end there. The industries in *Currin* did not craft the regulations, while *Adkins* involved no private check on an agency's regulatory authority. Even more damningly, the agency in *Adkins* could unilaterally change regulations proposed to it by private parties, whereas Amtrak enjoys authority equal to the FRA.[77]

The court stated that "just because two structural features raise no constitutional concerns independently does not mean Congress may combine them in a single statute."[78] Accordingly, the court concluded that the control given to Amtrak through section 207 was "close to the blatantly unconstitutional scheme in *Carter Coal*."[79]

Next, the court evaluated whether Amtrak was a public or private entity.[80] The court noted that a multitude of facts supported the government's argument that Amtrak was a public entity.[81] First, Amtrak's Board of Directors included the Secretary of Transportation, seven presidential appointees, and the President of Amtrak who was selected by the other members.[82] Furthermore, Amtrak was subject to the Freedom of Information Act (FOIA).[83] Finally, the government owned over 99 percent of Amtrak.[84]

On the other hand, the court identified a number of facts that indicated Amtrak should be considered a private entity.[85] First, the statute creating Amtrak stated that it "shall be operated and managed as a for-profit corporation" and that it "is not a department, agency, or instrumentality of the United States Government."[86] Furthermore, Amtrak's FOIA Handbook stated that it was a

77. *Id.* at 671.

78. *Id.* at 673 ("*Free Enterprise Fund* deemed invalid a regime blending two limitations on the President's removal power that, taken separately, were unproblematic: the establishment of independent agencies headed by principal officers shielded from dismissal without cause . . . and the protection of certain inferior officers from removal by principal officers directly accountable to the President . . . .").

79. *Id.*

80. *Id.* at 674.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *See id.* Each preferred share of Amtrak stock is convertible to ten shares of common stock. *Id.* Thus, if the government converted all of its preferred stock, it would own 99.2 percent of Amtrak.

86. *Id.* (citing 49 U.S.C. § 24301(a) (2012)).

"private corporation operated for profit."[87] Lastly, Amtrak's website resided at a ".com" rather than a ".gov" web address.[88]

Given the conflicting facts, the court evaluated Amtrak in light of the "functional purposes [served by] the public-private distinction"—democratic accountability and the belief that public entities, unlike private ones, act for the public good.[89] Despite the Supreme Court's ruling in *Lebron v. National Railroad Passenger Corporation* that Amtrak was "part of the Government for purposes of the First Amendment,"[90] the court concluded that "Amtrak is a private corporation with respect to Congress's power to delegate regulatory authority."[91] As a result, the court struck down the statute as "an unconstitutional delegation of regulatory power to a private party" without reaching the question of whether the statute violated due process.[92]

Although the D.C. Circuit made a determined effort to revive the private nondelegation doctrine, the resurrection was incomplete. The Supreme Court granted certiorari and found that Amtrak was not a private entity.[93] The Court's opinion focused on the government's statutorily mandated supervision over Amtrak and its control over Amtrak's stock and Board of Directors.[94] The Court also noted that Amtrak was required to pursue a number of goals defined by statute, that the government directed its day-to-day operations, and that its survival depended on federal support.[95] Because the Court found Amtrak to be a governmental entity, it did not address the private nondelegation doctrine. Justices Alito and Thomas, however, wrote concurrences that supported the revival of a private nondelegation doctrine rooted in the Vesting Clauses of the Constitution.[96]

II.
CARTER COAL'S LEGAL THEORIES FOR LIMITING DELEGATIONS OF REGULATORY POWER TO PRIVATE ENTITIES

The series of post-*Carter Coal* cases—*Currin*, *Rock Royal*, and *Adkins*—allowing private participation in the regulatory process spurred debate as to the basis of *Carter Coal*'s holding. In *Carter Coal*, the Court described the delegation both as "a denial of rights safeguarded by the due process clause of the Fifth Amendment" and as "legislative delegation in its most obnoxious

87. *Id.* at 675.
88. *Id.*
89. *Id.*
90. 513 U.S. 374, 400 (1995).
91. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 677 (D.C. Cir. 2013).
92. *Id.* at 673–77.
93. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1226 (2015) ("[F]or purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity.").
94. *Id.* at 1231–32.
95. *Id.* at 1232.
96. *See id.* at 1237–38 (Alito, J., concurring); *id.* at 1252–53 (Thomas, J., concurring in the judgment).

form."[97] The Court cited due process cases,[98] but it also cited *Schechter Poultry*—a nondelegation case that specifically expressed the view, albeit arguably in dictum, that the nondelegation doctrine prohibited the exercise of regulatory power by private parties.[99]

Various judges and legal scholars have differed in their interpretations of *Carter Coal*'s holding.[100] For example, Justice Thurgood Marshall[101] and Professor Eric Posner[102] interpreted *Carter Coal* to be a nondelegation case. However, Justice Antonin Scalia[103] and Professor Alexander Volokh[104] stated that *Carter Coal*'s holding was based on due process. Meanwhile, Justice William Brennan[105] and Paul Verkuil[106] treated *Carter Coal* as both a nondelegation and due process decision.

Carter Coal's ambiguous holding has led to a misguided intermingling of the due process and nondelegation doctrines.[107] In *Association of American Railroads v. Department of Transportation*, the D.C. Circuit indicated that the characterization of the inquiry as either nondelegation or due process did not matter because "neither court nor scholar has suggested a change in the label would effect a change in the inquiry."[108] However, the nondelegation doctrine

97. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

98. *Id.*

99. *Id.*; A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521–22 (1935).

100. *See* Volokh, *supra* note 26, at 973–80.

101. Nat'l Cable Television Ass'n, Inc. v. United States, 415 U.S. 352, 354 n.2 (1974) (Marshall, J., concurring in the result and dissenting) ("The last time that the Court relied upon *Schechter Poultry* was in *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).").

102. Posner & Vermeule, *supra* note 36, at 1757.

103. Synar v. United States, 626 F. Supp. 1374, 1383 n.8 (D.D.C.), *aff'd sub nom.* Bowsher v. Synar, 478 U.S. 714 (1986) ("The Court [in *Carter Coal*] denounced that provision as 'legislative delegation in its most obnoxious form,' but the Court's holding appears to rest primarily upon denial of substantive due process rights."); Transcript of Oral Argument at 37, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (No. 13-1080).

104. Volokh, *supra* note 26, at 973–80.

105. McGautha v. California, 402 U.S. 183, 272 n.21 (1972) (Brennan, J., dissenting) ("As applied to the Federal Government, the [private nondelegation] doctrine appears to have roots both in the constitutional requirement of separation of powers . . . and in the Due Process Clause of the Fifth Amendment.").

106. Paul R. Verkuil, *Public Law Limitations on Privatization of Government Functions*, 84 N.C. L. REV. 397, 422 (2006) ("The Court held the delegation arbitrary both under Article I of the Constitution and the Due Process Clause of the Fifth Amendment.").

