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Private entities often administer federal law. The early-twentieth-century Supreme Court derived constitutional limits to delegations of administrative power to private entities, grounding them in Article I of the Constitution where legislative power is delegated and in the Due Process Clause where the delegee's bias is apparent. But limits to the delegation of executive power to private administrators of law might exist in Article II. Those limits—in particular, their scope and the interplay among them—have been left underdeveloped by existing scholarship.

This Article explores the possibility of an Article II executive-power non-delegation doctrine for the private administration of federal law, and develops one potential framework for its analysis. Drawing force from the Vesting Clause, and informed primarily by the Take Care and Appointments Clauses, the doctrine might involve two inquiries: (1) Does the delegated task implicate "[t]he executive Power" that the Constitution vests in the President—a power, in the words of the Take Care Clause, to "take Care that the Laws be faithfully executed"? (2) If so, is the delegee a proper subordinate to the President, so that his performance of such executive tasks does not divest the President of "[t]he executive Power"? As the Article explains, a rigid unitary executive approach—which demands complete presidential control over every task connected with the execution of law—is not the only coherent way to understand Article II's Vesting Clause to restrict delegations of executive power. Under the Supreme Court's Article II precedent, the doctrine's inquiries might depend instead on the nature

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of the task and the form, degree, and directness of presidential oversight or control available over the task or over the one performing it, flexibly allowing for certain trade-offs among those control mechanisms, so long as the President remains accountable for the execution of law. By conceptualizing Article II as imposing a non-delegation analysis, this Article observes how the Vesting Clause might constrain certain delegations of power over law's execution that are made by the President and executive branch, not simply those made by Congress.

I. INTRODUCTION

In 2007, the federal Bureau of Prisons (BOP) arguably delegated to private, for-profit prisons certain authority to discipline federal inmates in administering their criminal punishment.[1] That delegation purported to authorize private prison employees to impose severe sanctions—such as solitary confinement—without first obtaining BOP

1. Memorandum from James E. Burrell, Administrator, Privatization Management Branch, Federal Bureau of Prisons to John M. Vanyur, Assistant Director, Correctional Programs Division, Federal Bureau of Prisons 1 (Mar. 30, 2007) (authorizing certain decisions of discipline hearing officers (DHOs) at private prisons to issue without prior certification by the BOP), *in* Vickers Decl'n ex. 6, Arellano v. Benov, No. 1:13-cv-00558, 2014 WL 1271530 (E.D. Cal. Mar. 27, 2014) [hereinafter *BOP 2007 Memorandum*]; *see, e.g.*, *Arellano*, 2014 WL 1271530, at *3 (noting that the BOP Memorandum "authorized private prison employees to serve as DHOs and discipline inmates").

approval.[2] Some private prison employees have been accused of threatening or imposing solitary confinement to retaliate against prisoners for seeking medical care, completing legal paperwork, or declining to work without compensation.[3] Through this scheme the executive branch might be said to have delegated authority to execute the law to entities whose accountability to the public interest is dubious.

This private role in law administration is not unusual. Entities that are commonly considered private perform various other roles in the administration of federal law.[4] The Financial Industry Regulatory Authority, an independent, not-for-profit organization, assists in promulgating and enforcing rules governing its broker-dealer members' conduct under federal securities laws.[5] Advertising industry associations help set data collection standards that exempt complying advertisers from other enforcement under the Children's Online Privacy Protection Act.[6] Manufacturers may issue consumer product safety standards on which the Consumer Products Safety Commission by statute must rely.[7] Other companies implement federal programs by dint of government contracts, such as Medicare reimbursement administered by insurance-company fiscal intermediaries.[8] Individual

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2. *See BOP 2007 Memorandum*, *supra* note 1; FED. BUREAU OF PRISONS, PROGRAM STATEMENT 5270.09: INMATE DISCIPLINE PROGRAM, at § 541.3 & tbl.1 (Aug. 1, 2011), http://www.bop.gov/policy/progstat/5270_009.pdf [http://perma.cc/D4MQ-H8NU] (listing DHO-imposable sanctions).

3. *See, e.g.*, Menocal v. GEO Group, Inc., No. 14-cv-02887, 2015 WL 4095592, at *1 (D. Colo. July 6, 2015) (describing allegations that detainees were forced, under threat of solitary confinement, to work without pay by cleaning living areas in private federal immigration detention center); AMERICAN CIVIL LIBERTIES UNION, WAREHOUSED AND FORGOTTEN: IMMIGRANTS TRAPPED IN OUR SHADOW PRIVATE PRISON SYSTEM 70, 75 (June 2014), https://www.aclu.org/sites/default/files/assets/060614-aclu-car-reportonline.pdf [http://perma.cc/T9AJ-RN26] (describing reports of incidents in which private prisons, by solitarily confining inmates, sought to "quash their efforts to obtain medical care" or to prevent them from assisting other inmates with the translation of legal forms).

4. *See generally* Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543 (2000) (providing examples).

5. 15 U.S.C. § 78s (2012); *About FINRA*, FIN. INDUS. REG. AUTH., www.finra.org/about (last visited Nov. 3, 2015) [http://perma.cc/X7W2-F5DF]; *What We Do*, FIN. INDUS. REGULATORY AUTH., www.finra.org/about/what-we-do (last visited Nov. 3, 2015) [http://perma.cc/X8P2-DSYD].

6. 15 U.S.C. §§ 6502(b), (c), 6503(a) (2012); 16 C.F.R. § 312.11 (2015); *see, e.g.*, *First "Safe Harbor" Approved for Children's Online Privacy Protection Act*, FED. TRADE COMM'N (Feb. 1, 2001), http://www.ftc.gov/news-events/press-releases/2001/02/first-safe-harbor-approved-childrens-online-privacy-protection [http://perma.cc/YTB6-3R47].

7. 15 U.S.C. § 2056(b)(1) (2012).

8. 42 U.S.C. § 1395kk-1(a)(1), (4) (2012); 42 C.F.R. §§ 421.100–.104 (2007); *Medicare Administrative Contractors*, CTRS. FOR MEDICARE & MEDICAID SERVS., http://www.cms.gov/Medicare/Medicare-Contracting/Medicare-Administrative-Contractors/MedicareAdministrativeContractors.html (last modified July 10, 2013 2:33PM) [http://perma.cc/B8AT-Y4K5].

citizens and collectives thereof pursue court judgments based on federal law violations, such as of environmental and personal privacy statutes, under citizen-suit statutory provisions.[9] And the trend toward privatization of federal law administration may be growing: some of the most significant administrative schemes recently adopted—under the Affordable Care Act, for example[10]—include roles for assorted private entities.

Some of these delegations to private entities are accomplished by statute. Others—like the BOP's private prison delegation—occur via executive action. Whether, when, and which delegations to such entities are constitutionally permissible are questions subject to debate. The Supreme Court, for its part, has invalidated certain delegations to private entities under two constitutional doctrines: the Article I doctrine that prohibits congressional delegations of legislative power; and the due process doctrine that restricts delegations made to biased decisionmakers. Both were referenced in the Supreme Court last Term in *Department of Transportation v. Association of American Railroads*,[11] in which challengers argued that a federal statute unconstitutionally delegated to Amtrak (which challengers characterized as a private, for-profit railroad carrier), and potentially to an arbitrator (which challengers claimed would also be private), a role in setting railroad performance standards.[12]

The D.C. Circuit decision under review in that case had forged a novel rule, not grounded in either of these recognized doctrines, that would per se bar private entities from ever wielding regulatory power.[13] Although the Supreme Court dodged the issue by deciding that Amtrak was governmental rather than private, Justice Samuel Alito's concurring opinion echoed the D.C. Circuit's per se rule.[14] But neither of the recognized doctrines nor that novel per se rule directly addresses an aspect of what may be problematic about the regulatory roles of

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9. *E.g.*, 33 U.S.C. § 1365 (2012) (Clean Water Act); 18 U.S.C. § 2520 (2012) (Electronic Communications Privacy Act).

10. *E.g.*, 42 U.S.C. § 300gg-15(a) (2012) (requiring the Secretary of Health & Human Services to "consult with . . . a working group composed of representatives of health insurance-related consumer advocacy organizations, health insurance issuers, health care professionals, [and] patient advocates" in developing standards for insurance plan explanations of benefits and coverage).

11. 135 S. Ct. 1225 (2015).

12. *See* Petition for Certiorari at I, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225 (2015) (No. 13-1080), 2014 WL 953507; Brief for the Petitioners at I, *Ass'n of Am. R.Rs.*, 135 S. Ct. 1225 (2015) (No. 13-1080), 2014 WL 4059775; *see also* Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 668, 675 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015).

13. *Ass'n of Am. R.Rs.*, 721 F.3d at 675–77.

