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The Legacy of Dames & (and) Moore v. Regan: The Twilight Zone of Concurrent Authority between the Executive and Congress and a Proposal for A Judicially Manageable Nondelegation Doctrine

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NOTES

THE LEGACY OF *DAMES & MOORE V. REGAN*: THE TWILIGHT ZONE OF CONCURRENT AUTHORITY BETWEEN THE EXECUTIVE AND CONGRESS AND A PROPOSAL FOR A JUDICIALLY MANAGEABLE NONDELEGATION DOCTRINE

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INTRODUCTION

On January 19, 1981, the United States entered into an executive agreement[1] with the Iranian government that provided for the release of American citizens who had been held hostage in Iran for 444 days.[2] The Agreement, executed by President Jimmy Carter, also provided for the repatriation of Iranian assets attached to U.S. courts, the termination of litigation between Iran and U.S. nationals, and the redirection of those claims into binding international arbitration.[3] In the following months, President Carter and President Reagan issued a series of Executive Orders authorizing the Secretary of the Treasury, Don Regan, to enforce the tenets of the Executive Agreement—named the "Algiers Accords" for Algeria's involvement as a forum for negotiations.[4] Inevitably, parties with injured financial interests objected to the President's authority to remove nearly $8 billion of Ira-

1 The Agreement was embodied in two declarations of the Republic of Algeria. The declarations are referred to popularly as the Algiers Accords. *See infra* note 13.

2 In November 1979, a terrorist student group called the "Muslim Student Followers of Imam's Policy," attacked and took over the United States Embassy in Tehran. Fifty-two United States diplomatic and consular personnel were taken hostage and detained for 444 days. The day after the raid of the Embassy, the Iranian Foreign Minister and the Ayatollah Khomeini publicly endorsed the attack. However, the actions of the terrorists were finally officially attributed to the Iranian government only when the Ayatollah issued public statements that the hostages would not be released until the United States deported the Shah and his property to Iran. *See* Concerning United States Diplomatic and Consular Staff in Tehran (United States v. Iran), 1980 I.C.J. 3 (May 24). On January 19, 1981—the last day of the Carter Administration—the United States and Iran signed the Algiers Accords. That Agreement provided for the release of the American hostages and the establishment of the Iran-U.S. Claims Tribunal at the Hague. *See* Symposium, *On The Iran-United States Claims Tribunal*, 16 LAW & POL'Y INT'L BUS. 667 (1984).

3 *See infra* note 13.

4 Because Iran refused to negotiate with the United States directly, the Iranian *majlis* (governing religious council) designated the Government of Algeria as the official mediator through which all official negotiations would be conducted.

> Because Iran would not sign an "agreement" with "the Great Satan," the United States negotiators drafted two "declarations," to be issued by the government of Algeria and to be "adhered to" by both Iran and the United States. The United States negotiators conveyed drafts of these Declarations to the Algerian intermediaries, who then conveyed them to the Iranian negotiators. The Iranian negotiators would respond with various comments and demands, and the United States negotiators would revise the Declarations in light of those demands.

Nancy Amoury Combs, *Carter, Reagan, and Khomeini: Presidential Transitions and International Law*, 52 HASTINGS L.J. 303, 321–22 (2000) (citing Roberts P. Owen, *The Final Negotiation and Release in Algiers*, *in* AMERICAN HOSTAGES IN IRAN 297, 311, 314–15 (Paul H. Kreisberg ed., 1985)).

nian assets from the jurisdiction of U.S. courts. Consequently, the courts were called upon to sanction the Executive Orders or reject the President's actions and thereby thrust the United States into breach of the Executive Agreement with Iran. The Supreme Court granted certiorari in an expedited schedule to resolve the constitutionality of the Orders as applied to suspended prejudgment attachments against the Iranian Atomic Energy Agency, and several Iranian banks, by the District Court for the Central District of California on behalf of petitioner Dames & Moore.[5] The Court issued a unanimous opinion in favor of the Orders' constitutionality less than one month from granting certiorari. Then-Justice Rehnquist, delivering the opinion of the Court, explained:

> We granted certiorari before judgment in this case, and set an expedited briefing and argument schedule, because lower courts had reached conflicting conclusions on the validity of the President's actions and, as the Solicitor General informed us, unless the Government acted by July 19, 1981, Iran could consider the United States to be in breach of the Executive Agreement.[6]

The sense of urgency suggested by Justice Rehnquist's characterization of the circumstances under which the case was heard might explain the apparent brevity and lack of depth of the opinion. The unanimity and terseness of the opinion might also suggest a Court unwilling to pursue any legal conclusion that would compromise the President's authority in foreign affairs. The United States had already surrendered almost $8 billion in Iranian assets on January 20, 1981, the day of President Reagan's inauguration, in exchange for the already-executed release of the hostages. A Supreme Court decision that invalidated the Agreement made by the Executive Branch could have done considerable damage to the President's ability to deal with foreign sovereigns.

Although *Dames & Moore* was likely borne of political pressure rather than principle, the decision has nevertheless become a part of the mainstream executive-powers jurisprudence. The federal courts have appealed to the *Dames & Moore* decision as a clear application of *Youngstown Sheet & Tube Co. v. Sawyer*[7] and *Field v. Clark*,[8] instead of regarding it as a politically motivated legal aberration.[9] The result has

5 Dames & Moore v. Regan, 453 U.S. 654 (1981).

6 *Id.* at 660.

7 343 U.S. 579 (1952). *Youngstown* is often referred to as "The Steel Seizure Case."

8 143 U.S. 649 (1892).

9 *See* American Ins. Ass'n v. Garamendi, 123 S. Ct. 2374 (2003); Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999); Ministry of Def. of the

been the codification of a distorted understanding of congressional delegation and a limitless field of executive action in the context of a unilaterally proclaimed "national emergency."

What *Dames & Moore* means today is that there is functionally no limiting principle applicable to executive orders where any congressional act at all—offered by the government or discovered by the courts—might be interpreted to authorize implicitly or explicitly the President's prerogative to do as he sees fit once he has declared a state of national emergency. In the wake of September 11th, some scholars have interpreted the Executive Orders authorized by a joint resolution of Congress in October 2001, charging the Executive with the broad task of redressing the terrorist attacks visited on the United States, as announcing the presidential omnipotence an injudicious federal judiciary courted with decisions like *Dames & Moore*. Addressing the issue of military tribunals created by an Executive Order issued by President Bush[10] for the purpose of trying enemy combatants detained during the United States' "War on Terrorism," Professors Laurence Tribe and Neal Katyal contend that:

> To fuse [the] three [constitutional] functions [of government] under one man's ultimate rule, and to administer the resulting simulacrum of justice in a system of tribunals created by that very same authority, is to mock the very notion of constitutionalism and to make light of any aspiration to live by the rule of law.[11]

However, although scholars proclaiming constitutional crises surrounding the Supreme Court's "unwillingness" or "failure" to articulate limiting principles for the President as Commander in Chief appeal to "fundamental principles" of our constitutional structure, their arguments often rely on mutable policy considerations. The executive-powers cases within the *Dames & Moore* "family" imply the conclusion that the President has inherent unilateral power to control all government functions in the area of national security. Not surprisingly, the Court has never reached this conclusion, but opinions such as *Dames & Moore* have rendered opposition to executive actions pertaining to national security functionally toothless.

Islamic Republic of Iran v. Gould Inc., 887 F.2d 1357 (9th Cir. 1989); Elec. Data Sys. Corp. Iran v. Soc. Sec. Org. of the Gov't of Iran, 651 F.2d 1007 (5th Cir. 1981); Roeder v. Islamic Republic of Iran, 195 F. Supp. 2d 140 (D.D.C. 2002).

10 *See* Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §§ 3(a), 4(b), 66 Fed. Reg. 57,833, at 57,833 (Nov. 13, 2001).

11 Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1259 (2002) (arguing that military tribunals are only constitutionally appropriate in a time of declared war).

This Note contends that the failure of the Court to articulate any meaningful limiting principles for executive power in the areas of national security and foreign affairs is symptomatic of a larger constitutional problem. More often than not, the Court disposes of the *Dames & Moore*-esque constitutional challenge by identifying a congressional source of authority. Given the breadth and malleability of the traditional canons of statutory interpretation, it is almost impossible to imagine a realistic scenario where the Court could not identify a congressional source of authority. The Supreme Court's and the legal academy's inability to conceive coherent separation of powers limitations on Congress's authority to delegate power has silenced argument beyond the point of congressional sanction. If one contends that our constitutional system is incompatible with an understanding of executive authority as functionally without limits in any area, then similar limitations must be applicable to Congress's authority to delegate power to the Executive. However, the current impotence of the so-called "nondelegation doctrine"[12] provides no standards to bind short-sighted Justices to immutable principles of constitutional structure. The *Dames & Moore* decision is emblematic of the flaws in the Court's delegation jurisprudence. In that decision the Supreme Court allowed Congress to acquiesce to unilateral executive use of the power vested exclusively in Congress by the Constitution to "make exceptions" to the jurisdiction of the Article III courts. This Note contends that Congress may not constitutionally delegate this "exceptions power" implicitly (e.g., by acquiescence) or explicitly to the Executive.

Part I of this Note reviews the Supreme Court's interpretation of the power exercised by President Reagan in Executive Order No. 12,294 and explains why the suspension of a class of party-defined pending litigation must be interpreted as a modification to the jurisdiction of Article III courts, and thus, an exercise of the exceptions power. Part II considers how the Court has interpreted Congress's authority to delegate power given a liberal interpretation of the modern administrative state. Finally, this Note proposes a judicially manageable nondelegation doctrine based on a dual understanding of constitutional powers, and concludes that the type of power exercised in Executive Order No. 12,294 was in fact that which Congress cannot implicitly or explicitly delegate to the Executive.