107. In addition to due process and nondelegation, several state courts have supported private nondelegation doctrines under the theory that delegations to private entities are inconsistent with a republican form of government. *See* Lawrence, *supra* note 26, at 672–94; Texas Boll Weevil Eradication Found., Inc. v. Lewellen, 952 S.W.2d 454, 469 (Tex. 1997) (striking down a delegation to a private entity because "the basic concept of democratic rule under a republican form of government is compromised when public powers are abandoned to those who are neither elected by the people, appointed by a public official or entity, nor employed by the government"); Hetherington v. McHale, 329 A.2d 250, 253 (Pa. 1974) (invalidating a private delegation of power to make appointments to a government board because "[a] fundamental precept of the democratic form of government [e]mbedded in our Constitution is that the people are to be governed only by their elected representatives").

108. 721 F.3d 666, 671 n.3 (D.C. Cir. 2013).

and the due process approach have differing purposes, inquiries, and ramifications. While both are implicated when Congress delegates regulatory power to private groups, nondelegation and due process should be treated as distinct legal theories.[109] The discussion below distinguishes the due process theory from the private nondelegation doctrine, highlighting the important and distinct structural protections provided by the Constitution's Vesting Clauses.

A. The Private Nondelegation Doctrine

1. Separation-of-Powers Principles Support the Private Nondelegation Doctrine

Both the public and private nondelegation doctrines are driven by separation-of-powers principles, which restrict the ability of any branch to aggrandize power beyond its constitutional limitations or to encroach upon the powers of another branch.[110] In theory, the nondelegation doctrines prevent Congress from delegating legislative power in a manner inconsistent with the constitutional framework.[111] These constraints maintain the structural integrity of the federal government and ensure that Congress makes fundamental policy decisions.[112]

Some scholars have argued that forbidding delegations to entities outside of the three branches of the government does not implicate the same separation-of-powers concerns that underlie delegations to executive agencies.[113] Proponents of this theory contend that private delegations and separation-of-powers principles actually serve the same goal because delegating to private entities disperses power rather than concentrating it.[114] But this view fails to recognize that governmental authority exercised by delegatees outside the federal government may influence the balance of powers within the

109. *See* Volokh, *supra* note 26, at 973 ("Labels don't always matter, though in this case, non-delegation and due process doctrines have quite different implications.").

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

111. *But see* Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power.").

112. Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst., 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment) ("When fundamental policy decisions underlying important legislation about to be enacted are to be made, the buck stops with Congress and the President insofar as he exercises his constitutional role in the legislative process."); Field v. Clark, 143 U.S. 649, 692 (1892) ("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.").

113. *See* Lawrence, *supra* note 26, at 665–66.

114. *See id.*; *see also* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952) (stating that the purpose of separating the powers of government was to "diffus[e] power the better to secure liberty").

government.[115] Serious separation-of-powers concerns arise with delegations to entities outside the federal government because of "the possible lack of executive branch supervision, the concomitant potential for increased congressional power, and the resultant fear of arbitrary, unreflective governance."[116]

Dean and Professor of Law Harold J. Krent thoroughly explores these concerns in his article *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*.[117] Krent points out that private delegations of regulatory power undermine the executive branch by allowing Congress to shift federal power away from federal officials who are appointed by and responsible to the President.[118] In addition to noting the encroachment of the power of the executive branch, Krent recognizes that "[d]elegating authority outside the federal government may permit Congress to exercise both a de facto appointment and removal authority."[119] This power functionally allows Congress to both create and fill offices, which is "the very combination of powers specifically withheld from [Congress] under the Constitution."[120]

2. The Vesting Clauses Prohibit the Use of Governmental Power by Private Entities

Article I, Section 1 of the U.S. Constitution, which vests "[a]ll legislative Powers" in Congress, bars the delegation of legislative power.[121] Viewed in isolation, the language in Article I does not provide any basis for distinguishing between private entities and executive agencies.[122] There could be "different interpretations of legislative power, and different interpretations of how far Congress can share that power," but the text of Article I itself does not "limit the recipient of delegated legislative power to federal officials."[123] Thus, some

115. Krent, *supra* note 34, at 70; *see also* JULIAN KU & JOHN YOO, TAMING GLOBALIZATION: INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 74 (2012) (noting that delegations to international organizations "create equally difficult problems with the separation of powers").

116. Krent, *supra* note 34, at 70.

117. *Id.* at 72–90.

118. *Id.* at 72–74.

119. *Id.* at 78.

120. *Id.*

121. Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1403 (2000) ("For almost two centuries, the Supreme Court has understood [the Article I Vesting Clause] to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking powers to executive or administrative officials."). *But see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487–90 (2001) (Stevens, J., concurring in part and concurring in the judgment) (arguing that the Vesting Clauses "do not purport to limit the authority of either recipient of power to delegate authority to others").

122. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2168 (2004) ("I cannot see how Article I, Section 1 can be interpreted to distinguish between different recipients of delegated legislative power.").

123. *Id.*

scholars have concluded that courts should apply the public nondelegation doctrine's intelligible principle test irrespective of the recipient of the delegated power.[124]

However, in *Department of Transportation*, Justice Thomas clarified that "[a]lthough no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called 'private nondelegation doctrine' flows logically from the three Vesting Clauses."[125] Justice Thomas went on to explain that "[b]ecause a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses . . . categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government."[126]

Justice Alito echoed these themes in his concurrence.[127] He stated that it is difficult to enforce the public nondelegation doctrine because "the other branches of Government have vested powers of their own that can be used in ways that resemble lawmaking. . . . When it comes to private entities, however, there is not even a fig leaf of constitutional justification" because the Constitution does not vest legislative or executive power in private entities.[128]

Justice Scalia's dissent in *Mistretta* rested on similar principles. Justice Scalia posited that the theory of lawful delegation is based on the premise that "a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action."[129] He explained that the Court's cases involving the public nondelegation doctrine evaluate "whether the degree of generality contained in the *authorization for exercise of executive or judicial powers* in a particular field is so unacceptably high as to amount to a delegation of legislative powers."[130] But when Congress authorizes entities outside of the federal government to promulgate regulations, "[i]t is irrelevant whether the standards are adequate, because they are not standards related to the exercise of executive or judicial powers."[131] Accordingly, Justice Scalia concluded that the majority opinion set "undemocratic precedent" because the recipient of the delegated regulatory power was "not one of the three Branches of Government."[132] Importantly, the majority opinion did not address the delegation of power outside of the

124. *See* Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 193 (1989); Volokh, *supra* note 26, at 961 (stating that "public and private delegations are both judged by the same 'intelligible principle' standard").

125. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment).

126. *Id.*

127. *Id.* at 1237 (Alito, J., concurring).

128. *Id.*

129. Mistretta v. United States, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (emphasis omitted).

130. *Id.* at 419 (emphasis added and omitted).

131. *Id.* at 420.