14. *Ass'n of Am. R.Rs.*, 135 S. Ct. at 1228, 1233–34; *id.* at 1237–38 (Alito, J., concurring).

certain private entities: those roles might constitute delegations of *executive* power (that is, authority to execute the law) to *unaccountable* entities (that is, entities that are not accountable to the American people via supervision or control by the popularly elected President of the United States). A doctrine that would address that issue—an executive-power non-delegation doctrine founded in Article II of the Constitution—might lurk beneath the surface of prior Supreme Court decisions, awaiting recognition and exposition.

This Article explores the possibility of an Article II executive-power non-delegation doctrine in the context of the private administration of federal law. The Article assumes, without endorsing or challenging, the continuance of the Supreme Court's long-established legislative-power non-delegation doctrine, which draws its non-delegation understanding from Article I's Vesting Clause on "legislative Powers." The Article then outlines some arguments that could support (or oppose) extending a similar understanding to Article II's Vesting Clause on "[t]he executive Power." From that Clause, which declares, "The executive Power shall be vested in a President of the United States of America," two inquiries arise: First, is the delegated task an executive task—that is, one that implicates "[t]he executive Power" that must be vested in the President? Second, if so, is the delegee an Article II executive entity—that is, one whose actions are sufficiently connected through the accountability chain to the President, such that the delegee's performance of an executive task does not divest the President of "[t]he executive Power"?

These inquiries could be fleshed out by reference to Article II's remaining text, informed by its history and interpretation by the judicial and executive branches. For the first inquiry, the meaning of "[t]he executive Power" might be informed by the Take Care Clause, which assumes a power of the President to "take Care that the Laws be faithfully executed." A task might be executive in nature and thereby implicate "[t]he executive Power," therefore, if it inheres in law's *execution*. This Article focuses on two potential categories of such tasks: law enforcement tasks, and interstitial policymaking tasks. On the second inquiry, whether an entity is executive might depend on whether the entity is subordinate to the President such that the President can "take Care" that the entity faithfully executes the laws. Such an entity might be one subject to a chain of accountability to the American people via the President sufficient to ensure that the President can meaningfully act to encourage the laws' faithful execution. But flexibility might remain in that requirement's implementation, such that the chain connecting the entity to the President could employ one of a variety of combinations of oversight or control mechanisms—

including through appointment, removal, or supervision or review of decisionmaking—of varying types, strengths, and directness. This flexible-control approach, distinct from many unitary executive theorists' more rigid approach, seems consistent at least with Article II's text and the Supreme Court's Article II jurisprudence, as well as with much historical practice.

Despite its foundations, a holistic executive-power non-delegation doctrine of the type this Article explores has eluded scholarly attention and development, particularly as to private administration of federal law. The two relevant categories of scholarship—on administrative law and privatization, and on constitutional law and the separation of powers—miss aspects of these issues.

Administrative law scholarship on privatization has largely overlooked Article II's relevance to private administration of law.[15] Much of it bemoans private entities' lack of accountability while underselling or overlooking potential Article II limits.[16] Some acknowledges issues under the Appointments Clause but not the Vesting and Take Care Clauses, and generally does not rely on any constitutional theory of executive power.[17]

Constitutional law scholarship is similarly incomplete.[18] Theorists who engage with the Vesting Clause's unitary executive structure generally take one of two extreme positions: either insisting absolutely that all mechanisms of direct presidential control must apply

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15. This is particularly surprising given that Article II—and in particular, the Take Care Clause—has otherwise enjoyed renewed scholarly attention with respect to, for example, President Barack Obama's administration and enforcement of the Affordable Care Act, federal immigration laws, and the Defense of Marriage Act. *E.g.*, Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 VAND. L. REV. 671, 673–74, 686 (2014); Robert J. Delahunty & John C. Yoo, *Dream On: The Obama Administration's Nonenforcement of Immigration Laws, the DREAM Act, and the Take Care Clause*, 91 TEX. L. REV. 781, 783–84 (2013); Neal Devins & Saikrishna Prakash, *The Indefensible Duty To Defend*, 112 COLUM. L. REV. 507, 532–35, 551 (2012).

16. *E.g.*, Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1443 (2003). Scholarly discussion of *Association of American Railroads*, for example, focuses on the legislative-power and due process doctrines, essentially overlooking Article II. *E.g.*, Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL'Y 931, 940–84 (2014); Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 419–23 (2015).

17. Harold J. Krent, *The Private Performing the Public: Delimiting Delegations to Private Parties*, 65 U. MIAMI L. REV. 507, 510–11 (2011); Thomas Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2167–68 (2004); Anne Joseph O'Connell, *Bureaucracy at the Boundary*, 162 U. PA. L. REV. 841, 902–06 (2014); PAUL R. VERKUIL, OUTSOURCING SOVEREIGNTY: WHY PRIVATIZATION OF GOVERNMENT FUNCTIONS THREATENS DEMOCRACY AND WHAT WE CAN DO ABOUT IT 106–09 (2007).

18. *E.g.*, Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power To Execute the Laws*, 104 YALE L.J. 541 (1994); Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153 (1992); Lawrence Lessig & Cass R. Sunstein, *The President and the Administration*, 94 COLUM. L. REV. 1 (1994).

to any task connected to the execution of federal law,[19] or that whole categories of laws are exempt from any requirement of presidential control over their execution.[20] Such theories, unlike the one explored here, do not examine or import significance to the interactions between presidential-control mechanisms—and between their respective natures, strengths, and degrees of directness—in determining what oversight or control over the law's execution or its executors is required. Many of them overlook potential presidential influence via the appointment power.[21] In addition, this scholarship category focuses on independent agencies rather than private administrators of federal law.

Even the little scholarship that bridges the gap between these categories neglects an important aspect of the problem. It does not recognize how Article II's Vesting Clause could restrict delegations of executive power made by the *Executive*, not simply those made by Congress.[22] Indeed, that insight is fostered by this Article's particular approach of conceptualizing Article II as imposing an executive-power *non-delegation* analysis, in which executive-branch actors are restricted in delegating certain powers that they may exercise themselves.[23]

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19. Calabresi & Rhodes, *supra* note 18, at 1165–68 (describing different "model[s] of the unitary executive," each of which insists on a particular mechanism (or mechanisms) of *direct* presidential control).

20. Lessig & Sunstein, *supra* note 18, at 45–46 (arguing that "administrative" laws are exempt from any presidential-control requirement).

21. *E.g.*, Calabresi & Rhodes, *supra* note 18, at 1166 (identifying only three direct mechanisms of presidential control: power to supplant a subordinate's executive action before it takes legal effect, power to nullify it afterward, and power to remove the subordinate at will); Calabresi & Prakash, *supra* note 18, at 593–95 (same, and arguing that all three direct control mechanisms are constitutionally required).

22. Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 67–68 (1990) (examining delegations by "congressional act," not by the Executive); *see* Krent, *supra* note 17, at 537 (asserting that Article II jurisprudence would *not* prevent "executive branch officials from delegating decisional authority to private individuals"); Freeman, *supra* note 4, at 579–84 (noting briefly the possibility of a delegation "so sweeping that it deprives the executive of its Article II powers," but only in the context of delegations by *Congress*). Gillian Metzger has referenced the need for supervision of the President's delegees, but has attributed it to the President's *duty* to supervise as opposed to a non-delegable or non-divestible supervisory *power* with respect to the execution of law. Gillian E. Metzger, *The Constitutional Duty To Supervise*, 124 YALE L.J. 1836, 1892–95 (2015).

23. A few other scholars have suggested an Article II non-delegation principle, but in more specific or distinct contexts, without detailing the underlying theory and its justifications. Tara Leigh Grove, *Standing as an Article II Nondelegation Doctrine*, 11 U. PA. J. CONST. L. 781 (2009); John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and The Appointments Clause*, 15 CONST. COMMENT. 87 (1998); Jeremy A. Rabkin & Neal E. Devins, *Averting Government by Consent Decree: Constitutional Limits on the Enforcement of Settlements with the Federal Government*, 40 STAN. L. REV. 203 (1987). In only alluding to a general Article II non-delegation principle in the private administration context, Gary Lawson has

This Article proceeds as follows. Part II contextualizes an Article II non-delegation doctrine by outlining the two recognized constitutional doctrines on delegations to private administrators of federal law: the legislative-power doctrine and the due process doctrine. Part III lays out the roots and contours of that Article II doctrine and its inquiries, describes some legal authority for and against it, and examines how the doctrine would, by its nature, constrain delegations of executive power made by the President and executive agencies, not simply by Congress.

Part IV explores some of the doctrine's implications with respect to private administration of federal law. Part IV first explains how the doctrine would fit with the recognized doctrines, and to some degree compares it to versions of an alternative "private non-delegation doctrine" that have been proffered by various jurists and scholars. Part IV also observes the doctrine's potential import for delegations to states, not just private entities. Part IV then assesses the doctrine in light of various values, and discusses how it might be implemented, if at all.