12 In fact, Professors Eric Posner and Adrian Vermeule go so far as to argue "that there is no such nondelegation doctrine: A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power." Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1721 (2002).

I. THE NATURE OF THE POWER EXERCISED BY EXECUTIVE ORDER NO. 12,294

Under the Algiers Accords,[13] the United States agreed to terminate all litigation between United States nationals and the Iranian government and to redirect those claims into binding international arbitration. Executive Order No. 12,294,[14] issued to effectuate the agreements made with the Iranian government, obligated the United States

> to terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, to nullify all attachments and judgments obtained therein, to prohibit all further litigation based on such claims, and to bring about the termination of such claims through binding arbitration.[15]

This Note will not address the "nullification of prejudgment attachments" provision because, although it effectively precludes the pending litigation from proceeding, it does not remove the litigation from the jurisdiction of Article III courts and, therefore, only arguably gives

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13 The Algiers Accords were composed of the Declaration of the Government of the Democratic and Popular Republic of Algeria, Jan. 19, 1981, U.S.-Iran, 81 DEP'T ST. BULL., Feb. 1981, at 1, 1–3, *reprinted in* 1 Iran-U.S. C.T.R. 3, 3–8 (1983) [hereinafter General Declaration]; and the Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Jan. 19, 1981, U.S.-Iran, 81 DEP'T ST. BULL., Feb. 1981, at 3, 3–4, *reprinted in* 1 Iran-U.S. C.T.R. 9, 9–12 (1983) [hereinafter Claims Settlement Declaration]. The General Declaration was dispensed with in the Claims Settlement Declaration. These documents together constitute the "Algiers Accords." The Algiers Accords are an executive agreement between the United States and Iran. For a history of the Agreement with Iran negotiated in Algeria, see Symposium, *The Settlement with Iran*, 13 U. MIAMI J. INT'L L. 1 (1981). Petitioner Dames & Moore described the Algiers Accords in its Brief in the following passage:

> On January 19, 1981, President Carter entered into the so-called Algerian Declarations, in which he agreed that, in return for Iran's releasing America's hostages, the President would undertake, *inter alia*, to terminate all lawsuits of American citizens pending in the United States against Iran and its agencies and controlled entities, to nullify all attachments and judgments obtained by American citizens in such lawsuits, and to transfer out of the country all Iranian property . . . .

Brief for Petitioner at 4, Dames & Moore v. Regan, 453 U.S. 654 (1981) (No. 20-2078) (citation omitted).

14 Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981).

15 *Id.*

rise to a "takings" challenge[16] under the Fifth Amendment.[17] This Note will focus exclusively on the nondelegation issue, that is, on provisions that order the termination of all legal proceedings and prohibit further litigation.

When President Reagan ratified the Algiers Accords in February 1981 through operation of a series of executive orders,[18] he ordered that pending litigation involving "Iran and its state enterprises . . . shall have no legal effect in any action now pending in any court of the United States."[19] Furthermore, President Reagan's Executive Order specified that "[t]he suspension of any particular claim terminates if the [International] Claims Tribunal determines that it has no jurisdiction over the claim."[20] Jurisdiction over claims involving foreign sovereigns and American citizens are constitutionally vested in the Article III courts.[21] By removing claims involving "Iran and its state enterprises" from the jurisdiction of Article III courts and expressly placing those claims under the jurisdiction of an international claims tribunal, Executive Order No. 12,294 effectively made an exception to Article III "diversity jurisdiction."[22] The Order very explicitly intended to affect which courts had jurisdiction over these particular "party-defined" claims by making their suspension contingent on the Claims Tribunal exercising jurisdiction under the Algiers Accords.[23] Presumably, if the Claims Tribunal's failure to exercise jurisdiction over a particular claim means that it is not suspended in courts of the

16 For more on Fifth Amendment "takings" challenges to the U.S.-Iran Accords, see Peter L. Fitzgerald, *"If Property Rights Were Treated Like Human Rights, They Could Never Get Away With This": Blacklisting and Due Process in U.S. Economic Sanctions Programs*, 51 HASTINGS L.J. 73 (1999); Note, *The U.S.-Iran Accords and the Taking Clause of the Fifth Amendment*, 68 VA. L. REV. 1537 (1982); R. David Weaver, Comment, Dames & Moore v. Regan*: Was It Fair?*, 34 BAYLOR L. REV. 283 (1982).

17 U.S. CONST. amend. V ("Nor shall private property be taken for public use, without just compensation.").

18 *See, e.g.*, Exec. Order No. 12,279, 46 Fed. Reg. 7919 (Jan. 19, 1981); Exec. Order No. 12,280, 46 Fed. Reg. 7921 (Jan. 19, 1981); Exec. Order No. 12,281, 46 Fed. Reg. 7923 (Jan. 19, 1981); Exec. Order No. 12,294, 46 Fed. Reg. 14,111 (Feb. 24, 1981). Executive Order No. 12,294 contains the relevant provisions about the suspension of pending claims and the nullification of attachments and final judgments. *See* Exec. Order No. 12,294, 46 Fed. Reg. at 14,111.

19 Exec. Order No. 12,294, 46 Fed. Reg. at 14,111.

20 Dames & Moore v. Regan, 453 U.S. 645, 666 (1981) (citing Exec. Order No. 12,294, 46 Fed. Reg. at 14,111).

21 U.S. CONST. art. III, § 2, cl. 1 ("The Judicial Power shall extend to . . . Controversies between . . . a State, or the Citizens thereof, and foreign States, Citizens or Subjects.").

22 28 U.S.C. § 1332(a)(4) (2000).

23 *See supra* note 13 and accompanying text.

United States, it follows that jurisdiction of the courts of the United States is contingent upon the operation of Executive Order No. 12,294. Thus, the issue of suspension is exclusively a question of jurisdiction.

A. A Summary of the Court's Interpretation of Executive Order No. 12,294

In *Dames & Moore v. Regan*,[24] the Supreme Court rejected the proposition that the President had circumscribed the jurisdiction of Article III courts by suspending pending claims between U.S. nationals and Iran.[25] Justice Rehnquist, delivering the opinion of the Court, described the historically broad arena of executive power in the area of national security. The opinion implied a single precedent created by the accumulation of two centuries of congressional delegation of presidential foreign affairs powers.[26] The government claimed that the International Emergency Economic Powers Act (IEEPA)[27] and the "Hostage Act" of 1868[28] expressly authorized the President to settle, nullify or void pending litigation. As such, the government argued, the Court should presume that the actions were proper unless the "Federal Government as an undivided whole lack[ed] [the] power."[29] Petitioner Dames & Moore made the contrary claim that Congress

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24 453 U.S. 654 (1981).

25 *Id.* at 678–86.

26 Justice Rehnquist discussed the difficulty of interpreting the historical development of presidential powers in the following passage:

> The questions presented by this case touch fundamentally upon the matter in which our Republic is to be governed. Throughout the nearly two centuries of our Nation's existence under the Constitution, this subject has generated considerable debate. We have had the benefit of commentators such as John Jay, Alexander Hamilton, and James Madison writing in The Federalist Papers at the Nation's very inception, the benefit of astute foreign observers of our system such as Alexis de Tocqueville and James Bryce writing during the first century of the Nation's existence, and the benefit of many other treatises as well as more than 400 volumes of reports of decisions of this Court. As these writings reveal it is doubtless both futile and perhaps dangerous to find any epigrammatical explanation of how this country has been governed. Indeed, as Justice Jackson noted, "[a] judge . . . may be surprised at the poverty of really useful and unambiguous authority applicable to concrete problems of executive power as they actually present themselves."

Id. at 659–60 (citing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (Jackson, J., concurring)).

27 50 U.S.C. §§ 1701–1706.

28 22 U.S.C. § 1732.

29 *Youngstown*, 343 U.S. at 636–37 (Jackson, J., concurring).

passed the Foreign Sovereign Immunities Act (FSIA)[30] specifically to prevent such executive action,[31] and thus as a measure incompatible with the express or implied will of Congress,[32] suspension of pending claims with Iran should be strictly interpreted as authorized only if part of the President's expressly delegated constitutional powers. The Supreme Court held that "neither the IEEPA nor the Hostage Act constitutes specific authorization of the President's [action]."[33] The Court, however, granted that the IEEPA "delegates broad authority to the President to act in times of national emergency"[34] and that the executive action was implicitly approved by congressional acquiescence[35]. Justice Rehnquist appealed to Justice Jackson's "zone of twilight" from *Youngstown*:

> When the President acts in the absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility.[36]

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30 Foreign Sovereign Immunities Act of 1976, Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

31 Brief for Petitioner at 6–7, 9–16, Dames & Moore v. Regan, 453 U.S. 654 (1981) (No. 80-2078).

> In the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602, *et seq.*, Congress, acting under its Article I powers, placed commercial claims of American citizens against foreign states squarely within the jurisdiction of federal district courts, and thereby removed the Executive from its historic role in the resolution of such claims. The President's action here, removing such claims from United States courts and transferring them to an international forum, contravenes the express will of Congress.

Id. at 6–7.

32 *Youngstown*, 343 U.S. at 634.

33 *Dames & Moore*, 453 U.S. at 677. However, the IEEPA does contain language that could be reasonably interpreted as authorizing the suspension of pending claims. Title 50 U.S.C. § 1702(a)(1)(B) authorizes the President to "nullify [and] void . . . exercising any right, power or privilege with respect to . . . any property in which any foreign country or a national thereof has any interest . . . ." Invoking the jurisdiction of the federal courts to enforce a party's rights and privileges attached to property could be treated as "exercising any right, power or privilege with respect to . . . any property . . . ." In fact, I think this is the correct interpretation of § 1702 in light of the International Claims Settlement Act. *See infra* note 43 and accompanying text. This alternative interpretation does not, however, change the unconstitutional nature of a unilateral executive suspension of Article III claims. *See infra* Part II.D.