132. *Id.* at 422.

government because it placed the United States Sentencing Commission within the judicial branch.[133]

In short, the Vesting Clauses and "the Constitution's implicit design principle limiting the federal government to three branches" prevent private parties and international organizations from exercising governmental power.[134]

3. The Private Nondelegation Doctrine Limits the Delegation of Regulatory Power because Regulating Is a Governmental Function

The private nondelegation doctrine applies to delegations of regulatory power. While the Vesting Clauses limit the exercise of federal power to the three branches, private parties can presumably be contracted to provide goods and services to the government.[135] The design principle forbidding delegations to nongovernmental parties seemingly extends only to "governmental functions."[136] Otherwise, the government could not outsource any task without running afoul of the private nondelegation doctrine.

There are no clear lines defining the boundaries of governmental functions.[137] Some scholars have drawn a line between what they refer to as "steering" and "rowing."[138] Rowing (services) can be outsourced to the private sector, but steering (policy decisions) cannot.[139] Others have argued that, in practice, private implementation cannot be clearly distinguished from

133. *Id.* at 384–91.

134. *See* Merrill, *supra* note 122, at 2168.

135. Privatization takes many different forms. Private entities have operated public airports, parking garages, trash collection services, public schools, emergency call centers, homeless shelters, welfare programs, and prisons. *See* Jody Freeman, *The Contracting State*, 28 FLA. ST. U. L. REV. 155, 164–69 (2000) (distinguishing the outsourcing of traditional government powers from the outsourcing of contracts for goods and services); Metzger, *supra* note 64, at 1380–94; Dru Stevenson, *Privatization of Welfare Services: Delegation by Commercial Contract*, 45 ARIZ. L. REV. 83, 85 (2003).

136. *See* Freeman, *supra* note 135, at 164–69; Metzger, *supra* note 64, at 1380–94; Stevenson, *supra* note 135, at 85; *see also* Ronald A. Cass, *Privatization: Politics, Law, and Theory*, 71 MARQ. L. REV. 449, 498 (1988) ("The necessary linchpin of the generic anti-delegation argument is a notion of the functions that are essentially governmental and, hence, nondelegable."). *But see* Lawrence, *supra* note 26, at 666 (arguing that the Vesting Clauses cannot support some "delegations while condemning others").

137. *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 539 (1985) (describing the difficulty of distinguishing between private and governmental functions); Harold H. Bruff, *Public Programs, Private Deciders: The Constitutionality of Arbitration in Federal Programs*, 67 TEX. L. REV. 441, 459 (1989) (stating that there is a "notoriously conclusory distinction between inherently 'governmental' functions, which must be kept in official hands, and 'proprietary' functions, which may be exercised privately").

138. DAVID OSBORNE & TED GAEBLER, REINVENTING GOVERNMENT: HOW THE ENTREPRENEURIAL SPIRIT IS TRANSFORMING THE PUBLIC SECTOR 26–48 (1992).

139. *Id.*

governance and policy management.[140] Ultimately, there is no consensus on a model for defining the activities that the government must perform.[141]

Fortunately, the Supreme Court has explicitly stated that promulgating regulations is a governmental function. In *Carter Coal*, the Court declared, "the difference between producing coal and *regulating* its production is, of course, fundamental. The former is a private activity; *the latter is necessarily a governmental function* . . . ."[142]

Justice Alito's concurrence in *Department of Transportation v. Association of American Railroads* seemingly adopted this conclusion:

> [I]t raises "[d]ifficult and fundamental questions" about "the delegation of Executive power" when Congress authorizes citizen suits. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 197 (2000) (Kennedy, J., concurring). A citizen suit to enforce existing law, however, is nothing compared to delegated power to create new law. By any measure, handing off regulatory power to a private entity is "legislative delegation in its most obnoxious form."[143]

Without explicitly stating that regulating is governmental, this language implies that Justice Alito believes that it is.[144]

History supports *Carter Coal*'s conclusion that regulating is a governmental function. Early Congresses passed statutes that required administrators to fill in the details through rulemaking.[145] Congress delegated this regulatory power to the President and others within the federal government, rather than private parties or international organizations. For example, Congress authorized the President to prescribe rules and regulations governing licenses to trade with Indian tribes.[146] The statue required any person trading with Indian tribes to obtain a license to trade and granted superintendents of the Indian Department the power to issue such licenses.[147] The licensees were "governed in all things touching the said trade and intercourse, by such rules and regulations as the President shall prescribe."[148]

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140. *See* Metzger, *supra* note 64, at 1395.

141. *See id.* at 1396–97 ("Identifying what constitutes government power is a notoriously hazardous enterprise, and little agreement exists on where the boundaries of government power as opposed to private power lie."); Stevenson, *supra* note 135, at 122 n.167.

142. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936) (emphasis added).

143. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237–38 (2015) (Alito, J., concurring).

144. *See id.*

145. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1303 (2006).

146. An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790) (expired 1793).

147. *Id.* § 1.

148. *Id.*

While the majority of delegations during the early republic were to the President or officers squarely within the executive branch,[149] it could be argued that early Congresses did not think of regulating as exclusively a governmental function because the First Bank of the United States participated in the regulation of our nation's fiscal policies. From 1791 to 1811, the First Bank controlled our nation's money supply by adjusting the availability of credit[150] and acting as a "watchdog over state banks and the economy."[151] But the First Bank's role in the regulatory process was compatible with the Vesting Clauses and the Constitution's implicit design principle for two reasons.

First, many attributes of the First Bank indicate that it was not a private entity.[152] For one, its charter of incorporation required it to render weekly reports of its condition to the Secretary of the Treasury.[153] Furthermore, the First Bank consistently "subordinated the earning of swollen profits to the maintenance of stability in public and private finance."[154] Indeed, on petition for renewal of the First Bank's charter, long-time bank director Sam Breck stated "that several of the Offices of discount & deposit [had] been Established at the request of the Secretary of the Treasury of the United States in order to aid the Fiscal operations thereof and without any expectation of benefit to the Institution."[155] Given the government's extensive oversight and practical operational control, the First Bank of the United States was likely a public entity.

And even if the First Bank of the United States was a private entity, it merely acted as an aid to the U.S. Department of Treasury and thus was not regulating.[156] After an extensive analysis of the First Bank's records, Professor David Cowen characterized the relationship between the Treasury and the First

149. *See, e.g.*, An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, § 1, 1 Stat. 95 (1789) (stating that pensions shall be paid "to the invalids who were wounded and disabled during the late war . . . under such regulations as the President of the United States may direct"); An Act to Establish the Post-Office and Post Roads Within the United States, ch. 7, § 3, 1 Stat. 232, 234 (1792) (granting the Postmaster General the "power to prescribe such regulations to the deputy postmasters, and others employed under him, as may be found necessary, and to superintend the business of the department").

150. *See generally* DAVID JACK COWEN, THE ORIGINS AND ECONOMIC IMPACT OF THE FIRST BANK OF THE UNITED STATES, 1791–1797 (2000).

151. *See id.* at 142.

152. In 1824, the Supreme Court held that the Second Bank of the United States was a "public office" that could not be taxed, *see* Osborn v. Bank of the United States, 22 U.S. (9 Wheat.) 738, 774 (1824), but the Court never decided whether the First Bank, which was structured differently, was a public entity.