Two caveats are in order for this Article:

First, the question of what is the best approach to understanding the Constitution is a deep one. Positions in that debate include originalist approaches—including "new originalism"[24] approaches that rely on original public meaning[25]—as well as living constitutionalist approaches,[26] among other views. This Article offers a variety of arguments that could be incorporated under many of these approaches, but reserves firm judgment in the larger methodological debate. To the extent that the doctrine explored here finds support through many tools on which these approaches rely, it may have "constructivist coherence."[27]

Second, this Article does not seek to advocate for recognition or implementation of an executive-power non-delegation doctrine, in this

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acknowledged, "A full answer to this question would require a separate article." Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 351 (2002).

24. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 456–57 & n.9, 467–69 (2013) (describing "new originalism" shared tenets and theorists, including Keith Whittington and Randy Barnett).

25. *E.g.*, Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611 (1999); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENTARY 427 (2007); *see* Gary Lawson, *Proving the Law*, 86 NW. U. L. REV. 859, 875 (1992).

26. *E.g.*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

27. Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189, 1193, 1237, 1243 (1987). *See* PHILIP C. BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 7 (1982) (outlining six "modalities" of constitutional argument—history, text, structure, doctrine, ethos, and prudential concerns—each of which is examined in this Article, to differing degrees).

or any other form. The Article assesses the doctrine to some degree in comparison to certain alternatives, but does not aspire or purport to determine its overall advisability. This is particularly so because the Article takes as given certain premises that might be changed or questioned, such as the current doctrinal context and some of the values and arguments underlying it. In essence, this Article seeks only to begin, not to exhaust, the conversation about a potential doctrine of this type: one that would constrain delegations of law-execution authority, including those to private entities.

II. CONTEXTUALIZING AN EXECUTIVE-POWER NON-DELEGATION DOCTRINE

This Article does not explore an Article II executive-power non-delegation doctrine in isolation. The Supreme Court has recognized two other constitutional doctrines that apply to delegations to private entities: one on legislative power and the other on due process.

A. The Article I Legislative-Power Non-Delegation Doctrine

The traditional non-delegation doctrine governs who may wield legislative power. Its roots are in Article I of the Constitution, and particularly in Article I's Vesting Clause.[28] That Clause reads, "All legislative Powers herein granted shall be vested in a Congress of the United States."[29] Among those powers is that of the Necessary and Proper Clause: Congress is authorized "[t]o make all Laws which shall be necessary and proper for carrying into Execution" various powers.[30] Although some Justices and scholars have questioned whether the Vesting Clause precludes the transfer of lawmaking power to others,[31] the Supreme Court has treated the issue as settled: the legislative power to make law cannot be delegated beyond Congress.[32]

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28. *E.g.*, A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); *see* Lisa Schultz Bressman, Schechter Poultry *at the Millennium: A Delegation Doctrine for the Administrative State*, 109 YALE L.J. 1399, 1403 (2000).

29. U.S. CONST. art. I, § 1.

30. *Id.* art. I, § 8, cl. 18; *see Schechter Poultry*, 295 U.S. at 529.

31. *E.g.*, FCC v. Fox, 129 S. Ct. 1800, 1825–26 & n.2 (2009) (Stevens, J., dissenting) (internal quotation marks omitted); INS v. Chadha, 462 U.S. 919, 985–87 (1983) (White, J., dissenting); Volokh, *supra* note 16, at 956; Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 89 n.13 (2010).

32. *E.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); Touby v. United States, 500 U.S. 160, 164–65 (1991); Mistretta v. United States, 488 U.S. 361, 371–72 (1989) (quoting Field v. Clark, 143 U.S. 649, 692 (1892)); *Schechter Poultry*, 295 U.S. at 529; Panama Refining Co. v. Ryan, 293 U.S. 388, 421 (1935).

The doctrine's intellectual development traces from a line of early twentieth-century decisions leading into the New Deal era. In *J.W. Hampton, Jr., & Co. v. United States*, decided in 1928, the Court concluded that a particular statute did not delegate legislative power, but nonetheless declared the basic non-delegation principle.[33] *J.W. Hampton* explained the distinction between " 'the power to make the law, which necessarily involves a discretion as to what it shall be, and . . . an authority or discretion as to its *execution*,' " the latter being permissibly wielded by the President under the Constitution.[34] The line between those powers provides the foundation for the legislative-power non-delegation doctrine's intelligible-principle standard: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to [take action] is directed to conform, such legislative action is not a forbidden delegation of legislative power."[35] The best theory for this notion is that the intelligible principle sets the basic policy of the law,[36] which suffices to constitute making the law,[37] such that any gap-filling—or interstitial policymaking with binding legal effect—is not an exercise of lawmaking power, but an exercise of law-execution power instead.[38] This line drawn between legislative and executive powers helps to determine which authority belongs to the President under Article II.

In 1935, the Court issued two decisions striking what it found to be unconstitutional delegations of legislative power: *Panama Refining Co. v. Ryan*,[39] which invalidated the President's statutory authority to prohibit certain interstate transportation of petroleum; and *A.L.A. Schechter Poultry Corp. v. United States*, which invalidated the President's statutory authority to approve codes of conduct set by and for the poultry industry.[40] In each, the Court relied on the lack of an intelligible principle to guide the President's actions, reasoning that the statute insufficiently specified its basic policy or standard and therefore left the President's discretion under the statute essentially unfettered.[41]

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33. 276 U.S. 394, 401, 404–06 (1928); *see* United States v. Cooper, 750 F.3d 263, 267 (3d Cir. 2014) ("[T]he modern nondelegation doctrine took shape in *J.W. Hampton, Jr., & Co. v. United States* . . . .").

34. 276 U.S. at 407–09 (quoting Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm'rs of Clinton Cty., 1 Ohio St. 77, 88 (1852)).

35. *Id.* at 409.

36. *Id.*

37. *See* Bressman, *supra* note 28, at 1404 ("Article I was satisfied as long as Congress retained for itself the responsibility for setting basic policy.").

38. *E.g.*, Lawson, *supra* note 23, at 338–40; Merrill, *supra* note 17, at 2099, 2116.

39. 293 U.S. 388, 406, 414–19 (1935).

40. 295 U.S. 495, 541–42 (1935).

41. *Schechter Poultry*, 295 U.S. at 541–42; *Panama Refining Co.*, 293 U.S. at 415.

Schechter Poultry and *Panama Refining Co.* applied the legislative-power non-delegation doctrine to limit delegations to the executive branch. But *Schechter Poultry* also rejected a statutory delegation to private entities. The Court determined that private industry's role in setting the poultry codes was an impermissible "delegat[ion] [of] legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent."[42] Because such associations were not legislative bodies, and because the only statutory guidance for their action consisted of "a preface of generalities as to permissible aims" rather than an intelligible principle, the Court invalidated the delegation to them.[43]

The Court has not struck government action under the non-delegation doctrine since *Schechter Poultry*.[44] Indeed, after the Court's 1937 switch in time, the doctrine went the way of so many from the *Lochner*/early New Deal era[45] and ceased to be cited by the Court as a basis to invalidate governmental acts. But although some describe the non-delegation doctrine as extinct,[46] it might be better described as dormant.[47] For better or worse, unlike for other *Lochner*-era rulings,[48] no decision has ever overruled *Schechter Poultry*'s non-delegation holdings.[49] In recent decades, the Court has repeatedly recognized the doctrine's vitality, albeit in declining to strike action challenged under it.[50] And it continues to inform federal statutory interpretation through

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42. *Schechter Poultry*, 295 U.S. at 537.

43. *Id.*

44. United States v. Cooper, 750 F.3d 263, 270 (3d Cir. 2014).

45. *See, e.g.*, ASHUTOSH BHAGWAT, THE MYTH OF RIGHTS: THE PURPOSES AND LIMITS OF CONSTITUTIONAL RIGHTS 54 (2010) (explaining how the Court in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), abandoned the freedom of contract substantive due process theory relied upon in *Lochner v. New York*, 198 U.S. 45 (1905)); Dina Mishra, *Child Labor as Involuntary Servitude: The Failure of Congress To Legislate Against Child Labor Pursuant to the Thirteenth Amendment in the Early Twentieth Century*, 63 RUTGERS L. REV. 59, 100–05 (2010) (describing the Court's jurisprudential reversal on the Commerce Clause and federal child-labor legislation in *United States v. Darby*, 312 U.S. 100, 109–10 (1941)).

46. *E.g.*, JOHN H. ELY, DEMOCRACY AND DISTRUST 131–33 (1980) (describing the doctrine as having "died"); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237 (1994) (noting its "[d]eath"); Lessig & Sunstein, *supra* note 18, at 104 & n.427, 119 (noting its "downfall"); ROBERT H. BORK, THE TEMPTING OF AMERICA 52 (1990) (describing *Schechter Poultry* as "utterly obsolete").