34 *Dames & Moore*, 453 U.S. at 677.

35 *Id.*

36 *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

Thus, the Court concluded that Congress had implicitly delegated the authority to "terminate all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, . . . [and] prohibit all further litigation based on such claims" to the Executive by acquiescing to the existence of a concurrent "zone" of authority.[37]

The question nonetheless remained as to what "species" of power such executive orders constituted. If the suspension of pending claims was tantamount to modifying the jurisdiction of Article III courts, then the "zone of twilight in which [the President] and Congress . . . have concurrent authority"[38] must include the "exceptions power."[39] However, if the suspension of pending claims was analogous to a quasi-legislative administrative action, then it was buttressed by a considerable judicially-sanctioned tradition of congressional delegation of such authority to the Executive.[40] Justice Rehnquist adopted the latter interpretation of the executive action. The Court "posited that the President did not modify federal court jurisdiction, but only directed the courts to apply a different rule of law."[41] The suspension of pending claims was treated as a modification of the substantive law compelling the settlement of the claims in the Claims Tribunal. As support for this interpretation, Justice Rehnquist appealed both to the decision in *United States v. Schooner Peggy*[42] and the International Claims Settlement Act of 1949[43] (ICSA).[44] In *Schooner Peggy*, the Su-

37 *Dames & Moore*, 453 U.S. at 668–69.

38 *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring).

39 U.S. CONST. art. III, § 2, cl. 2.

40 *See* Field v. Clark, 143 U.S. 649 (1892) (upholding President Harrison's authority to unilaterally suspend import duty exemptions set by Congress based on the powers delegated to the Executive by the Tariff Act of 1890; holding that the Tariff Act did not allocate congressional power to the Executive because the President was simply executing an Act of Congress, and was therefore not exercising a lawmaking function); *see also* Touby v. United States, 500 U.S. 160 (1991); Mistretta v. United States, 488 U.S. 361 (1989); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952); Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805 (1983); Paul G. Kauper, *The Steel Seizure Case: Congress, the President, and the Supreme Court*, 51 MICH. L. REV. 141 (1952); Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369 (1989).

41 Anthony J. Colucci III, Note, Dames & Moore v. Regan*: The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion*, 31 CATH. U. L. REV. 565, 587–88 (1982); *see also Dames & Moore*, 453 U.S. at 684.

42 5 U.S. (1 Cranch) 103 (1801). In *Dames & Moore*, Justice Rehnquist cited *Schooner Peggy* to stand for the proposition that an action such as Executive Order No. 12,294 simply directed the courts to apply a different rule of law and did not modify federal court jurisdiction. *Dames & Moore*, 453 U.S. at 685.

43 22 U.S.C. § 1623(f) (2000).

preme Court held that a treaty may amend substantive law without violating separation of powers.[45] The International Claims Settlement Act demonstrated that claims settlement is an example of executive amendment to substantive law in the due course of executing an act of Congress.[46] The constitutionality of the *Schooner Peggy* and ICSA precedent has repeatedly been called into question by legal scholars,[47] but in practice the precedent is nonetheless "systematic [and] unbroken."[48]

B. The Robertson v. Seattle Audubon Society *Standard*

There is, however, a leap of logic between the premise that suspension of all pending claims is approximate to claims settlement and the conclusion that such suspension is merely a modification of substantive law. The current standard for determining what congressional actions are modifications of law as opposed to actions under the jurisdiction of the Executive or Judicial departments is articulated in *Robertson v. Seattle Audubon Society*.[49] Justice Thomas, delivering the opinion for a unanimous Court, held that subsection (b)(6)(A) of the

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44 *Dames & Moore*, 453 U.S. at 680 ("Crucial to our decision today is the conclusion that Congress has implicitly approved the practice of claim settlement by executive agreement. This is best demonstrated by Congress' enactment of the International Claims Settlement Act of 1949.").

45 *Schooner Peggy*, 5 U.S. (1 Cranch) at 109.

46 *Dames & Moore*, 453 U.S. at 680.

47 *See, e.g.*, Colucci, *supra* note 41, at 588:

> The [*Dames & Moore*] Court's review of closely related legislation, however, lends little insight into how the foreign claims settlement power has been defined in this regard. Through examination of the Hostage Act, the International Claims Settlement Act, the IEEPA, and the FSIA, the only conclusion drawn is that the President has the power to affect claims settlement. The implication that this power entitles the President to override judicial claims settlements is literally unsupported.

Id.; *see also* Hyman, *supra* note 40, at 807–08:

> Our constitutional system of checks and balances under the doctrine of separation of powers requires that policymaking not be concentrated solely in one branch of the federal government . . . [I]ncreased concentration of the foreign policymaking power in the hands of the Executive is contrary to the spirit of the Constitution and is undemocratic. Presidential power in the area of foreign affairs should not be permitted to expand at the expense of Congress.

Id. at 807.

48 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 610 (1952).

49 503 U.S. 429 (1992).

Endangered Species Act of 1973[50] did not violate the separation of powers doctrine by directing an outcome in pending litigation, although specific claims were named in the subsection.[51] It is well-established constitutional doctrine that the resolution of cases and controversies is exclusively under the jurisdiction of the Article III courts.[52] Under the separation of powers doctrine, Congress cannot direct the Article III courts to make particular findings of fact or legal conclusions. In *Robertson*, the Seattle Audubon Society claimed that Congress violated the separation of powers doctrine by specifically naming pending litigation as examples in a statute resolving certain ambiguities in the Endangered Species Act.[53]

The *Robertson* Court found that the language of the Act did not instruct the courts on whether the pending litigation violated the old provisions, but clarified and narrowed what should qualify as "adequate consideration"[54] under the old provisions. Two factors played the principal roles in the Court's decision. First, the language of the new provision referred to and replaced the legal standards of the older provision.[55] Under the canon of interpretation that specific provisions qualify general ones, the enactment of a specific legal standard for an existing legal requirement simply narrows the judicial application of that requirement.[56] Second, it was significant to the *Robertson* Court that the provision modified the existing law "*clearly*"[57] and "*explicitly*."[58] Subsection (b)(6)(A) refers to the previous provisions explicitly and expressly provides that its purpose is to furnish standards for the existing statutory requirements.

The provisions of Executive Order No. 12,294, which provide for the termination of "all legal proceedings in United States courts involving claims of United States persons and institutions against Iran and its state enterprises, . . . [and] [the] prohibit[ion] [of] all further litigation based on such claims," clearly fail to meet the *Robertson* stan-

50 Department of the Interior and Related Agencies Appropriations Act of 1990, § 318, 103 Stat. 745. The Act is popularly known as the Northwest Timber Compromise.

51 *Robertson*, 503 U.S. at 438.

52 *See* United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871) ("It is evident from this statement that the denial of jurisdiction to this court, as well as to the Court of Claims, is founded solely on the application of a rule of decision, in causes pending, prescribed by Congress.").

53 *Robertson*, 503 U.S. at 437.

54 *Id.* at 438.

55 *Id.* at 439–40.

56 *See, e.g.*, Simpson v. United States, 435 U.S. 6, 15 (1978).

57 *Robertson*, 503 U.S. at 440 (emphasis added).

58 *Id.* (emphasis added).

dard. Although *Robertson* deals exclusively with congressional modification of substantive law, there is no reason to posit that a different standard would apply to the Executive's "quasi-legislative" function. Executive Order No. 12,294 makes no reference to legal standards (as that term was used by the *Robertson* Court) implicitly or explicitly. The multifarious laws underlying the claims affected by the Order are addressed neither implicitly nor explicitly and would not be modified by operation of the Order. According to the terms of the Executive Order, the claims were to be redirected into an international tribunal, which is not called upon in the Order to apply different law than would have applied in the Article III courts. The Order expressly directs the Article III courts to dismiss the litigation notwithstanding applicable legal standards.

C. Modifications to Jurisdiction and "Party-Based" Jurisdiction

The only "legal standards" that could have been implicitly modified (although it is unclear whether implicitness would satisfy the *Robertson* standard) by operation of Executive Order No. 12,294 would be 28 U.S.C. § 1332(a)(4),[59] which defines the diversity jurisdiction of U.S. courts over claims involving "a foreign state," and/or 28 U.S.C. §1605(a)(2)–(3),[60] exceptions to 28 U.S.C. § 1604 Foreign Sovereign

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59 28 U.S.C. § 1332(a)(4) (2000). That section provides:

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

. . . .

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

Id.

60 28 U.S.C. § 1605(a)(2)–(3). That section provides:

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

. . . .

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on

Immunity.[61] Through § 1604 Congress exempted foreign sovereigns from the jurisdiction of Article III courts except for those circumstances described in § 1605. The provisions of Title 28 are a vehicle by which Congress delimits the boundaries of Article III jurisdiction. Although these provisions of Title 28 are certainly "legal standards," their subject matter is purely jurisdictional in nature, and thus their modification cannot be understood as a modification of a "legal standard" as that term was construed in *Robertson*. Furthermore, the "judicial power of the United States" includes the power to decide six "party-defined jurisdictional categories."[62] The power to decide which of the six party-defined categories are heard by the Article III courts is given to Congress in the exceptions power.[63] The legal standard in Executive Order No. 12,294 is purely party-defined and is thus, similarly, a jurisdictional category. In fact, the last of the six party-defined

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in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States.

Id.

61 28 U.S.C. § 1604. That section provides:

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter.

Id.

62 *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985). Professor Amar proposes as part of his two-tier theory of Article III jurisdiction that the language

to Controversies to which the United States shall be a party;—to Controversies between two or more States;—between a State and a Citizen of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or Citizen thereof, and foreign States, Citizens or Subjects . . . .