153. An Act to Incorporate the Subscribers to the Bank of the United States, ch. 10, § 7, 1 Stat. 191, 195 (1791). In 1892, Charles Dunbar presented evidence that the First Bank of the United States made reports to the Treasury Department in compliance with this requirement. Charles F. Dunbar, *Accounts of the First Bank of the United States*, 6 Q.J. ECON. 471, 471–74 (1892).

154. James O. Wettereau, *New Light on the First Bank of the United States*, PA. MAG. HIST. & BIOGRAPHY 263, 272 (1937).

155. COWEN, *supra* note 150, at 147 (quoting Letter from Samuel Breck to Alexander J. Dallas (1810), *in* BRECK COLLECTION—HISTORICAL SOCIETY OF PENNSYLVANIA).

156. *Id.*

Bank as analogous to that between a coach and a quarterback: "The coach will call the play, the quarterback takes responsibility for execution on the field."[157] Ultimately, Cowen concluded that "the Treasury formulated policy, the [First Bank of the United States] executed it."[158] Because the First Bank merely implemented fiscal policies formulated by the U.S. Department of Treasury,[159] its participation in the regulatory process was consistent with the Vesting Clauses and the Constitution's implicit design principle.[160]

In conclusion, the design principle prohibiting delegations to nongovernmental parties likely extends only to "governmental functions." While there are no clear lines defining the boundaries of "governmental functions," the Court in *Carter Coal* explicitly stated that "regulating . . . is necessarily a governmental function."[161] A historical analysis of congressional delegations during the early republic supports *Carter Coal*'s conclusion.

B. Due Process Approach

Some scholars have asserted that the "doctrine forbidding delegation of public power to private groups is, in fact, rooted in a prohibition against self-interested regulation that sounds more in the Due Process Clause than in the separation of powers."[162] Those adhering to this view believe that the Court in *Carter Coal* found the authorizing statute unconstitutional because the delegation of governmental power to persons or entities that have incentives to exercise such power for their own ends is inconsistent with basic notions of fairness.[163] Thus, the due process approach focuses on fairness rather than structural boundaries.[164]

Given this underlying fairness rationale, the due process inquiry differs from a nondelegation inquiry rooted in the Constitution's Vesting Clauses. A court following the due process approach determines whether the delegatee exercises governmental powers in a neutral and disinterested manner.[165] The inquiry does not turn on whether the recipient of regulatory power is categorized

157. *Id.*

158. *Id.* at 151.

159. *Id.*

160. The threshold of permissible regulatory control by private entities is evaluated further in Part III.C.

161. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

162. Froomkin, *supra* note 52, at 153; *see* Lawrence, *supra* note 26, at 672–94; Liebmann, *supra* note 26, at 660–67 (arguing that "the applicable constitutional provision . . . is the due process clause, not a vague 'nondelegation' doctrine"); Volokh, *supra* note 26, at 941–55 (referring to the due process approach as the "Private Due Process Doctrine").

163. *See* Froomkin, *supra* note 52, at 153 ("The evil that the *Carter Coal* doctrine seeks to avoid is that of a private person being a judge or regulator, especially where there is a possible conflict of interest."); Volokh, *supra* note 26, at 946.

164. *See* Volokh, *supra* note 26, at 946.

165. *Carter Coal*, 298 U.S. at 311 (stating that delegating regulatory power to "persons whose interests may be and often are adverse to the interests of others in the same business" violates the Due Process Clause).

as public or private.[166] Indeed, during oral argument for *Department of Transportation*, Justice Scalia stated that under a due process theory he did not "see how it ma[de] any difference whether you call[ed] [Amtrak] governmental or not."[167]

The scope and protections of the due process approach differ from those of the private nondelegation doctrine. Due process limits delegations at both the federal and state level while the private nondelegation doctrine only applies to the federal government.[168] Furthermore, the Due Process Clause can support a claim for money damages against specific individuals under 42 U.S.C. § 1983 or *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*.[169]

Despite their many differences, the due process approach and the private nondelegation doctrine both rest on the same tenuous foundation—*Carter Coal*. In the due process context, *Carter Coal* could arguably be lumped in with expansive due process holdings, such as *Lochner v. New York*[170] and its progeny, that did not survive the 1930s.[171] But Alexander Volokh argues that *Carter Coal*'s due process holding is still good law.[172] To support his position, Volokh relies primarily on post-*Lochner* cases involving the issuing of permits and the initiation of similar adjudications by private parties,[173] but the due process principles appear to be equally applicable in the rulemaking context. Ultimately, the viability of a due process approach to invalidating the delegation of regulatory power remains unclear. Because the D.C. Circuit in *Association of American Railroads v. Department of Transportation* ruled on nondelegation grounds, the Supreme Court did not address the validity of the due process theories that the Association of American Railroads asserted.[174]

166. The due process approach is not limited to private parties. *See, e.g.*, Gibson v. Berryhill, 411 U.S. 564, 578–79 (1973) (finding that the Due Process Clause does not allow individuals on government board to utilize government authority in an area where they have pecuniary interests); Ward v. Village of Monroeville, 409 U.S. 57, 60 (1972) (barring a similar scheme in which the mayor adjudicated traffic violations that were payable to the village); Tumey v. Ohio, 273 U.S. 510, 532 (1927) (invalidating a statutory scheme in which the mayor had a financial stake in the outcome under the Due Process Clause).

167. Transcript of Oral Argument at 37, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (No. 13-1080). Throughout oral arguments, Justice Scalia indicated that he believed this was a due process inquiry, which is consistent with his statement in *Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986).

168. Volokh, *supra* note 26, at 973; *see also* Wecht, *supra* note 52, at 825 n.57.

169. *See* 403 U.S. 388 (1971); *See* Volokh, *supra* note 26, at 1007.

170. 198 U.S. 45 (1905).

171. *See* Froomkin, *supra* note 52, at 143 ("Notoriously used by a reactionary court to strike down elements of FDR's New Deal reforms, the constitutional doctrine preventing excessive delegations carries some heavy baggage."); Transcript of Oral Argument at 44, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (No. 13-1080) (Justice Breyer stating that he always put *Carter Coal* "in the same box as *Lochner*").

172. Volokh, *supra* note 26, at 944 (claiming that "the due process rationale for striking down delegations of regulatory authority to private parties—in particular competitors—remain[s] alive and well").

173. *Id.* at 940–50.

174. *Am. R.Rs.*, 135 S. Ct. at 1234.

III.
A REGULATORY POWER NONDELEGATION FRAMEWORK

Having reviewed the constitutional basis of the private nondelegation doctrine, this Note continues by presenting a framework for applying the doctrine when Congress authorizes an entity, public or private, to promulgate regulations. While the framework applies to all congressional delegations of regulatory power, this Section focuses primarily on the inquiries associated with delegations to private parties and international organizations.

Step 1—Intelligible Principle: First, courts must evaluate whether Congress has provided an intelligible principle to guide the exercise of the regulatory authority. If the statute does not contain an intelligible principle, Congress has unconstitutionally delegated legislative power regardless of the recipient.[175] If Congress has provided an intelligible principle, the analysis moves on to Step 2.