47. *See Cooper*, 750 F.3d at 269 ("The Supreme Court's continued attention to *Panama Refining* and *Schechter Poultry* signals that—while their continued existence is hardly robust—they nonetheless have continuing precedential force.").

48. *See supra* note 45.

49. Bressman, *supra* note 28, at 1405.

50. *E.g.*, Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 472 (2001); Loving v. United States, 517 U.S. 748, 771–72 (1996); Touby v. United States, 500 U.S. 160, 164–65 (1990); Mistretta v. United States, 488 U.S. 361, 371–72 (1988).

the canon of constitutional avoidance and substantive non-delegation canons.[51] As the legislative-power non-delegation doctrine has evolved into the modern era, however, the intelligible principle requirement has constrained delegation less. The Court has come to accept even broad, sweeping, or minimal standards as intelligible principles to sustain challenged statutes.[52]

B. The Due Process Doctrine

Delegations of regulatory power have also been invalidated under a doctrine derived from the Due Process Clauses—under the Fifth Amendment for exercises of federal power[53] and the Fourteenth Amendment for exercises of state power.[54] Particular delegations—including some to private entities—have been found to violate due process on the ground that the decisionmaking entity's personal biases, such as from a conflict between its own pecuniary interests and those of the regulated parties, render that entity insufficiently impartial.[55]

This was the ground on which the New-Deal-era Court rejected a delegation of power to private coal producers in *Carter v. Carter Coal Co.*[56] The challenged statute gave a subset of the coal industry the power to set labor hours, wages, and conditions for the entire industry.[57] The Court ruled this to be "legislative delegation in its most obnoxious form"[58] because it involved decisionmaking by an insufficiently

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51. *Mistretta*, 488 U.S. at 373 n.7; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 223, 242–46; Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000).

52. *Loving*, 517 U.S. at 771–72; *Touby*, 500 U.S. at 165; *Mistretta*, 488 U.S. at 373, 379; *e.g.*, American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (rejecting non-delegation challenge even though standards for the executive action were "broad"); Nat'l Broad. Co. v. United States, 319 U.S. 190, 225–26 (1943) (finding an intelligible principle in a statute's authorizing of regulation for the "public interest, convenience, or necessity"); N.Y. Cent. Sec. Corp. v. United States, 287 U.S. 12, 24–25 (1932) (same).

53. *E.g.*, Carter v. Carter Coal Co., 298 U.S. 238, 311 (1936).

54. *E.g.*, Agua Pura Co. of Las Vegas v. Mayor, Etc., of City of Las Vegas, 60 P. 208, 216 (N.M. 1900); Gen. Elec. v. N.Y. State Dep't of Labor, 936 F.2d 1448, 1457 (2d Cir. 1991).

55. *E.g.*, *Carter Coal*, 298 U.S. at 310–12; Gibson v. Berryhill, 411 U.S. 564, 567, 570, 578–79 (1973); Withrow v. Larkin, 421 U.S. 35, 46–47 (1975); Schweiker v. McClure, 456 U.S. 188, 189, 195–96 & n.8 (1982); Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252, 2259 (2009); *see* Volokh, *supra* note 16, at 940–41, 946, 950; Krent, *supra* note 17, at 510, 528; A. Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 153 (2000); Gillian E. Metzger, *Private Delegations, Due Process, and the Duty To Supervise*, *in* GOVERNMENT BY CONTRACT: OUTSOURCING AND AMERICAN DEMOCRACY 291, 302 (Jody Freeman & Martha Minow eds., 2009).

56. 298 U.S. at 310–12.

57. *Id.* at 310–11.

58. *Id.* at 311.

impartial and likely personally biased entity: "[I]t is not even delegation to an official or an official body, presumptively disinterested, but to private persons *whose interests may be and often are adverse to the interests of others in the same business.*"[59] *Carter Coal* emphasized that in the case at hand "the record clearly indicates . . . conflicting and even antagonistic interests" between those setting the regulations and those being regulated.[60] Accordingly, the Court found the delegation so clearly arbitrary as to constitute "a denial of rights safeguarded by the due process clause of the Fifth Amendment."[61] In so concluding, the Court invoked prior decisions that similarly struck delegations to private parties on case-specific due process impartiality grounds.[62]

The due process impartiality principle has persisted in federal administrative law,[63] including for administration by private entities. In *Schweiker v. McClure*, the Court applied the principle to private insurance carrier employees who served as hearing officers for Medicare reimbursement claims, ultimately finding no constitutional violation because evidence of those decisionmakers' bias did not meet a rigorous standard of proof.[64]

After *Carter Coal* and *Schweiker*, the Court's due process doctrine does not per se prohibit delegations to private entities, but instead treats the entities' private status as—at most—mere evidence of potential bias that must be proven on the case record.[65]

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59. *Id.* (emphasis added).

60. *Id.*

61. *Id.*

62. *Id.* at 312 (citing Eubank v. City of Richmond, 226 U.S. 137, 143 (1912), which rejected a delegation to local property owners to set a building line "*solely for their own interest* or even capriciously" (emphasis added); and Seattle Trust Co. v. Roberge, 278 U.S. 116, 121–22 (1928), which invalidated—as repugnant to the Fourteenth Amendment Due Process Clause—a delegation to owners who were "not bound by any official duty, but *are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice.*" (emphasis added)).

63. *See, e.g.*, Goldberg v. Kelly, 397 U.S. 254, 271 (1970); Withrow v. Larkin, 421 U.S. 35, 47 (1975); Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 882–87 (2009); Gibson v. Berryhill, 411 U.S. 564, 567, 570, 578–79 (1973).

64. 456 U.S. 188, 189, 195–96 & n.8 (1982).

65. *See supra* text accompanying notes 60–61; *see also* Constitutional Limitations on Fed. Gov't Participation in Binding Arbitration, 19 Op. O.L.C. 208, 234 (1995) ("*Schweiker* stands for the proposition that the Due Process Clause does not *per se* prohibit vesting [a final, binding] decision in a private actor.").

III. ARTICLE II LIMITS ON DELEGATION OF EXECUTIVE POWER

A. An Article II Doctrine's Basic Form

The basic form of the potential doctrine explored here should be summarized at the outset: This Article analyzes certain intratextualist, structural, and historical arguments for and against extending the Supreme Court's non-delegation understanding of Article I's Vesting Clause to Article II's Vesting Clause. It adopts a primarily clause-centered approach[66] in examining a potential executive-power non-delegation understanding of Article II. Specifically, this Article observes that Article II's Vesting Clause vests the President of the United States with "[t]he executive Power," which might encompass the authority that is at least presumed by the Take Care Clause, namely, to "take Care that the Laws be faithfully executed." The Vesting Clause's declaration that such power shall be vested in the President might mean that it must remain with him. The existence of Article II's Appointments Clause—along with other constitutional provisions—establishes that the Constitution comprehends that the President might see to the execution of laws by subordinates rather than execute them himself. But for the President to retain his power to "take Care" that his subordinates' execution is faithful, it would seem that the subordinates who assist him in that execution must remain, at least to some degree, *subordinate* to him. That is, it would seem that they—or the execution they perform—must be subject to his oversight or control in a manner sufficient to avoid divesting him of his "executive Power."

This Article respects the indeterminacy of Article II's Vesting Clause, which is phrased in relatively open-ended terms,[67] by exploring a less rigid understanding of it than do many unitary executive theorists. The President might retain his "executive Power" by retaining authority to take actions that tend to encourage the law's faithful execution. On this understanding, certain tradeoffs may be made among the forms, degree, and directness of the presidential oversight or control mechanisms required over each particular executive task, so long as the President does not have so little control that he could deny to the American people his responsibility for

66. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1948–49 (2011).

67. *See id.* at 1945, 1985, 2017–20 (explaining that the Vesting Clause "speak[s] in general terms" about "[t]he executive Power," in contrast to the more specific terms of, for example, the Appointments and Impeachment Clauses, which spell out the manner in which those particular powers are to be exercised).

decisions made in the execution of law.[68] For example, certain protections against removal of an official might be permissible in light of the official's cabined discretion over policy decisions in the execution of law. Or, for a given task in the execution of law, a method of appointing the official that involves less or less direct presidential control over the specific appointment might be offset by a stronger or more direct form of removing the official or directing his decisionmaking, resulting in sufficient overall presidential control over and accountability for the executive decisions of that official. This flexible-control approach is largely consistent with Supreme Court precedent and with much historical practice, including by the executive branch.