U.S. CONST. art III, § 2, cl. 1, refers collectively to "party-defined" controversies to which Congress may make "exceptions" under U.S. CONST. art III, § 2, cl. 2. Amar, *supra*, at 254–59. Professor Amar distinguishes these "party-defined" jurisdictional categories from Article III "Cases," which he proposes may only be excepted to if at least one inferior Article III tribunal is created that has jurisdiction. *Id.* at 255. Essentially, Professor Amar's two tiers are first, certain subject matter-defined cases, and second, certain party-defined controversies. *Id.* at 240–59. Thus, as this Note argues, any government action which regulates the access of those parties mentioned in Article III, § 2, to Article III tribunals necessarily modifies the jurisdiction of the one Supreme Court created by the Constitution and the inferior tribunals created by Congress.

63 U.S. CONST. art III, § 2, cl. 2.

jurisdictional categories is "Controversies . . . between a State, or the citizens thereof, and foreign States, Citizens or Subjects."[64] Just as Congress made an exception to this basis for jurisdiction through 28 U.S.C. § 1604 Foreign Sovereign Immunity, Executive Order No. 12,294 made a wholesale exception for Iran from those circumstances exempted from operation of § 1604 by § 1605(a)(2)–(3).[65] Thus, as a purely party-defined limitation to the invocation of the jurisdiction of United States courts, Executive Order No. 12,294 is unequivocally a circumvention of Article III jurisdiction. Any exclusively party-based denial of access to Article III courts must be interpreted as an exercise of the "exceptions power" delegated to Congress in Article III of the Constitution.[66]

II. THE DOCTRINE OF NONDELEGATION

The remaining question is the one Justice Rehnquist avoided by characterizing the exercise of executive power as a modification of law:[67] is the exceptions power[68] within the "zone of twilight in which [the President] and Congress . . . have concurrent authority"?[69] May Congress acquiesce, implicitly or explicitly, to sharing with the Executive the power to make exceptions to Article III jurisdiction? Conceptually, the constitutional grant of the exceptions power to Congress entails a principle of nondelegation.[70] Under the nondelegation doctrine, Congress may not delegate its constitutionally-vested power to another department, and complementarily, under the separation of powers doctrine the other federal departments may not unilaterally usurp Congress's constitutionally-vested powers.

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64 *Id.*

65 *See supra* note 60.

66 *C.f.* Dames & Moore v. Regan, 453 U.S. 654, 684 (1981) (asserting that "[n]o one would suggest that a determination of sovereign immunity divests the federal corts of 'jurisdiction'").

67 *See supra* note 41 and accompanying text.

68 U.S. CONST. art. III, § 2.

69 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952).

70 *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 351 (14th ed. 2001). For more general discussions linking the doctrine of nondelegation with separation of powers, see SOTIRIOS A. BARBER, THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER 24 (1975); and Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv. L. Rev. 1231, 1237 (1994) (connecting the nondelegation doctrine with separation of powers); *see also* Indus. Union Dep't v. Am. Petroleum Inst., 448 U.S. 607, 671 (1980) (Rehnquist, J., concurring in the judgment).

In practice, Congress has frequently delegated rulemaking and adjudicative functions[71] to the executive branch that are analogous to exercises of the legislative and judicial powers. In the area of international agreements, the courts have predominantly upheld the constitutionality of this type of delegation.[72] In *Field v. Clark*,[73] the Supreme Court upheld President Harrison's authority to unilaterally suspend import duty exemptions set by Congress, based on the powers delegated to the Executive by the Tariff Act of 1890.[74] The Court avoided the nondelegation issue by holding that the Tariff Act did not allocate congressional power to the Executive because the President was simply executing an Act of Congress, and was therefore not actually exercising a lawmaking function.[75]

The holding in *Field v. Clark* reflects the modern approach to separation of powers and nondelegation questions in the context of international agreements. In the last century the courts have approached the delegation issue from a progressively functional perspective, while certain segments of the legal academy have adhered to a rather more formal understanding of separation of powers.[76] Scholars such as Arnold I. Burns and Stephen J. Markman have taken issue with a functionalist interpretation of the "Sweeping Clause"[77] as practically

71 *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 10 (2d ed. 2001) ("When an agency engages in rulemaking, it does something that looks very much like a legislature passing law . . . . When an agency engages in adjudication, it does something that looks very much like a court deciding a case.").

72 *See* SULLIVAN & GUNTHER, *supra* note 70, at 351–52:

> There are only two cases, both in the early 1930s, in which the Court found a violation of the Nondelegation doctrine. In the Schechter Poultry case [295 U.S. 245 (1935)], the Court unanimously struck down the provision of the National Industrial Recovery Act that authorized the President to approve "codes of fair competition.". . . [a]nd in Panama Ref. Co. v. Ryan, 293 U.S. 3 88 (1935), the "hot oil" case, the Court struck down another provision of the NIRA on delegation grounds. . . . Only rarely have dissenters urged that the nondelegation doctrine be given sharper teeth. See, e.g., Justice Rehnquist's opinion in American Textile Mfr. Inst. v. Donovan, 452 U.S. 490 (1981).

Id.

73 143 U.S. 649 (1892).

74 Tariff Act of Oct. 1, 1890, ch. 1244, 26 Stat. 583.

75 *Clark*, 143 U.S. at 681–82.

76 For a discussion of theories of formalism and functionalism in the context of separation of powers, see Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 CORNELL L. REV. 1 (1994); and Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions—A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

77 U.S. CONST. art. I, § 8, cl. 18 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested

blurring the lines between governmental functions.[78] Burns and Markman explain rather simply that "[the] division and enumeration of powers establishes the fundamental terms by which one branch's claim to authority may be deemed valid or invalid . . . . Our system of government, properly viewed, is *not*, as one scholar has described it, 'separate institutions *sharing* powers.'"[79]

A. A Liberal View of the Modern Administrative State

It is fairly unproblematic to make a separation of powers and/or nondelegation objection to the constitutionality of Executive Order No. 12,294 if one adopts the Burns and Markman view of the constraints of congressional authority to delegate power. However, a liberal, functional view of the modern administrative state is reconcilable with doctrines of separation of powers and nondelegation that rely on formal, immutable principles of constitutional structure.

The *Dames & Moore* decision relied upon a functional and interdependent understanding of government functions. The precedent to which the *Dames & Moore* Court repeatedly alluded was Justice Jackson's famous concurrence in *Youngstown*.[80] Justice Jackson described the doctrine of separation of powers as enjoining upon the federal branches "separateness but interdependence, autonomy but reciprocity."[81] Although Justice Jackson denied that the President's role as "Commander in Chief of the Army and Navy"[82] gave him blanket authority to "do anything, anywhere,"[83] Jackson did concede a remarkably flexible "zone" of concurrent authority between the President and Congress. In *Mistretta v. United States*,[84] the Supreme Court followed Justice Jackson's functional approach in *Youngstown* to reject nondele-

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by this Constitution in the Government of the United States, or in any Department or Officer thereof.").

78 Arnold I. Burns & Stephen J. Markman, *Understanding Separation of Powers*, 7 PACE L. REV. 575, 575–83 (1987). For the doctrinal underpinnings of this kind of argument, see John Locke's *Second Treatise of Civil Government*, published in 1690, where he wrote that "[the] power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands." JOHN LOCKE, SECOND TREATISE OF CIVIL GOVERNMENT 75 (C.B. Macpherson ed., 1980) (1690).

79 Burns & Markman, *supra* note 78, at 575–80.

80 343 U.S. 579, 634 (1952) (Jackson, J., concurring).

81 *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

82 U.S. CONST. art. II, § 2, cl. 1.

83 *Youngstown*, 343 U.S. at 642 (Jackson, J., concurring).

84 488 U.S. 361 (1989).

gation and separation of powers challenges to the U.S. Sentencing Commission.[85] Justice Blackmun, writing for the majority in *Mistretta*, asserted that a "practical understanding [of] our increasingly complex society, replete with ever changing and more technical problems, [leads to the conclusion that] Congress simply cannot do its job absent an ability to delegate power under broad general directives."[86]

Similarly, in *Touby v. United States*,[87] the Supreme Court abandoned any traditional understanding of the principle of nondelegation by holding that the Attorney General may practically define what constitutes criminal conduct under the Controlled Substance Act[88] in an effort to "assist" Congress without implicating constitutional delegation problems.[89] Justice O'Connor, writing for a unanimous Court, explained that the nondelegation doctrine

> does not prevent Congress from seeking assistance, within proper limits, from its coordinate Branches. Thus, Congress does not violate the Constitution merely because it legislates in broad terms, leaving a certain degree of discretion to executive or judicial actors. So long as Congress "lay[s] down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[90]

After *Touby* it is difficult to discern permissible congressional requests for assistance and forbidden delegations of legislative power. In an effort to prevent doctrinal formalities from curtailing the actions of government agencies, the Court has simply refused to apply a nondelegation rationale instead of defining appropriate boundaries to its application.[91]

Nowhere, however, has the nondelegation doctrine had as little teeth as in the area of foreign affairs. In *Dames & Moore*, Justice Rehnquist appealed repeatedly to that famous precedent which implied that, in the context of a national emergency or war, there is hardly any

85 The Commission was established by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, tit. II, ch. 2, 98 Stat. 1987 (codified in scattered sections of 18 & 28 U.S.C.). The Commission is an independent arm of the judicial branch, but its members are appointed and removable by the Executive branch, and its actions require the advice and consent of the Senate.

86 *Mistretta*, 488 U.S. at 372.

87 500 U.S. 160 (1991).

88 Controlled Substances Act, Pub. L. No. 91-513, tit. II, 84 Stat. 1236, 1242 (1970) (codified as amended in scattered sections of 21 U.S.C.).

89 *Touby*, 500 U.S. at 164.

90 *Id.* at 165 (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 409 (1928)) (citations omitted).