Step 2—Public-Private Distinction: The second step requires courts to determine if the recipient of the authority is a public or private entity. If the recipient is an entity within the federal government, the delegation is constitutional under the nondelegation doctrine. In the majority of cases, the recipient will be squarely within the executive branch so the test collapses into the intelligible principle inquiry and no further analysis is required.[176] However, if the recipient is an entity outside of the federal government, the analysis proceeds to Step 3.

Step 3—Regulatory Power: Finally, courts must determine whether the private entity or international organization is impermissibly utilizing regulatory power. To that end, courts must evaluate whether the recipient of the delegated authority is "regulating" within the meaning of *Carter Coal*[177] or is merely participating in an advisory role in the regulatory process, which the Supreme Court permitted in several post-*Carter Coal* cases.[178]

The following Sections expand upon each of these three steps. The analysis focuses primarily on how much involvement a private entity may have in the promulgation of regulations before its participation becomes unconstitutional.

A. Step 1—Intelligible Principle Inquiry

First, courts evaluate whether Congress has provided an intelligible principle to guide the exercise of regulatory authority. As discussed in Part I, the

175. *See supra* Part I.A.

176. In *Association of American Railroads v. Department of Transportation*, the D.C. Circuit evaluated the extent of regulatory power exercised before determining whether Amtrak was a public or private entity. 721 F.3d 666, 671–74 (D.C. Cir. 2013). In this framework, the public-private distinction was moved to Step 2 because this three-part test is intended to apply to all authorizations of regulatory authority. Since Congress typically delegates to entities within the federal government, the proposed framework will often eliminate the need to complete the difficult regulatory power inquiry.

177. *See supra* Part II.A.3.

178. As a reminder, this Note generally references "private entities," but the analysis can be applied to international organizations that exercise authority pursuant to federal statute or treaty.

intelligible principle requirement is a low hurdle to overcome.[179] For example, in *Whitman v. American Trucking Associations*, the Supreme Court concluded that a statute directing the U.S. Environmental Protection Agency to set air quality standards "requisite to protect the public health" with an "adequate margin of safety" contained sufficient congressional guidance under the intelligible principle test.[180] The Court has also upheld statutes authorizing the promulgation of regulations in the "public interest."[181]

While these sweeping authorizations certainly look like delegations of legislative power, the Supreme Court has stated that "they are exercises of—indeed, under our constitutional structure they must be exercises of—the 'executive Power.'"[182] As Justice Harlan wrote in *Field v. Clark*, "[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."[183] This distinction is generally accepted, but some have questioned whether the intelligible principle test has sufficient teeth to ensure that agencies are limited to executing the law rather than making it.[184]

In any event, under the Supreme Court's current jurisprudence, if Congress has not provided an intelligible principle, it has unconstitutionally delegated legislative power, regardless of the recipient. But if Congress has provided an intelligible principle, the analysis proceeds to Step 2.

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179. *See supra* Part I.A.

180. 531 U.S. 457, 473–76 (2001).

181. *See, e.g.*, Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (holding that the public interest is a sufficient standard to guide delegation of power to the Federal Communications Commission); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (finding that the public interest has a "direct relation" to the authority to regulate transportation services).

182. Arlington v. FCC, 133 S. Ct. 1863, 1873 n.4 (2013) (citing Art. II, § 1, cl. 1); *see also* Field v. Clark, 143 U.S. 649, 693 (1892) ("Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law."). *But see* Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) (asserting that the Supreme Court "pretend[s] . . . that the authority delegated to [agencies] is somehow not 'legislative power'").

183. *Field*, 143 U.S. at 693–94 (internal quotations omitted).

184. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1246 (2015) (Thomas, J., concurring in the judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power."). Although not the focus of this Note, it should be noted that no court has indicated that the scope of the power granted affects the level of guidance required. In theory, there is nothing stopping Congress from turning over all of its power to the executive branch to implement in the "public interest."

B. Step 2—Public-Private Distinction

Next, courts must determine if the recipient of the authority is a public or private entity. The public-private distinction is notoriously difficult to discern.[185] In the early nineteenth century, the Supreme Court distinguished between public and private entities in a number of cases, including *Terrett v. Taylor*,[186] *Trustees of Dartmouth College v. Woodward*,[187] and *Osborn v. Bank of United States*.[188] Yet, after nearly two centuries and a slew of law review articles, the distinction between public and private entities remains hazy and ill-defined.[189]

Distinguishing between public and private entities has become increasingly arduous because entities often exist at the margins of the federal administrative state.[190] Professor Anne O'Connell has identified a multitude of "entities on the boundary between the federal government and the nongovernmental sectors," which she aptly labels "boundary organizations."[191] These organizations "straddle the federal-private boundary" as well as the "federal-foreign border."[192] Some "boundary organizations" appear more governmental in nature—for example, the U.S. Postal Service and the Tennessee Valley Authority. However, other entities exercising regulatory power, such as the Financial Industry Regulatory Authority, are less governmental.[193]

The analysis of Amtrak in *Department of Transportation* provides a perfect example of the difficulty of classifying these "boundary organizations." Certain characteristics make Amtrak seem private: the statute creating Amtrak states that it "is not a department, agency, or instrumentality of the United States Government";[194] Amtrak's FOIA Handbook states that it is a private corporation operated for profit; and Amtrak's website uses a commercial domain.[195] However, Amtrak has other attributes that are governmental: it is subject to FOIA;[196] almost all members of Amtrak's Board of Directors are presidential

185. *See generally* Bruff, *supra* note 137, at 458 ("The boundary of the public sector in American life has never been distinct."); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Michael Wells & Walter Hellerstein, *The Governmental-Proprietary Distinction in Constitutional Law*, 66 VA. L. REV. 1073 (1980).

186. 13 U.S. (9 Cranch) 43, 51–52 (1815).

187. 17 U.S. (4 Wheat.) 518, 559, 669–73 (1819).

188. 22 U.S. (9 Wheat.) 738, 860–61 (1824).

189. *See generally* Paul Brest, *State Action and Liberal Theory: A Casenote on* Flagg Brothers v. Brooks, 130 U. PA. L. REV. 1296 (1982); Horwitz, *supra* note 185; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

190. *See generally* O'Connell, *supra* note 15; KEVIN R. KOSAR, CONG. RESEARCH SERV., RL30533, THE QUASI GOVERNMENT: HYBRID ORGANIZATIONS WITH BOTH GOVERNMENT AND PRIVATE SECTOR LEGAL CHARACTERISTICS (2011).

191. O'Connell, *supra* note 15, at 855–61.

192. *Id.* at 857, 863–65.

193. *See* Roberta S. Karmel, *Should Securities Industry Self-Regulatory Organizations Be Considered Government Agencies?*, 14 STAN. J.L. BUS. & FIN. 151, 155–59 (2008).

194. Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 675 (D.C. Cir. 2013) (citing 49 U.S.C. § 24301(a) (2012)).