Some terminology should be clarified. This Article terms the potential doctrine it examines to be one of non-delegation of executive power, but that doctrine would not forbid every delegation of authority to execute the law. Instead, under this potential doctrine, what must never be divested from the President is "*[t]he* executive Power," a specific authority that might be described above and to which Article II's Vesting Clause refers. The President may delegate *an* executive power—that is, authority to perform a task that is executive in nature, a task fundamental to the execution of law—to any of a number of entities without violating the Constitution. But, under this doctrine, where that delegation is to someone over whom, or over whose performance, the President lacks sufficient oversight or control, an impermissible divestment of "*[t]he* executive Power"—the power to supervise the executive task or its executor—is effected. In essence, this executive-power non-delegation doctrine forbids divestment of "[t]he executive Power" by confining the delegation of executive tasks (certain tasks fundamental to the execution of law) to proper executive entities (those whose role or decisions are subject to sufficient presidential control). The doctrine imposes conditions on the delegation of subsidiary executive authority, rather than forbidding it outright.

Although it is not this Article's focus, a similar analysis might apply to acts of Congress. The doctrine examined here rests on the principle of non-divestment of "[t]he executive Power" from the President. Where Congress purports to authorize someone to perform certain tasks fundamental to the execution of law, under this doctrine's logic Congress cannot divest the President of all influence or control, whether directly or through his subordinates, over that task or the one performing it. The purported authorization by Congress commonly is,

68. Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 667–68 (1984).

and is in this Article, termed a "delegation" of the authority it assigns, even though other commentators might use that term in a stricter sense, as encompassing only the transfer of authority by one who possesses, and hence could wield, it himself.[69] Scholars generally agree that the Necessary and Proper Clause affords Congress broad authority to designate which executive entity may perform particular executive tasks.[70] But, under this doctrine, neither the President nor his executive branch nor Congress could delegate certain executive tasks to an entity that is not an "executive entity" under Article II because it is not sufficiently subject, through *some* accountability chain, to the President's oversight or control. Such a delegation, it might be said, would not be "proper" to "carry[ ] into Execution" the Article II power vested in the President, and would instead divest it.

The Supreme Court's modern Article II jurisprudence—particularly in the last three decades—is consistent with this basic focus on maintaining presidential control with respect to the execution of law in order to preserve the President's Article II power, responsibility, and role. In *Free Enterprise Fund v. Public Company Accounting Oversight Board (PCAOB)*, for example, the Court assessed the argument that a statute unconstitutionally "conferr[ed] wide-ranging executive power on [PCAOB] members without subjecting them to Presidential control," and held that those members' "multilevel protection from removal is contrary to Article II's vesting of the executive power in the President."[71] In *Printz v. United States*, likewise, the Court indicated that the Constitution gives responsibility for the administration of the laws to the President and his appointees (or those appointed by his appointees), and declared invalid a "transfer[ ] [of] this responsibility" to entities that lack "meaningful Presidential control."[72] And in *Morrison v. Olson*, the Court declared that its removal jurisprudence is "designed . . . to ensure that Congress does not interfere with the President's exercise of the 'executive power' and his

69. *See, e.g.*, Dep't of Transp. v. Ass'n of Am. R.Rs., 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment) (urging use of the term "authorizes" to describe congressional assignment of executive authority, rather than "delegates," because "Congress may not 'delegate' power it does not possess" (citing Perez v. Mortgage Bankers Ass'n, 135 S. Ct. 1199, 1224–25 (2015) (Thomas, J., concurring in the judgment))).

70. *See* Robert V. Percival, *Who's In Charge? Does the President Have Directive Authority Over Agency Regulatory Decisions?*, 79 FORDHAM L. REV. 2487, 2491 (2011) (reading the Necessary and Proper Clause to "suggest[ ] that there is no constitutional barrier to Congress vesting powers in agency heads"); Calabresi & Rhodes, *supra* note 18, at 1168 ("Unitary executive theorists concede that Congress has broad power under the Necessary and Proper Clause to structure the executive department . . . .").

71. 561 U.S. 477, 484–87, 496–97 (2010).

72. 521 U.S. 898, 922 (1997).

constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II," and concluded that the removal limitation did not "sufficiently deprive[ ] the President of control over the independent counsel" as to so interfere.[73] Although these and other cases focus on different aspects of Article II—the removal power, the appointment power, and the Take Care Clause—and therefore have been viewed atomistically, in fact they could embody a unified doctrine that awaits formal judicial recognition.

The following Sections further explore how the Supreme Court's decisions might flesh out an executive-power non-delegation doctrine applicable to some private administration of federal law. The application of an executive-power non-delegation principle to private entities seems consistent with at least one executive-branch opinion by the U.S. Department of Justice's Office of Legal Counsel (OLC), although earlier opinions disagreed.[74] And it also seems consistent with the Court's *PCAOB* decision, which concerned an entity that, in many respects, might seem private.[75] Section III.B.1 examines the potential doctrine's core premise: that Article II's Vesting Clause entails a non-delegation understanding with respect to executive power. To the extent that premise is correct, Section III.B.2 describes how the Clause could be read to impose two core inquiries. Section III.C addresses the first inquiry—whether the delegated task is an executive task that implicates "[t]he executive Power." Section III.D addresses the second—whether the delegee is a proper executive entity. Operating together, those inquiries could implement a rule that only subordinates subject to sufficient presidential control may perform executive tasks that implicate "[t]he executive Power." But, contrary to more rigid unitary executive theorists' position, this Article allows that the Constitution

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73. 487 U.S. 654, 689–90, 693 (1988); *see also* Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982) (stating that Article II's Vesting Clause gives the President "supervisory responsibilit[y]" over "the enforcement of federal law," consistent with the President's constitutional charge to 'take Care that the Laws be faithfully executed' ").

74. *See* Auth. of the U.S. to Enter Settlements Limiting the Future Exercise of Exec. Branch Discretion, 23 Op. O.L.C. 126, 142–43 & n.12, 147 (1999) [hereinafter *OLC Executive Discretion Opinion*] (describing the "general separation of powers principle," based in part on the vesting of executive power in the President, that "may constrain the authority of Congress to delegate the administration of federal law to non-executive branch actors," such as certain private parties).

75. 561 U.S. at 484–85 (noting that the Public Company Accounting Oversight Board (PCAOB) was "modeled on private self-regulatory organizations in the securities industry," was created by Congress as a "private 'nonprofit corporation,' " had members and employees that were "not considered Government 'officer[s] or employee[s]' for statutory purposes," and could "recruit its members and employees from the private sector by paying salaries far above the standard Government pay scale"). *But see id.* at 485 (noting that the PCAOB "is a Government-created, Government-appointed entity" that the parties agreed was " 'part of the Government' for constitutional purposes").

might not require complete control through every mechanism over every task connected with the execution of law.

B. Doctrinal Foundations and Structure

An executive-power non-delegation doctrine under Article II could reason by analogy to the Supreme Court's legislative-power non-delegation doctrine under Article I. Taking as established the legislative-power non-delegation doctrine in its modern form, since the Court has treated it as settled, this Section examines some of the logic for and against extending the Court's non-delegation understanding of Article I to Article II.

1. The Article II Vesting Clause's Non-Delegation Understanding?

a. Intratextualist Comparison

Any textual analysis of Article II's Vesting Clause should begin with a comparison to the Vesting Clauses of Articles I and III. Article I's Vesting Clause reads, "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."[76] Article II's reads, "The executive Power shall be vested in a President of the United States of America."[77] Article III's reads, "The judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."[78]

These Vesting Clauses seem meaningfully similar and meaningfully different. Each contains the same mandatory prescription ("shall be vested") that different particular authority is to be wielded by different particular entities: Congress, the President, or the federal judiciary, respectively. The Court has adopted a non-delegation interpretation of Article I's Vesting Clause. By that interpretation, the designated powers, including the power to "make all Laws" under the Necessary and Proper Clause, may not be divested from the designated entity, Congress. On that reasoning, any law made by an entity other than Congress would divest that power, hence, the power to make laws may not be delegated. Assuming that interpretation's correctness, it arguably ought also apply to Article II's Vesting Clause (and perhaps also to Article III's, although other features of Article III might cabin

76. U.S. CONST. art. I, § 1.
77. *Id.* art. II, § 1, cl. 1.
78. *Id.* art. III, § 1.

its scope).[79] That is, the designated "executive Power," which might be a power to "take Care that the Laws be faithfully executed," arguably may not be divested from the designated entity, the President. On that reasoning, any execution of law by an entity beyond the President's power to "take Care" would divest that power, hence, the power to execute the law may not be delegated to such an entity. As the following Sections illustrate, the similarity between the Clauses seems to support that conclusion, and the differences do not necessarily detract from it.

i. "Shall Be Vested"

Beginning with the similarity, the phrasing "shall be vested" might be understood to declare that the designated power must, at least initially, be assigned to the designated entity.[80] "Vest," around the time of the Constitution's ratification, was understood to mean "'[t]o place in possession of' an individual or entity."[81] A number of scholars have understood "shall be vested" to confer possession of the designated power upon the designated entity, *as opposed to* other entities.[82] That understanding may be consistent with the constitutional structure of dividing three sets of specific powers and duties among three sets of entities that each possess particular attributes that may facilitate the performance of their respective powers and duties.[83]

That conclusion is not beyond dispute, however. John Manning notes, for example, that it rests on an argument by negative implication—that by vesting powers in one set of entities, the Constitution denies those powers to all others—rather than on express text.[84] And even if Article II's Vesting Clause initially designates a power particular to the President, some might question whether it

79. *Cf.* Akhil Reed Amar, *Intratextualism*, 112 HARV. L. REV. 747, 794–95 (1999) (arguing that "a principled interpreter must . . . construe the Vesting Clauses of Articles I, II, and III with equal generosity," as each includes "a complete, carefully elaborated command that appears in identical language with a single variation that (presumptively) should make no legal or moral difference").