91 *See supra* Part I.B.

executive action (within the scope of such an emergency) that would encroach far enough on the province of the legislature and the courts to render it unconstitutional. Ironically, in *Youngstown*,[92] the majority, led by Justice Black, held that President Truman's action was in fact an example of this narrow category of impermissible executive encroachment on Congress.[93] In the end though, the majority opinion said little more than that if the President wishes to enjoin the unions, he must do so according to the Taft-Hartley Act of 1947. Thus, the only limitation to the executive action was that Congress did not sanction it. The opinion, therefore, says very little about the limitations on Congress's ability to sanction—and thereby delegate congressional authority to—executive action.

The lasting impact of *Youngstown* for our present discussion comes from Justice Jackson's concurring opinion, in which he details three "somewhat over-simplified grouping[s] of practical situations in which a President may doubt, or others may challenge, his powers."[94] Justice Jackson fit President Truman's actions within the third grouping, which explained the legal consequences of an executive action contrary to an act of Congress.[95] Justice Jackson agreed with Justice Black that, as Congress had legislated several times on the topic of executive power in the area of economic emergency, and specifically industry and union control, the President was bound to act within the parameters of those legislative acts.[96] Significantly, Justice Jackson did not say that the President was without power if his action conflicted with the will of Congress, but rather that his power was at its "lowest ebb." The implication is that the President has certain inherent powers that are not necessarily delineated in, but perhaps only implied by, the Constitution.

In *Dames & Moore*, the majority relied on Justice Jackson's second "grouping" of executive action from *Youngstown*, where he suggested both that Congress and the Executive have certain concurrent powers, and that Congress may waive through silence any objection to Presi-

92 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

93 *Id.* at 588.

94 *Id.* at 635 (Jackson, J., concurring).

95 "When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Id.* at 637 (Jackson, J., concurring).

96 "It seems clearly eliminated from that class because Congress has not left seizure of private property an open field but has covered it by three statutory policies inconsistent with this seizure." *Id.* at 639 (Jackson, J., concurring).

dential exercise of these powers.[97] In *Dames & Moore*, and many other foreign affairs powers cases,[98] this precedent has been interpreted to mean that where the Court finds a concurrent zone of authority either created by the Constitution and/or related congressional acts, congressional silence will have the same legal effect as express delegation. The tacit implication is that in this amorphous "zone of concurrent authority," congressional delegation is relieved of the "clearly articulated principle" standard established some thirty-nine years later in *Touby*.[99]

The implication that there is no "clearly articulated principle standard" in the concurrent zone of authority between the Executive and Congress has been especially true of war and foreign affairs powers. For example, in *Loving v. United States*,[100] Justice Kennedy, writing for the majority in an 8-1 decision, held that the President's unique role as Commander in Chief gave him broad discretion in the area of military affairs which made congressional guidance on the criteria imposed by military tribunals for a death penalty sentence unnecessary.[101] Justice Kennedy wrote that "delegations [which call] for the exercise of judgment or discretion that lies beyond the traditional authority of the President" would fail to provide guiding principles in violation of the nondelegation doctrine.[102] Explication of the issue was unnecessary because the Court found that the Executive Order in question lay within the traditional authority of the President. The Court in *Loving* used the term "traditional authority" to mean effectively the same thing as the inherent presidential authority suggested by Justice Jackson's concurrence in *Youngstown*.[103] The general unwillingness of the Supreme Court to disturb the administration of legislation through agencies or the exercise of presidential foreign affairs

97 Dames & Moore v. Regan, 453 U.S. 654, 668–69 (1981).

98 *See* Orvis v. Brownell, 345 U.S. 183 (1954); *Youngstown*, 343 U.S. 579 (1952); United States v. Pink, 315 U.S. 203 (1942); United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 105 (1801); Chas. T. Main Int'l, Inc. v. Khuzestan Water & Power Auth., 651 F.2d 800 (1st Cir. 1981); Ozanic v. United States, 188 F.2d 228 (2d Cir. 1951); *see also* RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES: POWER TO WAIVER OR SETTLE CLAIMS § 213 (1965).

99 Touby v. United States, 500 U.S. 160 (1991).

100 517 U.S. 748 (1996).

101 *Id.* at 761.

102 *Id.* at 772.

103 *See supra* note 36 and accompanying text.

powers has effectually rendered the nondelegation doctrine—to use the word chosen by several legal scholars— "toothless."[104]

The search for limiting principles in the area of congressional delegation does not, however, lack a chorus of dissenting voices. Justice Scalia, dissenting in *Mistretta*, reminded his dismayed audience of structural formalists that "[i]t is difficult to imagine a principle more essential to democratic government than that upon which the doctrine of unconstitutional delegation is founded."[105] Regrettably, Justice Scalia failed to distinguish the fundamental nature of the nondelegation doctrine from its ineffectual application by the Court and concludes that it is "not . . . readily enforceable by the courts," because it has become a "debate not over a point of principle but over a question of degree."[106] However, Justice Scalia goes on to make a powerful argument suggesting that impermissible delegation should not be a question of degree:

> Today's decision follows the regrettable tendency of our recent separation-of-powers jurisprudence . . . to treat the Constitution as though it were no more than a generalized prescription that the functions of the Branches should not be commingled too much—how much is too much to be determined, case-by-case, by this Court. The Constitution is not that. Rather, as its name suggests, it is a prescribed structure, a framework, for the conduct of government.[107]

Although Justice Scalia conceded in the subsequent portion of his dissent that this structural framework is blurred at its boundaries, he refused to sanction an understanding of delegation which did no more than allow the Court to make ad hoc determinations about whether a particular delegation looked like it commingled government functions too much.

Similarly, eight years before *Mistretta*, Chief Justice Rehnquist, concurring in the judgment in *Industrial Union Department v. American Petroleum* ("The Benzene Case"),[108] stated that the plurality should have struck down § 6(b)(5) of the Occupation Safety and Health Act

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104 *See* William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L.J. 523 (1992); Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 CARDOZO L. REV. 775 (1999); Timothy A. Wilkins & Terrell E. Hunt, *Agency Discretion and Advances in Regulatory Theory: Flexible Agency Approaches Toward the Regulated Community as a Model for the Congress-Agency Relationship*, 63 GEO. WASH. L. REV. 479 (1995).

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

106 *Id.* (Scalia, J., dissenting).

107 *Id.* at 426 (Scalia, J., dissenting) (citations omitted).

108 448 U.S. 607 (1980).

(OSHA)[109] on nondelegation grounds.[110] The Chief Justice wrote that the briefs of the parties and opinions of his fellow Justices demonstrated that "Congress, the governmental body best suited and most obligated to make the choice confronting us in this litigation, ha[d] improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."[111] Justice Rehnquist then outlined a brief history of the nondelegation doctrine and identified the judicial shift during the New Deal as the point at which "the principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud."[112] However, like Justice Scalia in *Mistretta*, Justice Rehnquist refused to couch his nondelegation objection in formal terms, but instead appealed to the principle articulated by Chief Justice Taft that delegations of legislative authority must be judged "according to common sense and the inherent necessities of the governmental co-ordination."[113]

The objections of Chief Justice Rehnquist and Justice Scalia simultaneously recognize that a modern administrative state requires limiting principles of delegation to be considered against a background of agency principles, and leave the sympathetic reader with the sense that some essential character of the nondelegation doctrine is yet discoverable and somewhere applicable. This impression is the result of the nondelegation doctrine functioning on two levels. The nondelegation inquiry in both *Mistretta* and *American Petroleum* ask: *what* are the legislative or judicial or executive powers? The question is essentially the content of each constitutional power. Chief Justice Rehnquist and Justice Scalia adopt seemingly functional interpretations of this "*what* is the power?" question, because no matter how strictly one proposes a principle of nondelegation be applied to government action, one cannot escape the "Venn Diagram" created by an inventory of those powers the Court has sanctioned under each branch.

109 29 U.S.C. §§ 651–658 (2000).

110 *Am. Petroleum*, 448 U.S. at 672 (Rehnquist, J., concurring in the judgment).

111 *Id.* (Rehnquist, J., concurring in the judgment).

112 *Id.* at 674 (Rehnquist, J., concurring in the judgment).

113 J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928).

FIGURE 1. VENN DIAGRAM OF FEDERAL AUTHORITY

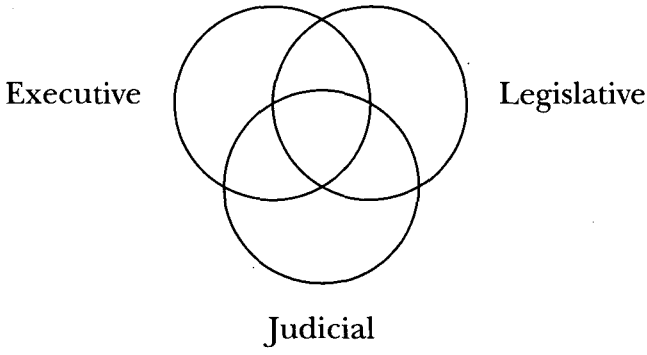

Figure 1 is a rather simplistic illustration of the tension created by an approach to delegation questions that treats the powers of each branch as finite and exclusive fields. Certainly the legislative branch cannot delegate to the Executive a power or privilege that both enjoy. James Madison defended just such a model of federal power when he wrote in Federalist No. 47 that separation of powers "does not mean that these departments ought to have no *partial agency* in, or no *control* over, the acts of each other."[114] Therein lies the other side of the principle of nondelegation: the control of each branch over the others. The question of what *partial agency* each branch may have in another must be answered through a diagram like Figure 1 and is appropriately dealt with through an analytical framework like that currently used in "excessive delegation" cases.[115] However, the question

114 THE FEDERALIST NO. 47, at 302 (James Madison) (Clinton Rossiter ed., 1961). Madison believed that Montesquieu's conception of separation of powers was only that when the "*whole* power of one department is exercised by the same hands which possess the *whole* power of another department, the fundamental principles of a free constitution are subverted." *Id.* at 302–03. *Cf.*, Mistretta v. United States, 488 U.S. 361, 426 (1989) (Scalia, J., dissenting). In his *Mistretta* dissent, Justice Scalia stated that Madison's point in Federalist No. 47 was

> that the commingling specifically provided for in the structure that he and his colleagues had designed—the Presidential veto over legislation, the Senate's confirmation of executive and judicial officers, the Senate's ratification of treaties, the Congress' power to impeach and remove executive and judicial officers—did not violate a proper understanding of separation of powers.