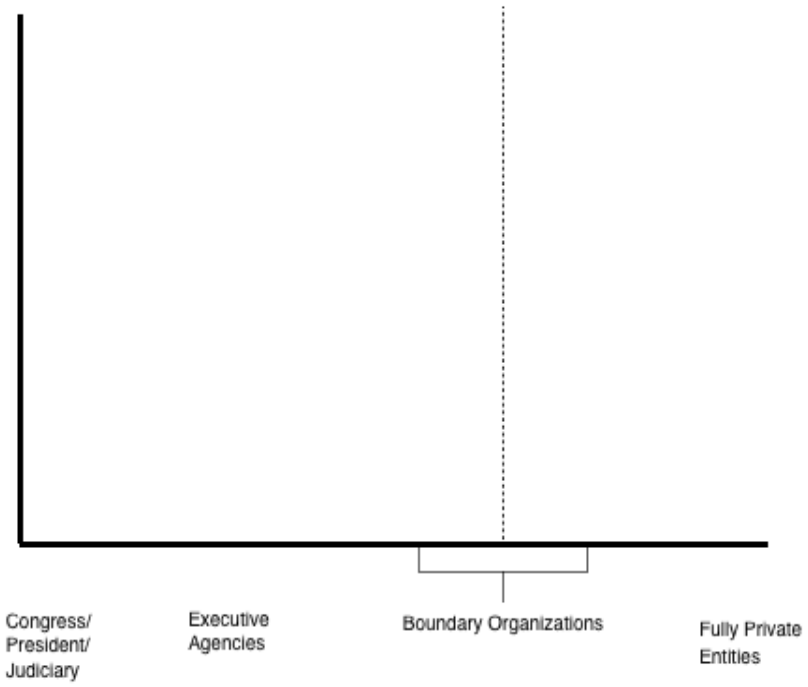
195. *Id.*

196. *Id.* at 674.

appointees;[197] and the government owns over 99 percent of Amtrak.[198] The D.C. Circuit and the Supreme Court considered these conflicting characteristics and reached different conclusions.[199]

Figure 1 illustrates the public-private distinction as a continuum. As entities progress along the horizontal axis from left to right, they become further removed from the control of the federal government and less politically accountable.

Figure 1: Linear Spectrum of Public-Private Distinction



The three branches of the federal government—Congress, the President, and the judiciary—are represented on the left of the horizontal axis at the origin. The Executive Office of the President and cabinet-level departments are slightly to the right of the origin. Independent regulatory commissions, such as the Federal Trade Commission or the Securities and Exchange Commission, likely fall to the left of the "boundary organizations" zone. The "boundary organizations" zone includes a multitude of "entities on the boundary between the federal government and the nongovernmental sectors."[200] Finally, entities on

197. *Id.*
198. *See id.*
199. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1231–34 (2015).
200. *See* O'Connell, *supra* note 15, at 855.

the far right of the horizontal axis are fully private entities and have no accountability to the federal government. Professor Julian Ku argues that "international organizations are less accountable than . . . private parties because they are far less likely to be subjected to effective executive oversight,"[201] suggesting that international organizations should also be placed to the far right on the horizontal axis. The defined line dividing public from private entities on the chart in no way indicates that such a bright line actually exists. The line merely illustrates that there is some hypothetical point at which public organizations are considered private, and vice-versa.

Courts must evaluate the characteristics of each delegatee to determine how the entity should be classified. If the delegatee is within the federal government (to the left of the public-private line), the statute is constitutional under the nondelegation doctrine. In the majority of cases, the delegatee will be within the executive branch so the test compresses to the current intelligible principle inquiry. However, if the delegatee is an entity outside of the federal government (to the right of the public-private line), the analysis continues to Step 3.

C. Step 3—Regulatory Power Analysis

Finally, courts must determine whether the recipient of the delegated authority is using "regulatory power," which would bring it within the ambit of the nondelegation doctrine.[202] *Carter Coal* held that "regulating . . . is necessarily a government function,"[203] but subsequent cases have indicated that private entities can assist a government agency in the regulatory process.[204] It remains unclear "how much involvement . . . a private entity [may] have in the administrative process before its advisory role trespasses into an unconstitutional delegation."[205]

The amount of private participation permitted under the private nondelegation doctrine depends on whether courts take a formalist or functionalist approach to separation of powers. Formalists generally adhere to the text, history, and structure of the Constitution, while functionalists rely on the broader purposes of the Constitution.[206] This Section provides overviews of formalist and functionalist approaches to the Step 3 regulatory-power inquiry.

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201. Ku, *supra* note 25, at 124.

202. *See Am. R.Rs.*, 721 F.3d at 671–74.

203. Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

204. *See supra* Part I.B.1.

205. *Am. R.Rs.*, 721 F.3d at 671.

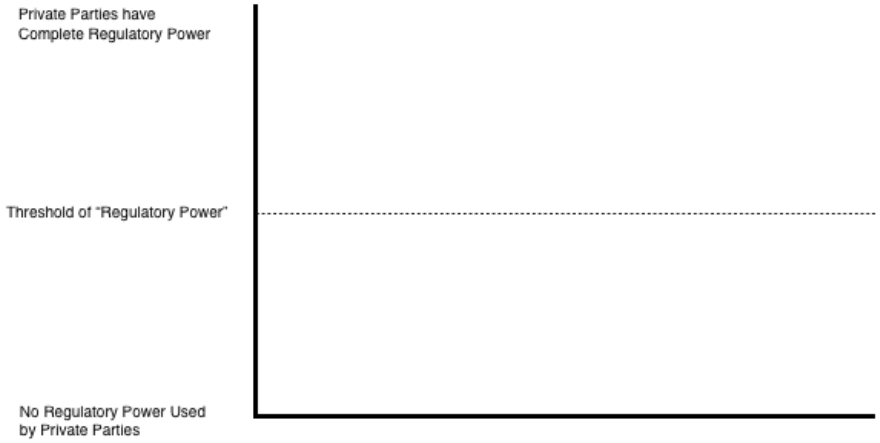
206. *See generally* William N. Eskridge Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998) (describing the formalist and functionalist methodologies to separation of powers and concluding that "they are inextricably related").

1. Formalist Approach to the Regulatory-Power Inquiry

A formalist approach to the private nondelegation doctrine would not allow private parties or international organizations to exercise legislative, executive, or judicial powers. As discussed in Part II, "[b]ecause a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses . . . categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government."[207] But the Supreme Court has not clearly defined the point at which participation in regulatory process becomes a use of federal regulatory power.

Figure 2 illustrates the regulatory-power spectrum along the vertical axis. At the origin of the chart, private entities and international organizations are exercising no regulatory power, which means that the government controls the regulatory process. At the top of the chart, private entities and international organizations are exercising complete regulatory power without government involvement, as in *Carter Coal*.[208] Somewhere between these two points, private participation in the regulatory process becomes a use of federal power.

Figure 2: Regulatory-Power Continuum



A formalist would likely delineate the threshold of federal regulatory power by categorically determining whether certain tasks or levels of participation utilized federal power.[209] But defining this threshold is difficult in the absence

207. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment).

208. *See Carter Coal*, 298 U.S. at 311.