80. This does not foreclose the possibility that some tasks may fall within the scope of more than one type of power. For example, authority to perform particular tasks in the interpretation of law might be justified by reference to "[t]he executive Power" but could alternatively be justified by reference to "[t]he judicial Power." *See infra* Section III.C.1.b.

81. Calabresi & Prakash, *supra* note 18, at 572 & n.116 (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE 2102 (Libraire du Liban ed. 1978) (4th ed. 1773)).

82. *See* Merrill, *supra* note 17, at 2122 ("vests" confers an "exclusive power"); Glenn Harlan Reynolds, *Is Dick Cheney Unconstitutional?*, 102 NW. U. L. REV. 1539, 1541 (2008) ("The Vesting Clause of Article II vests all the executive power in the President, with no residuum left over for anyone else."); Calabresi & Prakash, *supra* note 18, at 548, 581 ("[Article II] vests . . . a power over law execution in the President, and it vests that power in him alone.").

83. Manning, *supra* note 66, at 2010 & n.360.

84. *Id.* at 2010–11.

restricts that power from being subsequently delegated or divested.[85] Justice John Paul Stevens, for example, has contended that neither Article I's nor Article II's Vesting Clause expressly "purport[s] to limit the authority of either recipient of power to delegate authority to others."[86] And, as to *Article I*'s Vesting Clause, Volokh suggests that the term "vest" does not limit the subsequent transfer of the power, because "rights that 'vest' aren't usually inalienable."[87] Volokh, however, ignores the phrasing "shall be," which seemingly declares a mandatory prescriptive state, not a merely descriptive one.[88] This, along with the design of Articles I through III,[89] might reveal a prescriptive structure of government that ought to remain until subjected to legitimate constitutional change.[90]

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85. *See* Manning, *supra* note 66, at 2011 (noting the potential argument "that the particular structural clauses are mere default positions—initial prescriptions of power pending Congress's later determination that another set of arrangements would" be better); Merrill, *supra* note 17, at 2129–30 (describing a potential "transferability principle," directly implied by the Necessary and Proper Clause, that would permit cross-branch transfers of power).

86. Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in the judgment).

87. Volokh, *supra* note 16, at 956.

88. *See, e.g.*, Amar, *supra* note 79, at 759–61. Some scholars say *Morrison v. Olson*, 487 U.S. 654 (1988), "is incompatible with a mandatory reading of 'shall' in . . . the Article II . . . Vesting Clause." Calabresi & Rhodes, *supra* note 18, at 1213, 1209–10. But *Morrison* purported to reject only the proposition that the Vesting Clause "requires that every officer of the United States exercising any part of [the executive] power *must serve at the pleasure of the President and be removable by him at will*." 487 U.S. at 690 n.29 (emphasis added). *Morrison* never stated that executive power could be divested from the President; to the contrary, it noted that the Court's removal jurisprudence "ensure[s] that Congress does not interfere with the President's exercise of the 'executive power' " and his Take Care Clause duty, *id.* at 689–90, and it implied that the President must retain the ability "to ensure the faithful execution of the laws," *id.* at 692, 693 (internal quotation marks omitted), which—it implied—would be impermissibly undercut if "the power to remove an executive official ha[d] been *completely* stripped from the President," *id.* at 692 (emphasis added). In essence, the *Morrison* majority simply disagreed with the dissent, and with the above-referenced scholars, about the *scope* of constitutionally required presidential control over an entity performing executive tasks. That goes to the proper outcome of the Vesting Clause's second inquiry, *see infra* note 137 and accompanying text, not the Clause's mandatory nature.

89. Manning, *supra* note 66, at 2011 (noting that such design "makes it difficult to think of the accompanying assignments of power [in the Vesting Clauses] as merely provisional").

90. This Article takes no position on the far-reaching question of what constitutes a legitimate method of constitutional change, other than that an ordinary, one-time legislative or executive delegation alone typically would not qualify. *See* William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216–17 (2001) (outlining three potential methods of change to "constitutional understandings": the Article V formal amendment process, an Ackermanian "constitutional moment," or enactment of a "super-statute"); Stephen E. Sachs, *Originalism as a Theory of Legal Change*, 38 HARV. J.L. & PUB. POL'Y 817, 844–45 (2015) (articulating a theory under which constitutional change is legitimate if it was done in accordance with rules that were valid at the relevant point of origin, such as the Founding).

Consistent with this argument, the original Constitution describes other states of affairs that "shall be," and does so in a manner seeming to evince their prescriptive permanence absent constitutional change. For example, Article I states "[t]he House of Representatives *shall be composed* of Members" chosen every two years, and "[t]he Senate of the United States *shall be composed* of two Senators from each State."[91] These descriptions do not appear to define only an initial composition of the House and Senate that would permit later alteration without constitutional change. By contrast, in many instances where the original Constitution uses "shall be" but comprehends states of affairs that are *not* prescriptively permanent in that manner, it provides explicitly the relevant timeframes or conditions or specifies the possibility of congressional or executive override.[92]

Thomas Merrill argues, to the contrary, that the Necessary and Proper Clause supports a "first mover" interpretation, whereby the powers vested by the Vesting Clauses can be subsequently freely delegated.[93] He points to the Necessary and Proper Clause's authorization of Congress to make all laws necessary and proper "for carrying into Execution [Article I] Powers, *and all other Powers* vested by this Constitution," including—he notes—those powers originally vested in the executive branch and judicial branch.[94] This, he explains, gives Congress authority to specify who might execute or judicially implement the law. But even if so, the Necessary and Proper Clause authorizes making all laws "necessary and proper for *carrying into Execution*" the powers vested in the executive and judicial branches—not necessarily for reassigning those vested powers away from their designees. That, reinforced by the Clause's requirement that laws be "proper" for that purpose, might indicate that the laws should be consistent with the powers as vested by the Constitution's other provisions, rather than revising their scope. Thus, particularly if "[t]he executive Power" is understood as a power to "take Care that the Laws be faithfully executed" rather than to execute the laws oneself, it might be that Congress may pass laws that carry that power into execution by

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91. U.S. CONST. art. I, §§ 2–3 (emphases added).

92. *See, e.g.*, *id.* (specifying number of Representatives to which each State "shall be entitled" "until [an actual population] enumeration shall be made"); *id.* art. II, § 4 (explaining that various officeholders "shall be removed from Office on Impeachment . . . and Conviction"); *id.* art. I, § 4 (noting that federal election "Times, Places and Manner . . . *shall be prescribed* in each State by the Legislature thereof; but *the Congress may at any time by Law make or alter such Regulations* . . . ." (emphases added)); *see also* Calabresi & Prakash, *supra* note 18, at 567 ("When questions were punted to Congress and to future generations, such as the question of whether to set up inferior federal courts, the [Constitution's] text was . . . explicit about the 'punting.' ").

93. *See* Merrill, *supra* note 17, at 2129–30.

94. *See id.*

designating particular executive entities to assist the President with particular executive tasks, but may not divest "[t]he executive Power" itself by designating entities for those tasks that are completely beyond the President's authority to "take Care" by supervising or controlling.

Ultimately, most arguments that Article II's language "shall be vested" does not prohibit the divestment of the vested power run up against the Supreme Court's understanding of the Vesting Clause of *Article I.* Although the Court has allowed Congress to "seek[] assistance, within proper limits, from its coordinate Branches," it has purported that the Constitution confines to Congress the legislative power to "make all Laws" by demanding that Congress provide, at a minimum, the intelligible principle that constitutes each law.[95] Accordingly, for purposes of analyzing whether the Court's settled non-delegation understanding of Article I extends intratextually to Article II, what seems to matter is whether that understanding might be attributable to text that is in Article I but *not* in Article II, rather than to the "shall be vested" language in both.

ii. Different Text of Article I: "All" and "Herein Granted"

Some scholars argue that the non-delegation understanding of Article I's Vesting Clause rests on its inclusion of "[a]ll" in describing the powers that shall be vested.[96] Their argument infers that Article II's *omission* of "all" must have been deliberate, to reflect recognition that the President—unlike Congress—cannot exercise *all* of his vested power himself because others must execute the law. Essentially, they read Article II's Vesting Clause to permit *some* of "[t]he executive Power" to be exercised by entities other than the President, such as private entities or states.