Id. (Scalia, J., dissenting).

115 As Justice Scalia explained in *Mistretta*:

> [T]he focus of the controversy, in the long line of our so-called excessive delegation cases, has been 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.

Mistretta, 488 U.S. at 419 (Scalia, J., dissenting).

of the *control* of each branch over the others—i.e., the constitutionally vested power of each branch to delimit and/or expand the scope of the other branches' authority—is not a "debate of degree." The question of the control of each branch over the others, which I will refer to as the "jurisdictional question," is a structural principle to which Madison's "commingling" model is inapplicable. A more appropriate analysis for the "jurisdictional question" can be derived from the Supreme Court's separation of powers jurisprudence. The remainder of this Note is dedicated to developing this analytical model.

B. Limitations on Congress's Authority to Delegate Power

The most common Supreme Court cases for which an excessive delegation argument succeeded are those in which the Court found that Congress had created a statutory scheme that either sought to or had the indirect result of aggrandizing its own power. In cases such as *Bowsher v. Synar*,[116] *INS v. Chadha*,[117] *Clinton v. City of New York*,[118] and

116 478 U.S. 714 (1986). In *Bowsher*, Justice Burger, writing for the majority, articulated one clear and important limit on the removal power: Congress cannot give itself the power to remove executive officials by any process other than impeachment. *Id.* at 726. The Court therefore held the Balanced Budget and Emergency Deficit Control Act of 1985, Pub. L. No. 99-177, tit. II, 99 Stat. 1038, unconstitutional on the grounds that Congress could not retain removal power of the Comptroller General, thereby insulating him from executive control and charging him with exercising executive power. *Id.* at 734.

117 462 U.S. 919 (1983). In *Chadha*, Justice Burger, writing for the majority, held that Congress and the Executive may not pass into law a bill that waives the right of the President and the Senate to review the certain legislative actions by the House of Representatives in the area of immigration and naturalization. *Id.* at 959. The Court stated that, without exception, the bicameralism and presentment requirements are non-waiveable. *Id.* at 958. The House of Representatives cannot exercise "legislative Powers," U.S. CONST. art. I, § 1, without adhering to the constitutionally prescribed structure. *Id.* at 957.

118 524 U.S. 417 (1998). In *Clinton v. City of New York*, Justice Stevens, writing for the majority, held that Congress may not delegate to the Executive the authority to veto certain monetary provisions in a duly enacted law without being subject to a two-thirds override by Congress. *Id.* at 439. Justices Scalia, O'Connor, and Breyer dissented, maintaining that the line-item veto was no broader a delegation of Presidential execution of the spending laws than the suspension power of the Tariff Act of 1890 upheld in *Field v. Clark*, 143 U.S. 649 (1892). *Id.* at 464–65 (Scalia, J., dissenting). The majority responded that, unlike the President's "power to suspend exemptions from import duties" under provisions of the Tariff Act of 1890, "[the] power to cancel portions of a duly enacted statute" involves greater presidential discretion. *Clinton*, 524 U.S. at 443–44. Conversely, compare the Court's reasoning in *Clinton v. City of New York* with the practice of Executive Agreements that function legally as treaties, but do not require the advice and consent of the Senate. Again we see how flexible the Court has been in the area of foreign affairs.

Buckley v. Valeo,[119] the Supreme Court has not hesitated to deny that Congress's implicit authority to delegate power, however broadly interpreted, cannot be wielded in such a fashion that it compromises the procedural requirements set out in the Constitution to safeguard the structural balance of power between the separate, yet interdependent, branches. At the same time, cases such as *Mistretta v. United States*,[120] *United States v. Curtiss-Wright Export*,[121] *Loving v. United States*,[122] and *Morrison v. Olson*,[123] instruct us that Congress may broadly delegate "quasi-" legislative,[124] "quasi-" executive, and "quasi-" judicial powers to administrative bodies designed to execute congressional acts.

The present challenge is to articulate a principle that distinguishes those cases the Supreme Court has found emblematic of the inalienable structural requirements of the Constitution from those

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119 424 U.S. 1 (1976). In a per curiam opinion, the Supreme Court held unconstitutional a federal law that empowered the Speaker of the House and the President pro tempore of the Senate to appoint members of the Federal Election Commission. The Court explained that, if Federal Elections Commission (FEC) personnel exercised authority that made them "Officers of the United States," they could only be appointed by the President in accordance with the Appointments Clause, but if the FEC personnel were "inferior Officers," then Congress could delegate their appointment to courts of law or heads of departments, but not to itself. *Id.* at 132.

120 *See supra* notes 84–86 and accompanying text.

121 299 U.S. 304 (1936). Justice Sutherland, writing for the majority, upheld a 1934 Joint Resolution of Congress authorizing President Roosevelt to initiate arms embargoes against certain countries. The Court simply rejected petitioner Curtiss-Wright's non-delegation objection with an ambiguous proclamation about the President's unique power to "speak or listen as a representative of a nation." *Id.* at 319. Even as the Court was willing to repeatedly strike down provisions of the NIRA (National Industrial Recovery Act) on delegation grounds, *see* SULLIVAN & GUNTHER, *supra* note 70, at 351, it was unwilling to apply the doctrine in the context of foreign affairs.

122 *See supra* note 100 and accompanying text.

123 487 U.S. 654 (1988). Justice Rehnquist, writing for the majority, upheld the constitutionality of the independent counsel provision of the Ethics in Government Act of 1978, Pub. L. No. 95-521, 92 Stat. 1824. *Id.* at 696–97. The Court distinguished *Bowsher v. Synar*, *see supra* note 116, on the ground that although Congress restricted the Executive's ability to remove the independent counsel, Congress had no role in the removal. *Id.* at 686. Justice Scalia dissented, concluding that prosecution and investigation are purely executive powers and thus a statute which vests these powers in a person who is not removable by the Executive is void. *Id.* at 706 (Scalia, J., dissenting).

124 A term used by the Court to distinguish agency action from "purely" legislative and judicial powers. *See* Federal Maritime Comm'n v. South Carolina State Port Authority, 535 U.S. 743, 774 (2002) ("The terms '*quasi* legislative' and '*quasi* adjudicative' indicate that the agency uses legislative *like* or court *like* procedures but that it is not, constitutionally speaking, either a legislature or a court.").

where Congress has broad authority to delegate power. According to Supreme Court jurisprudence, Congress cannot: (1) delegate new powers to itself;[125] (2) relieve itself from the bicameralism and presentment requirements;[126] (3) relieve itself from the supermajority requirement to override a veto;[127] (4) delegate to the Executive or its agencies the authority to amend or repeal duly enacted law;[128] (5) delegate executive functions to an officer removable by Congress;[129] or (6) delegate executive or quasi-judicial tasks to an agency with a majority of congressionally appointed personnel.[130] These limitations on Congress's ability to delegate power share certain clear structural principles. Loosely, the structural principles at issue are: (1) bicameralism; (2) presentment; (3) removal; and (4) appointment.

The Supreme Court has approached a distinct majority of the cases in which it struck down a legislative scheme for having violated the previously-mentioned constitutional structural requirements not as impermissibly vague congressional delegations, but as instances of Congress attempting to aggrandize its own power. However, consistent structural principles must apply where Congress attempts to abdicate power that functions as a "control over the acts" of another branch.[131] Unlike those constitutional powers that lend themselves to "partial agency" in the other branches of government, constitutionally vested powers that are designed to control the scope of a co-equal branch's authority are nondelegable.[132]

For example, although Congress may delegate quasi-legislative powers to the Environmental Protection Agency (EPA) to promulgate environmental regulations, it cannot delegate to the EPA the power to amend duly enacted environmental law. So why is it that the EPA may, in all practicality, "legislate" about the environment, but it may not affect the legislation about the environment that Congress has enacted? The difference lies in the fact that the latter threatens the structural interdependence of the three federal branches whereas the former does not; the structure prescribed in the Constitution for enacting law is in itself a delegation of power to each house of Congress and to the President to prescribe the control of each branch over the

125 *See supra* note 116 and accompanying text.
126 *See supra* note 117 and accompanying text.
127 *See supra* note 118 and accompanying text.
128 *Id.*
129 *See supra* note 119 and accompanying text.
130 *Id.*
131 THE FEDERALIST NO. 47, *supra* note 114, at 302 (James Madison). *See supra* note 114 and accompanying text.
132 *Id. See also supra* note 114 and accompanying text; *supra* Figure 1.

others. Congress may always legislate to counteract something that the EPA has done that it does not like (i.e., does not meet with popular approval), and the President may then veto that legislation in the interest of the executive agency, and then Congress may override that veto if it can rally a supermajority. In sum, each branch of the federal government is the exclusive executor of certain structural powers referred to by James Madison as "checks."[133] Congress cannot delegate away its "checks" to the other branches, just as surely as it cannot delegate to itself the checking powers of the other branches. As explained in Part II.A., each branch's exclusive "jurisdictional" powers control the scope of the authority of the other branches. Cases such as *Bowsher*, *Chadha*, *Clinton*, and *Buckley* begin to give content to this categorization of constitutional powers, and *Chadha* in particular suggests why traditional nondelegation analysis is inept—because it fails to differentiate between "partial agency" powers and "jurisdictional" powers.