209. Defining "regulatory power" as a legislative, executive, or judicial power is difficult when a private entity or international organization is utilizing such power. *See* I.N.S. v. Chadha, 462 U.S. 919, 951 (1983) ("When any Branch acts, it is presumptively exercising the power the Constitution has delegated to it."). Fortunately, the classification of "regulatory power" does not matter to formalists in this context because private entities and international organizations are not vested with any

of cases utilizing the private nondelegation doctrine. The only Supreme Court cases that discuss this issue were decided in the wake of the *Carter Coal* decision: *Currin v. Wallace* and *Sunshine Anthracite Coal Co. v. Adkins*.[210]

In *Currin*, the Supreme Court upheld a statute that authorized tobacco producers to veto regulations proposed by the Secretary of Agriculture.[211] The Court found this authorization permissible under the nondelegation doctrine of *Carter Coal* because "a group of producers [did not] make the law and force it upon a minority. . . . Here it is Congress that exercises its legislative authority in making the regulation and in prescribing the conditions of its application."[212] Thus, under *Currin*, the private nondelegation doctrine allows private parties to veto regulations—that is, determine if and when they will go into effect—so long as public officials have determined the substantive content of those regulations.

Justice Thomas, however, does not believe that *Currin* is still good law.[213] In *Department of Transportation*, he pointed out that the Supreme Court's more recent decision in *INS v. Chadha* held that a discretionary "veto" necessarily involves an exercise of legislative power.[214] As a result, Justice Thomas concluded that *Currin* "ha[s] been discredited and lack[s] any force as precedent[]."[215]

Alexander Volokh has challenged Justice Thomas's conclusion.[216] He argues that *Currin* has not been implicitly overruled because *Chadha* does not "stand[] for the broader proposition that any veto must be legislative power."[217] Under Volokh's view, "the same act . . . can be legislative when done by Congress and executive when done by the President."[218] This may be true, but regardless of whether the veto power is legislative or executive, the Vesting Clauses prohibit the government from delegating governmental powers to private entities or international organizations.[219] Thus, Justice Thomas's ultimate conclusion that *Currin* is no longer binding precedent is the more reasoned view. The authority to control the applicability of regulations—i.e., the ability to veto them—likely falls above the threshold of regulatory power.

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governmental power—legislative, executive, or judicial power. *See Am. R.Rs.*, 135 S. Ct. at 1252 (Thomas, J., concurring in the judgment).

210. *See* 306 U.S. 1 (1939); *see also* 310 U.S. 381 (1940).

211. 306 U.S. at 6.

212. *Id.* at 15–16.

213. *Am. R.Rs.*, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment).

214. *Id.* (citing *Chadha*, 462 U.S. at 952–53).

215. *Id. But see* Ky. Div., Horsemen's Benevolent & Protective Ass'n v. Turfway Park Racing Ass'n, 20 F.3d 1406, 1416 (6th Cir. 1994) (relying on *Currin* to uphold delegation of veto power); Sequoia Orange Co. v. Yeutter, 973 F.2d 752, 759 (9th Cir. 1992) (citing *Currin* and *Rock Royal* to uphold delegation of veto power).

216. *See* Sasha Volokh, *Justice Thomas Delivers What He Promised on February 27, 2001*, WASH. POST (Mar. 11, 2015), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/03/11/justice-thomas-delivers-what-he-promised-on-february-27-2001 [https://perma.cc/WSR6-QGN6].

217. *Id.*

218. *Id.*

219. *See supra* Part II.A.2.

The other post-*Carter Coal* case, *Sunshine Anthracite Coal Co. v. Adkins*, allowed private entities to participate in determining the content of binding regulations.[220] The Supreme Court allowed private parties to propose regulations governing prices for the coal industry because the government agency retained the power to "approve[], disapprove[], or modif[y]" the proposed regulations.[221] *Adkins* appears to be good law. Several circuit courts have relied on *Adkins* to uphold statutes that allowed private parties to propose regulations.[222] Furthermore, in the statutory context, lobbyists frequently propose draft legislation that is subsequently modified and enacted.[223] As a result, the ability to propose regulations likely falls below the regulatory power threshold if the government agency retains the discretion to approve, disapprove, or modify the regulations presented.

These two cases provide very little guidance for future applications of a formalist private nondelegation doctrine. Yet, as this Note suggests, the framework for applying a formalist private nondelegation doctrine is very much in place. Figure 3 combines the public-private distinction with the regulatory-power continuum to provide a visual depiction of a formalist approach to the nondelegation inquiry. Only statutes that authorize private entities or international organizations (which fall to the right of the vertical public-private line) to promulgate regulations using federal power (which is above the horizontal regulatory-power line) are unconstitutional under a formalist approach.

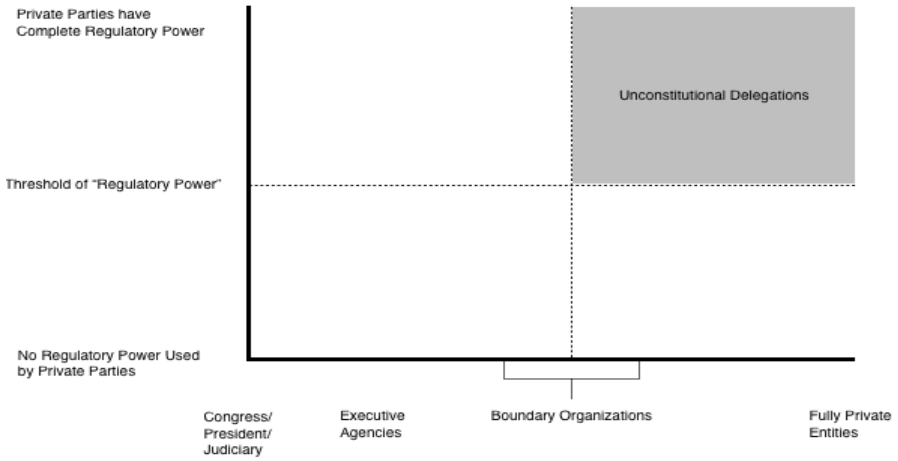
220. 310 U.S. 381, 388 (1940).

221. *Id.*

222. *See* Pittston Co. v. United States, 368 F.3d 385, 394–97 (4th Cir. 2004); United States v. Frame, 885 F.2d 1119, 1128–29 (3d Cir. 1989); R.H. Johnson & Co. v. SEC, 198 F.2d 690, 695 (2d Cir. 1952).

223. *See generally* Victoria F. Nourse & Jane S. Schacter, *The Politics of Legislative Drafting: A Congressional Case Study*, 77 N.Y.U. L. REV. 575 (2002).

Figure 3: Formalist Approach to Delegations



Courts will have to flesh out whether certain tasks or levels of private participation require the utilization of federal power. However, once courts establish permissible levels of participation, a formalist analysis of the Step 3 inquiry will be relatively straightforward.