It could be that "all" has the meaning that these scholars would ascribe to it. But their extratextual logic—that the President cannot possibly execute the law by himself—is relevant only if they assume

95. Touby v. United States, 500 U.S. 160, 164–65 (1991). Merrill indicates, to the contrary, that the Court has recognized that "Congress may delegate legislative power to agencies." Merrill, *supra* note 17, at 2114–15, 2135. But the Court decisions he cites concern congressional delegation of *rulemaking or ratemaking* power, and none of them declare such authority to be "legislative power" within the meaning of Article I's Vesting Clause. *Id.* (citing Mistretta v. United States, 488 U.S. 361, 386 n.14 (1989); Ariz. Grocery Co. v. Atchinson, Topeka, & Santa Fe Ry. Co., 284 U.S. 370, 386 (1932)); *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) (admitting that language in at least four of the Court's legislative-power non-delegation opinions treats rulemaking authority pursuant to a statutory intelligible principle as not "legislative power").

96. *See, e.g.*, Merrill, *supra* note 17, at 2116, 2128; David M. Driesen, *Toward a Duty-Based Theory of Executive Power*, 78 FORDHAM L. REV. 71, 93 (2009).

that "[t]he executive Power" must be the power *to execute* the law (as some rigid unitary executive theorists contend), rather than the power to "*take Care* that the Laws be faithfully executed" by others.

Moreover, the textual contrast between Article I's Vesting Clause, on the one hand, and Article II's and III's, on the other, is not between "*all* legislative Powers [(plural)]" and "executive Powers [(plural)]," nor even between "*all* of the legislative Power [(definite singular)]" and "the executive Power [(definite singular)]." It is between "[a]ll legislative Powers [(plural)] herein granted" and "*[t]he* executive Power [(singular)]." As Merrill acknowledges, Article I's phrasing might have been to make clear that Congress was being granted some particular set of what might be considered legislative powers, "as opposed to some single, undifferentiated 'legislative power' parallel to the grant of 'executive' power to the President."[97] The inclusion of "all" might be to clarify that the non-delegation understanding attributable to the "shall be vested" phrasing extends not simply to a subset of those powers granted to Congress in Article I that might be considered most generically legislative (such as the authority to make all laws or lay taxes),[98] but also to the other powers granted to Congress by Article I,[99] or, perhaps, by the Constitution more broadly.[100] By contrast, "*[t]he* executive Power" of Article II could import its own meaning, which is exclusively reserved to its constitutional vestee: the President.[101] This argument would afford significance to the term "all"—a term given scholarly weight in other constitutional contexts[102]—but would decline to interpret it as the sole textual basis for a non-delegation understanding.

This textual logic would seemingly extend to Article III as well, which declares that "*[t]he* judicial Power of the United States" shall be vested in the federal judiciary and—like Article II—omits the term "all" in doing so. One might contend that the fact that state courts have long

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97. Merrill, *supra* note 17, at 2129. With relevance to the contribution of "herein granted" to that understanding, see *infra* note 108.

98. U.S. CONST. art. I, § 8, cls. 1, 18.

99. *See, e.g.*, *id.* art. I, § 8, cls. 2–17 (including, for example, the powers to grant copyright, to coin money, and to declare war).

100. *E.g.*, *id.* art. III, § 3 (granting Congress "Power to declare the Punishment of Treason"); *see* Merrill, *supra* note 17, at 2118–19 (noting, and examining implications of, the possibility that "herein granted" extends beyond Article I).

101. *See* Strauss, *supra* note 68, at 598 n.88 (citing C. THACH, THE CREATION OF THE PRESIDENCY 1775–1789, at 138–39 (1923)); Calabresi & Prakash, *supra* note 18, at 570–85; Lawson, *supra* note 23, at 337–45.

102. *See, e.g.*, Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 242 (1985) ("The selective use by the Framers of the word 'all' may not be lightly presumed to be unintentional.").

exercised authority to decide federal cases[103] demonstrates that Article III's Vesting Clause *cannot* be understood to reserve "[t]he judicial Power of the United States" to Article III courts and to preclude its delegation to others.[104] Accordingly, that contention would go, Article *II*'s Vesting Clause and "[t]he *executive* Power" cannot be understood to preclude delegation either.

One potential reply to this point is that *both* "[t]he judicial Power of the United States" and "[t]he executive Power" could be supervisory powers, rather than a power to adjudicate all federal claims or execute all federal law in the first instance. Akhil Amar argues, for example, that "[t]he judicial Power of the United States" vested in the federal judiciary is a power of *supremacy*, a power "to speak definitively and finally" in the name of the nation, that is divested only when state court decisions on cases implicating Article III's "judicial Power" are subject to *no* form of federal judicial review.[105] Consistent with this understanding, Amar reasons, Congress has generally afforded at least Supreme Court review to a set of cases from state courts that might plausibly be understood to be those "arising under" federal law within the meaning of Article III.[106]

Thus, the absence of "all" in Article II's and Article III's Vesting Clauses, as compared to Article I's, does not unequivocally undercut a non-delegation interpretation of each. And the other main textual difference between Article I's Vesting Clause, on the one hand, and Article II's and III's, on the other, might reinforce a non-delegation interpretation for all three. Specifically, Article I's Vesting Clause cross-references legislative powers "herein granted" and then separately

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103. *See, e.g.*, Charles Warren, *Federal Criminal Laws and the State Courts*, 38 HARV. L. REV. 545 (1925) (outlining evidence of federal criminal prosecutions in state courts); THE FEDERALIST NO. 82, at 130, 132 (Alexander Hamilton) (E. Bourne ed., 1947) ("[T]he inference seems to be conclusive, that the State courts would have a concurrent jurisdiction in all cases arising under the laws of the Union, where it was not expressly prohibited."). *But see* Michael G. Collins & Jonathan Remy Nash, *Prosecuting Federal Crimes in State Courts*, 97 VA. L. REV. 243, 248 (2011) (explaining that evidence of state court enforcement of federal criminal laws "has been greatly overstated," and was largely confined to civil proceedings for monetary penalties or fines).

104. I thank David Vladeck for raising this point.

105. Amar, *supra* note 102, at 213, 229, 231–38.

106. *See* Akhil Reed Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1529 (1990) (interpreting Article III's reference to "Cases . . . arising under" federal law—a set of cases to which Article III declares "[t]he judicial Power shall extend"—to encompass only decisions on federal claims). Although the Federal Judiciary Act of 1789, § 25, 1 Stat. 73, 85–87, conferred Supreme Court appellate jurisdiction over only state-court decisions *denying* federal claims, Amar has argued that perhaps appeals of state-court decisions granting federal claims do not "aris[e] under" federal law because the *appellants* do not advance a claim under federal law. *See* Amar, *supra*, at 1529. A fuller inquiry into the consistency or inconsistency of Supreme Court jurisprudence, including on Article I tribunals, with a *judicial*-power non-delegation doctrine might be pursued in a separate Article.

declares those powers "shall be vested in a Congress." It thereby acknowledges a potential distinction between a power simply being granted to an entity in the first instance ("granted"), and a requirement that it remain undivestably assigned to that entity ("shall be vested").[107] Although Article II's Vesting Clause does not similarly reference powers "herein granted," it uses the same "shall be vested" language as Article I's Vesting Clause, which suggests the vesting requirement has the same meaning—particularly since both provisions were drafted and ratified simultaneously.[108]

b. The Unitary Executive Structure

An inference that Article II's Vesting Clause entails a non-delegation understanding could be reinforced by the unitary structure it adopts. That structure derives from the Clause's declaration that "[t]he executive Power shall be vested in *a President* of the United States of America,"[109] which comprehends that such power shall rest in a single executive branch head. This basic proposition is relatively uncontroversial,[110] although scholars spar over the specific metes and bounds of unitary executive theory.

The concerns underlying the unitary executive structure are informative. The Framers seem to have envisioned it as a means not

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107. Rigid unitary executive theorists, many of whom insist that the federal government can exercise only enumerated powers, interpret the "shall be vested" language of Article II's Vesting Clause to additionally *grant* "[t]he executive Power," because they do not see a power with respect to the execution of law enumerated elsewhere in Article II. *See, e.g.*, Calabresi & Prakash, *supra* note 18, at 572. The argument in the text is not inconsistent with that position, because it signifies only that "shall be vested" means something *more* than a mere grant of power, not that "shall be vested" cannot also encompass a grant; but the argument is also consistent with the position, held by others, *see infra* notes 145–146 and accompanying text, that the President's power with respect to the execution of law is enumerated as granted by another provision, such as the Take Care Clause, or may be inferred from the Constitution's structure.