C. A Proposal for a Judicially Manageable Nondelegation Doctrine

As Justice Scalia pointed out in his dissenting opinion in *Mistretta*, "debate over unconstitutional delegation [has become] a debate not over a point of principle but over a question of degree."[134] The fact is that it is difficult to even characterize this question of limits on delegation as a "doctrine," when the courts have rendered it functionally ineffectual and the scholars grappling with this ineffectuality cannot formulate any principles coherent enough to allow for doctrinal judicial application. However, although few deny that "separation of powers" necessarily entails some concept of nondelegation,[135] no one can seem to agree on how or even whether the Constitution constrains congressional reallocation of those "separate" powers. If constraints exist, do they only apply if the power is "important" enough? Or if the delegation is "ambiguous" enough? Or must it be both?

In *Wayman v. Southard*,[136] Chief Justice Marshall explained that

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133 THE FEDERALIST NO. 48, *supra* note 114, at 311 (James Madison). ("An *elective despotism* was not the government we fought for; but one in which the powers of government should be so divided and balanced among several bodies of magistry, as that no one could transcend their legal limits, without being effectually checked and restrained by others.").

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

135 *Cf.* Posner & Vermeule, *supra* note 12, at 1721 (arguing that a statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power.)

136 23 U.S. (10 Wheat.) 1 (1825).

> [t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.[137]

Marshall thus proposed constraints on delegation determined by a constitutional line drawn between "important subjects" and "[subjects] of less interest." The obvious criticism to this argument was made in *Synar v. United States*.[138] The plaintiffs in *Synar* appealed directly to Justice Marshall's rationale from *Wayman* to buttress their argument that certain features of the Balanced Budget and Emergency Deficit Control Act of 1985[139] delegated to the Executive the type of authority that is "'so central to the legislative function' that it may not be delegated."[140] The D.C. District Court rejected this argument on the grounds that "judicial adoption of a 'core functions' analysis would be effectively standardless. No constitutional provision distinguishes between 'core' and 'non-core' legislative functions, so that the line would necessarily have to be drawn on the basis of the court's own perceptions of the relative importance of various legislative functions."[141]

Professor Martin Redish articulates a doctrine of nondelegation based on what he terms the "political commitment" principle.[142] Professor Redish explains that Congress may delegate rulemaking and adjudicative choices to the other branches, so long as those choices are necessary to "ensure the political responsibility contemplated by the Constitution's scheme of representation."[143] The relevant inquiry under Professor Redish's model is thus whether a particular delegation is so vague that it creates an accountability problem.[144] Redish's model draws a constitutional distinction between delegations that clarify lines of causation between government action and the responsible actors, and those delegations that blur such causative lines. The electorate's ability to determine causation is the essence of "political responsibility." Thus, impermissible delegations of authority are those that are too vague for the electorate to determine which consequent

137 *Id.* at 43.

138 626 F. Supp. 1374 (D.D.C. 1986), *aff'd*, 478 U.S. 714.

139 2 U.S.C. §§ 900–907, 922 (2000).

140 *Synar*, 626 F. Supp. at 1385.

141 *Id.*

142 MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 137 (1995).

143 Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 375 (2002) (discussing Redish's political commitment principle).

144 REDISH, *supra* note 142, at 143.

actions derive from the delegation. However, in practice, "vagueness" analysis has proven to be nearly as "standardless" as the D.C. District Court cautions application of Chief Justice Marshall's "core functions" analysis would be. For example, in *American Petroleum*, Justice Stevens, joined by the Chief Justice and Justice Stewart, explained that if the Government was correct that neither § 3(8) nor § 6(b)(5) of OSHA required findings upon which the Secretary of Labor would determine classifications of toxic substances, the Act itself would "make such a 'sweeping delegation of legislative power' that it might be unconstitutional."[145] As is evident from the various positions taken by the Justices on this point in *American Petroleum*, the qualification of a particular delegation as "too vague," "too broad," or "too sweeping" is inevitably the product of backward reasoning.[146]

There are certain significant consistencies between the various formulations of the nondelegation doctrine[147] that, taken together, present a useful, yet loose, set of guidelines.[148] The inquiry under this combined model is roughly whether the delegating branch (almost invariably Congress) has (1) delegated a power that it possessed and thus had the authority to give away,[149] and (2) constrained the scope of that delegation in such a way that (a) it retains the ultimate author-

145 448 U.S. 607, 646 (1980).

146 The paradigmatic example of this kind of reasoning is Chief Justice Marshall's statements in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825), to the effect that—in the words of Gary Lawson—"the Constitution requires Congress to make whatever decisions are important enough so that the Constitution requires Congress to make them." LAWSON, *supra* note 71, at 114. However, Lawson's formulation of the nondelegation doctrine falls victim to the same circular reasoning when he proposes that "Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them." Lawson, *supra* note 70, at 1239.

147 *See* DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION (1993) (arguing that the constitutionality of a particular delegation can be determined by reference to the ability of its specific terms to resolve cases brought under the statute authorizing the delegation). Essentially, the statute must lay out the constraints on the delegation plainly enough for an interested person to determine what is legally allowed under the statutory scheme. *Id.* at 183; *see also* LAWSON, *supra* note 71, at 115 (explaining that the ultimate inquiry is "whether a statute vesting discretion in administrators would have been viewed by the late 18th-century public as a 'proper' exercise of legislative (and executive) authority, and is therefore authorized by the sweeping clause"). Professor Lawson proposes that "'Congress must make whatever policy decisions are sufficiently important to the statutory scheme at issue so that Congress must make them.'" LAWSON, *supra* note 71, at 115 (quoting Lawson, *supra* note 70, at 1239).

148 However, this combined model suffers from the same problems in application.

149 *See, e.g.*, *Wayman*, 23 U.S. (10 Wheat.), at 42–43 ("It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are

ity in that area ("core functions" would be those powers which are not amenable to constrained delegation), and (b) the scope of that authority is knowable to both the electorate and to the courts.

In practice, the multi-prong inquiry above is generally asked in one sweeping inquiry based on the ad hoc determination of the focus of each particular delegation challenge. For example, in *Whitman v. American Trucking Ass'ns*,[150] *J.W. Hampton, Jr., & Co. v. United States*,[151] and *Mistretta v. United States*,[152] (among others) the Supreme Court applied an "intelligible principle" standard[153] to delegation challenges. Some scholars have treated judicial attempts to articulate the meaning of the nondelegation doctrine, such as the "intelligible principles" standard, as inexact if not unfaithful applications of the constitutional principle.[154] Scholars such as John Hart Ely have identified this gulf between judicially created standards and the constitutional principle as the death knell of the nondelegation doctrine.[155] Conversely, Professor Cass Sunstein explains that the standards articulated in cases have not murdered the doctrine, but that the doctrine has merely been "relocated"[156] in these standards, which he refers to as "nondelegation canons." Professor Sunstein maintains that, "[t]he nondelegation canons are far preferable to the old nondelegation doctrine, because they are subject to principled judicial application, and because they do not threaten to unsettle so much of modern government."[157]

Professor Sunstein's "nondelegation canons," which are loosely synonymous with the two-part inquiry this Note designates the "com-

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strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.").

150 531 U.S. 457, 472 (2001).

151 276 U.S. 394, 409 (1928).

152 488 U.S. 361, 372 (1989).

153 Justice Scalia, writing for the majority in *Whitman v. Am. Trucking Ass'ns*, held that, "when Congress confers decisionmaking authority upon agencies *Congress* must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton, Jr., & Co.*, 276 U.S. at 409).

154 *See, e.g.*, Jeffrey A. Wertkin, Note, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L. J. 1055, 1055 (2002) (arguing that the "disconnect between legal principle and application reflects a flawed, inconsonant approach to the nondelegation doctrine that obscures basic constitutional concerns of accountability and separation of powers").

155 JOHN HART ELY, DEMOCRACY AND DISTRUST 132–33 (1980) (asserting that the nondelegation doctrine is dead).

156 Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 315–16 (2000) (asserting that the doctrine is alive and well, "relocated rather than abandoned").

157 *Id.*

bined model," reflect a practical understanding of our increasingly complex society, and maintain the spirit of the constitutional principle. However, the "disconnect"[158] some scholars observe between such a view of nondelegation and the inalienable nature of the constitutional structure is not a function of surrendering the latter to a functional understanding of delegation, but rather a misunderstanding of the dual nature of constitutional power. The "nondelegation canons" that have developed in the context of administrative law account for the relationship of Congress to those constitutional powers that are conducive to "partial agency" as described in Part II.A. Article I vests Congress with the power to "make all Laws."[159] In operation, the Necessary and Proper Clause allows (and even directs) Congress to use the other branches as its agents to give life to the law. In principle, Sunstein's "canons of nondelegation" create limiting principles for how Congress may act through the agency of the other branches: (1) Congress can only delegate to its agent what it may itself do; (2) if the other branch is to act as Congress's agent, it follows that Congress must retain its status as principal; and (3) the actions of the agent cannot bind third parties unless the scope of its agency is knowable to those parties. If the functional interpretation of the nondelegation doctrine in the context of "partial agency" powers were approached from this perspective, common law principles would guide just and coherent application of the doctrine.

However, this formulation of nondelegation does not work in the context of those constitutional powers designed to control the scope of a co-equal branch's authority.[160] These powers are per se nondelegable.

By separating "partial agency" powers from "scope of authority" powers we are able to reconcile that which Justice Scalia did not: that the Constitution is a "prescribed structure, a framework, for the conduct of government" and that "commingling of functions" as conceived by the Framers cannot seem to be contained by any formal principle.

D. The Exceptions Power and Nondelegation

Significantly, the Court in *Robertson v. Seattle Audubon Society* implied that a congressional action which "purported to direct any particular findings of fact or applications of law, old or new, to fact,"[161]

158 *See* Wertkin, *supra* note 154, at 1055.