2. Functionalist Approach to the Regulatory-Power Inquiry

Functionalism enables more diverse government structures than formalism.[224] Functionalists believe that the Framers intended "to leave to successive Congresses, through the medium of the necessary and proper clause, the flexibility required for shaping the government to the demands of changing circumstances."[225] Indeed, Justice Breyer has stated that "the Constitution[] demands . . . structural flexibility sufficient to adapt substantive laws and institutions to rapidly changing social, economic, and technological conditions."[226] Thus, a functionalist would likely tolerate more private participation in the regulatory process.[227]

224. *Compare* Bowsher v. Synar, 478 U.S. 714, 721–27 (1986) (invalidating a statute that delegated executive power to an officer removable by Congress), *and* I.N.S. v. Chadha, 462 U.S. 919, 952–53 (1983) (invalidating legislative vetoes that violated Article I procedures), *with* Morrison v. Olson, 487 U.S. 654, 685–96 (1988) (upholding the delegation of prosecutorial functions to an independent counsel that was partially insulated from executive removal).

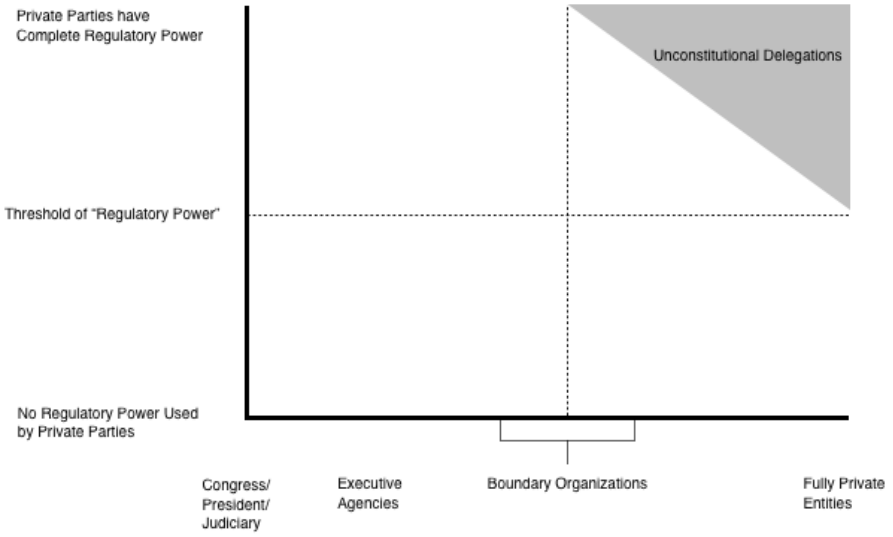
225. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 601 (1984).

226. Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 787 (2002) (Breyer, J., dissenting); *see also* Bruff, *supra* note 137, at 464 ("The functional test is far more permissive of diverse government structure than is formalism.").

227. *See* Ku, *supra* note 25, at 76 ("[C]ases where the courts take a flexible, functionalist approach to constitutional interpretation seem to permit wide-ranging delegations of federal power to non-federal entities like state governments and private groups.").

In determining what an acceptable level of private involvement in a public regulatory structure would be, functionalists would likely evaluate the delegatee's accountability and the government's involvement in the regulatory process to assess the constitutionality of Congress's delegation.[228] If a private entity or an international organization were sufficiently accountable to the government, a functionalist might allow it to exercise regulatory power. Similarly, the presence of governmental checks or governmental involvement in the regulation process would minimize a functionalist's concern about a private party or international organization using regulatory power. Figure 4 demonstrates the functionalist approach to the private nondelegation doctrine.

Figure 4: Functionalist Approach to Delegations



There is a progression along both the horizontal and vertical axes. As the delegatees become less accountable (move further along the horizontal axis), lower levels of participation in the regulatory process are permitted. Thus, a certain level of participation may be constitutional for a boundary organization but unconstitutional for a fully private entity.[229]

228. In *Association of American Railroads v. Department of Transportation*, the D.C. Circuit evaluated Amtrak's democratic accountability to determine whether it was public or private. 721 F.3d 666, 675 (D.C. Cir. 2013). This was a functionalist approach to the public-private distinction, but the court operated within a formalist framework in ultimately striking down the delegation of regulatory power because the court was unwilling to move past the strict precedent clarifying the meaning of "regulate."

229. Even a functionalist would likely find delegations to completely private parties unconstitutional. *See* John C. Yoo, *Kosovo War Powers, and the Multilateral Future*, 148 U. PA. L. REV. 1673, 1716 (1999) ("[Functionalists] have not endorsed the delegation of federal power to those who are *completely* insulated from presidential control.") (emphasis added).

This multivariable inquiry may alleviate some of the difficulties surrounding the public-private distinction.[230] Under the functionalist approach, the distinction between public and private would be less significant because an entity that is barely over the public and private border would likely be able to exercise a significant amount of regulatory power due to its greater accountability.

Although it is not represented in Figure 4, functionalists may explicitly take into account the magnitude of the federal power delegated.[231] A delegation of regulatory authority that has a miniscule monetary impact will likely be evaluated differently than a delegation involving billions of dollars. Similarly, if the regulatory power does not authorize the delegatee to restrain the rights and liberties of third parties, a functionalist may evaluate the delegation with less scrutiny.

To summarize, functionalists would likely allow greater private participation in the regulatory process than formalists. Under a functionalist approach, the constitutionality of an authorizing statute would likely be dictated by the government's control over both the entity and the regulatory process as well as the extent of federal power delegated.

CONCLUSION

"The principle that Congress cannot delegate away its vested powers exists to protect liberty."[232] Delegations of regulatory authority outside the federal government allow unrestrained and unaccountable parties to make public policy.[233] The private nondelegation doctrine ensures that the politically accountable branches of the federal government enact the laws and regulations that govern our nation. The doctrine protects the basic structure of our government.

Without a revival of the private nondelegation doctrine, "[t]he answer to Lord Ellenborough's famous rhetorical question, 'Can the Island of Tobago pass a law to bind the rights of the whole world?' may well be yes, where the world has conferred such binding authority through treaty."[234] As the preceding analysis demonstrates, there are multiple approaches to the private nondelegation doctrine as well as a number of unresolved issues surrounding it. But in one form

230. *See supra* Part III.B.

231. In reality, such a consideration would likely influence a formalist analysis but would not be an explicit part of the test.

232. Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1237 (2015) (Alito, J., concurring).

233. *See* Yoo, *New Sovereignty*, *supra* note 27, at 116 ("Efforts to transfer federal authority to an entity outside the federal government undermine the principles of the unitary executive, of the non-delegation doctrine, and of the public accountability they both seek to promote. If the American people disagree with the manner in which such federal power is exercised, they have no political avenue to influence the individuals who wield that power.").

234. Torres v. Mullin, 540 U.S. 1035, 1041 (2003) (Breyer, J., dissenting from denial of cert.) (quoting Buchanan v. Rucker, 103 Eng. Rep. 546, 547 (K.B. 1808) (Ellenborough, C.J.)).

or another, the Supreme Court should revive the private nondelegation doctrine of *Carter Coal* to prevent Congress from aggrandizing power, protect the structural integrity of our government, and ensure that a politically accountable branch makes our nation's fundamental policy decisions.