159 U.S. CONST. art I, § 8, cl. 18.

160 *See supra* Part II.A.

161 503 U.S. 429, 438 (1992).

would have violated Article III of the Constitution by infringing upon the "Judicial Power"[162] vested exclusively in the courts. The impermissible "congressional direction of judicial decision-making" scenario is directly analogous to the example given about the EPA.[163] Congress directing the outcome of pending litigation in the Article III courts would functionally usurp the courts' jurisdictional power to adjudicate cases and controversies. The courts would cease to be a coequal branch of government and would instead be agents of Congress.

Similarly, an executive action that removes certain parties from the jurisdiction of the Article III courts would infringe upon Congress's authority to make "exceptions"[164] to the appellate jurisdiction of the Supreme Court and to constitute inferior Article III courts.[165] The constitutional power of Congress to define the appellate jurisdiction of the Supreme Court and constitute inferior courts is the paradigmatic example of a "jurisdictional power" as described in Part II.B. Congress alone can define the scope of the "Judicial Power" beyond the original jurisdiction of the Supreme Court, and thus Congress alone can create subject matter or party-defined exceptions to Article III cases and controversies. If the "exceptions power" were within the "twilight zone"[166] of concurrent authority between the Executive and Congress, then the Executive could unilaterally decide how, if, and when it would execute the laws. For example, an executive administration that disagreed ideologically with the Freedom of Access to Clinic Entrances Act of 1994,[167] could simply remove parties injured under the Act from the jurisdiction of the courts and thereby frustrate the purpose of the law. This outcome is clearly irreconcilable with the constitutional structure of American government. For the same reason, cases like *Seattle Audubon* and *Klein* demonstrate that Congress's power to define and redefine the cases and controversies within the jurisdiction of the Article III courts must fall short of a power to "direct any particular findings of fact or applications of law, old or new, to fact"[168] in the courts.

Both the text and structure of Article III and the historical exercise of the powers defined therein support the conclusion that the "Exceptions Power" is a structural principle like bicameralism, pre-

162 U.S. CONST. art. III, § 1.

163 *See supra* Part II.B.

164 U.S. CONST. art. III, § 2.

165 U.S. CONST. art. I, § 8, cl. 9.

166 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (Jackson, J., concurring).

167 18 U.S.C. § 248 (2000).

168 *See* United States v. Klein, 80 U.S. (13 Wall.) 128 (1871); *supra* note 52.

sentment, appointment, and removal. Article III, section 2 begins with "The judicial Power shall extend to . . ."[169] —meaning that this section defines the scope of the "Judicial Power." Thus, "with such Exceptions, and under such Regulations as the Congress shall make,"[170] is in reference to the scope of power of the Article III courts. Article III, section 2, therefore, grants Congress the power to define the appellate jurisdiction of the Supreme Court. Article I, section 8 grants Congress the power "to constitute Tribunals inferior to the supreme Court."[171] The necessary implication is that Congress has the power to define the jurisdiction of the inferior courts. Thus Congress is constitutionally exclusively responsible for the scope of power for all Article III courts.

Congress has taken full advantage of its exceptions power, for example, through the creation of specialized administrative adjudicative bodies, the provisions of Title 28, and limitations imposed on courts' ability to hear and grant habeas petitions.[172] Part I.C. explained how Congress codified exceptions from Article III jurisdiction for foreign sovereigns and specific exclusions from that general immunity in Title 28. Claims such as that of Dames & Moore were only hearable in Article III courts by virtue of the statutory exceptions to foreign sovereign immunity[173] created by Congress. The removal of that litigation from the courts by Executive Order 12,294 modified the jurisdictional scheme created by Congress.

Because the "exceptions power" is a structural principle like bicameralism, presentment, removal, and appointment,[174] it should not be administered through executive order. Such a "jurisdictional power" is not exercisable by a coordinate branch, nor is it delegable by the branch charged with its exercise. To delegate the "exceptions power" to the Executive would concentrate "jurisdictional power" in the Executive, dangerously disrupting the balance between the coequal branches of government. There is, therefore, no way to legitimate the provisions of Executive Order No. 12,294 which removed pending litigation from the Article III courts and vested this litigation in international tribunals. Only Congress has the power to shift jurisdiction from federal courts to international courts. Executive Order

169 U.S. CONST. art. III, § 2, cl. 1.

170 *Id.*

171 U.S. CONST. art. I, § 8, cl. 9.

172 *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

173 28 U.S.C. § 1604 (2000).

174 *See* discussion *supra* Part II.B.

No. 12,294 thus violated the letter, structure, and history of our constitutional system.

CONCLUSION

Based on her research into the constitutional limits of Executive Agreements such as the Algiers Accords, Professor Sharon Hyman reported that "Congress . . . has expressed concern that its powers are being eroded by the extensive use of the international agreement by the executive branch . . . ."[175] In the sensitive field of foreign affairs, it is particularly important that Congress and the Executive properly balance their authority. Improper delegation compromises important decisionmaking procedures and accountability that are vital to protecting individual rights during times of national emergency. Professor Harold Koh maintains that the Iran-Contra Affair is an example of this sort of procedural and accountability failure due to poor delegation decisions on the part of Congress. Professor Koh writes that the *Dames & Moore* decision "condoned legislative inactivity at a time that demanded interbranch dialogue and bipartisan consensus."[176] In the context of the Bush Administration's "War on Terrorism" it is not especially difficult to see how inattention to the delegation decisions of Congress might be regrettable in the future. The outrage by members of the practicing and academic legal communities over President Bush's November 13, 2001 Military Order[177] granting the Secretary of Defense broad powers to create military commissions for the detention and (presumably) the prosecution of persons the Executive unilaterally named as subject to the order, demonstrates how the changing nature of national emergencies requires immediate consideration and resolution of the constitutional delegation questions at issue.

Increasingly, our domestic policy is inseparable from international policy and agreements. It is unrealistic to assume that condon-

175 Sharon G. Hyman, *Executive Agreements: Beyond Constitutional Limits?*, 11 HOFSTRA L. REV. 805, 807 (1983) (citing *Congressional Review of International Agreements: Hearings Before the Subcomm. on Int'l Security and Scientific Affairs of the House Comm. on Int'l Relations*, 94th Cong. (1976); *Congressional Oversight of Executive Agreements—1975: Hearings on S. 632 and S. 1251 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 94th Cong. (1975); *Congressional Oversight of Executive Agreements—1972: Hearings on S. 3475 Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. (1972)).

176 HAROLD HONGJU KOH, THE NATIONAL SECURITY CONSTITUTION: SHARING POWER AFTER THE IRAN-CONTRA AFFAIR 140 (1990).

177 Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §§ 3(a), 4(b), 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001).

ing broad exercise of functionally limitless executive powers in the context of foreign affairs will not profoundly affect individual rights (both personal and property) domestically. The *Dames & Moore* decision as precedent suggests that the Executive could deny all individuals whose personal or property rights were violated by the current administration's "War on Terrorism" access to Article III courts, so long as Congress were to "acquiesce" to such an exercise of power, and perhaps even if Congress vocally disapproved. A generation ago, Justice Frankfurter recognized how truly fine the line was between the ability to delegate authority and a dangerous concentration of authority, when he wrote:

> [The Framers] rested the structure of our central government on the system of checks and balances . . . . Not so long ago it was fashionable to find [that] system of checks and balances obstructive to effective government. It was easy to ridicule that system as outmoded—too easy. The experience for which the world has passed in our own day has made vivid the realization that the [Framers] were not inexperienced doctrinaires.[178]

The reference is, recognizably, to the rise of the Nazi party in Germany. The allusion may seem dramatic, but we must remember that the "Post September 11th Era" is still too new for thoughtful reflection. Concurring with Justice Frankfurter's opinion, Justice Jackson wrote that in the area of national security, "any actual test of [executive] power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[179] Perhaps it is worth considering whether Justice Jackson's "imperatives of events and contemporary imponderables"[180] might be the same as those "fashionable"[181] practices which Justice Frankfurter reminds us paved the way for fascism. One can agree that the "great ordinances of the Constitution do not establish and divide fields of black and white,"[182] without conceding that those "great ordinances" fail to make inalienable any power of the separately established branches of government. The Constitution was intended to be a self-paternalistic contract specifically because the Framers recognized that adherence to "abstract theories of law"—what might be better termed "princi-

178 Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 593 (Frankfurter, J., concurring).

179 *Id.* at 637 (Jackson, J., concurring).

180 *Id.* (Jackson, J., concurring).

181 *Id.* at 593 (Frankfurter, J., concurring).

182 *Id.* at 597 (Frankfurter, J., concurring) (quoting Springer v. Philippine Islands, 277 U.S. 189, 209 (1928) (Holmes, J., dissenting)).

ples"—when inconvenient or unpopular is the purpose of a Constitutional system.

In *Dames & Moore v. Regan*, Justice Rehnquist cited *United States v. Curtiss-Wright Export Corp.*, where the Court noted:

> [W]e are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations—a power which does not require as a basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution.[183]

A constitutional interpretation that allows the Executive to modify the jurisdiction of the Article III courts would insulate the Executive from accountability to the judicial and legislative branches. Thus, the *Dames & Moore* decision, and the executive unaccountability which it invites, exposes the problematic weaknesses in the current interpretation of constitutional principles "vital to the integrity and maintenance of"[184] our system of government. The nondelegation doctrine proposed in this Note, based on a dual understanding of constitutional powers, is offered as a foundation for canons of constitutional interpretation designed to protect our democracy in the Post-September 11th Era.

183 Dames & Moore v. Regan, 453 U.S. 654, 661 (1981) (citations omitted).
184 Field v. Clark, 143 U.S. 649, 692 (1892).