108. *See* Amar, *supra* note 79, at 791. Some scholars argue against inferring meaning from the inclusion of "herein granted" in Article I; they emphasize that "herein granted" was added by the Committee on Style, a committee that had not been charged with the authority to make substantive changes to the draft Constitution, and induced no debate. *See, e.g.*, Henry P. Monaghan, *The Protective Power of the Presidency*, 93 COLUM. L. REV. 1, 22 (1993); Lessig & Sunstein, *supra* note 18, at 48–49. But, as some of those scholars acknowledge, "Importantly, . . . the ratifiers would not have known when 'herein granted' was inserted." Lessig & Sunstein, *supra* note 18, at 49 n.203.

109. U.S. CONST. art. II, § 1 (emphasis added).

110. *See* Lessig & Sunstein, *supra* note 18, at 8 ("No one denies that in some sense the framers created a unitary executive; the question is in what sense."); Calabresi & Prakash, *supra* note 18, at 545 n.6 ("Of course, in some sense all Article II scholars believe the Constitution creates a unitary Executive."); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1275 (2006) ("There would indeed be a unitary 'executive' but what that meant for the organization of 'administration' remained to be determined.").

only to protect presidential authority against legislative encroachment[111] and to preserve the constitutionally intended efficacy of executive power,[112] but also to promote the political accountability of the Executive.[113] In contrast to the required unity, a "plurality in the Executive" would create a "danger of difference of opinion," "personal emulation and even animosity,"[114] and would "tend[ ] to conceal faults and destroy responsibility" by creating a "difficulty of detection" of transgressions and potential for confusing "mutual accusations."[115]

Private entities that are not accountable to the American people via the President raise some of these concerns when they administer federal law. Where free from presidential control, private entities lack that mechanism of ongoing accountability to the American people. Absent any other such mechanism, the entities could freely engage in legal conduct that is misaligned with the public interest. And allowing a proliferation of such entities to perform tasks fundamental to the execution of law without being subject to any unifying coordination or influence by the presidentially headed executive branch could produce confusion about responsibility for problems in that execution. Independent private entities and the President could blame one another, and voters would be unsure about whom to seek to sanction for the error.

Scholars debate, for the legislative-power doctrine, whether a strict non-delegation understanding promotes or hinders accountability.[116] But some arguments against a strict non-delegation understanding of legislative powers tend to favor it for executive power in the context of private administration of federal law. For example, some who criticize a strict legislative-power non-delegation doctrine,

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111. *E.g.*, THE FEDERALIST NO. 51, at 319–20 (James Madison) (Clinton Rossiter ed., 1961); *see, e.g.*, Morrison v. Olson, 487 U.S. 654, 698–99 (1988) (Scalia, J., dissenting) (citing 1 FARRAND'S RECORDS, at 66, 71–74, 88, 91–92 (Farrand rev. ed., 1966); 2 *id.* at 335–37, 533, 537, 542); Clinton v. Jones, 520 U.S. 681, 711–12 (1997) (Breyer, J., concurring) (emphasizing the Founders' "conscious[ ] deci[sion] to vest Executive authority in one person rather than several").

112. THE FEDERALIST NO. 70, at 421, 425 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (contending that unity in the Executive promotes "[e]nergy in the executive" that is needed for "the steady administration of the laws," by encouraging "[d]ecision, activity, secrecy, and dispatch," "vigor and expedition").

113. *Id.* at 426–27; *see Clinton*, 520 U.S. at 711–12 (noting that the Founders vested "[t]he executive Power" in a single President "in order to focus, rather than to spread, Executive responsibility thereby facilitating accountability").

114. THE FEDERALIST NO. 70, at 423–24 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

115. *Id.* at 426–27; *see Morrison*, 487 U.S. at 729 (Scalia, J., dissenting) (unitary executive ensures that "[t]he people know whom to blame").

116. *See* Merrill, *supra* note 17, at 2141–42 (describing the debate between "proponents of strict nondelegation"—such as John Hart Ely, Martin Redish, David Schoenbrod, and Marci Hamilton—and "revisionist thinkers, led by Jerry Mashaw").

including Justice Elena Kagan before her Supreme Court appointment, have advocated the virtues of administration of federal law by entities more responsive to the popularly elected President.[117] That mechanism of democratic accountability to the citizenry promotes responsiveness to voters' preferences and facilitates their ability to monitor government officials for compliance therewith, via their selection of the President.[118] Yet when private entities—specifically, those that lack the presidential subordination that Article II might require—execute federal law, the ongoing democratic check on their actions is lacking. The multiplicity of members of Congress, rather than a unitary structure of that branch, might make legislative monitoring and removal of those entities an insufficient check, and one subject to delays and other difficulties.[119] Where those entities cannot be removed via election, and the President cannot remove them or guide their decisions, there might be insufficient democratic accountability to keep their actions consistent with the American people's preferences or with the scope and conditions of governing authority delegated through the Constitution.

c. Historical Practice

Perhaps the most powerful challenge to a non-delegation understanding of Article II's Vesting Clause rests on historical practice, especially the practice of state officials pursuing the enforcement of federal law.[120] Harold Krent and others have catalogued examples of state officials' involvement—or at least federal statutory authorization of their involvement—in arrests or apprehension of fugitive slaves, deserting seamen, and dangerous "alien enemies"; as well as in criminal

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117. *See, e.g.*, Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 J.L. ECON & ORG. 81, 95–96 (1985) (explaining that "the delegation of political authority to [executive-branch] administrators . . . improv[es] the responsiveness of government to the desires of the electorate" because of voters' ability and tendency to select a President who will adopt their preferred policies); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2333–37, 2367 (2001) (advocating that "the President . . . should count as a specially favored . . . delegee of lawmaking power" and his "involvement in the exercise of discretion granted to agency heads should mitigate concerns arising from these delegations" because he reflects—more than Congress, at least—the public's policy preferences, partly due to his national constituency).

118. *See* Kagan, *supra* note 117, at 2367–68.

119. *See* Jody Freeman & Martha Minow, *Introduction: Reframing the Outsourcing Debates*, *in* GOVERNMENT BY CONTRACT, *supra* note 55, at 1, 3 (stating that congressional oversight investigations may be infrequent, "reactive[,] and superficial, offering relatively little by way of meaningful reform").

120. *See* David M. Driesen, *Firing U.S. Attorneys: An Essay*, 60 ADMIN. L. REV. 707, 714 (2008) ("Historically, the first Congress relied heavily upon state officials to execute federal law.").

prosecutions and civil and qui tam actions for federal law violations.[121] Such practice, challengers argue, illustrates that executive powers can, in fact, be delegated beyond the President's control—at least where they are delegated to states.[122]

That practice evidence tends to undercut the non-delegation understanding of Article II's Vesting Clause that is explored in this Article if at least two things are true: first, if the authority that was exercised by state officials concerns executive tasks that implicate the President's "executive Power"; and second, if the President was divested of that power by being deprived of any authority or ability to "take Care" that those state officials faithfully execute the law.

Many of those state officials' tasks, however, might not be executive tasks that could implicate "[t]he executive Power"—in particular, the civil and qui tam actions, which might not qualify as law enforcement, as Section III.C explains. More recent scholarship also contends that evidence about state involvement in prosecutions for federal crimes and its permissibility in the Supreme Court's view is greatly overstated,[123] although at least one mid-nineteenth-century example of such a state prosecution has been identified.[124]

In addition, for at least some, if not all, of the arrest and apprehension examples, presidential control was maintained to at least some degree over the ultimate use of force to exact compliance or punish noncompliance with the law.[125] Under the Alien Enemy Act of July 6, 1798, for example, state officials were authorized to order an alien removed from the United States for posing a "danger [to] the public peace and safety" and to restrain the alien until his removal order was executed, but it was the duty of the marshal "to execute such order"[126]—a marshal appointed and removable at pleasure by the President.[127]

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121. *E.g.*, Harold J. Krent, *Executive Control over Criminal Law Enforcement: Some Lessons from History*, 38 AM. U. L. REV. 275, 303–08 (1989); Warren, *supra* note 103.

122. *E.g.*, Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. REV. 663, 715 (2001) ("[T]he historical pedigree of delegation of federal power to state officials . . . long ago established the legitimacy of assigning the administration of federal law to state officials beyond executive control.").

123. Collins & Nash, *supra* note 103, at 248, 266–75 (explaining that much of what was understood to be criminal prosecution by states for federal crimes was civil in nature; and that the Supreme Court's decisions, properly understood, rejected state courts' authority to prosecute federal crimes).

124. Krent, *supra* note 121, at 306–07 (citing, for example, *State v. Wells*, 20 S.C.L. (2 Hill) 687, 695 (1835)).

125. *See infra* Section III.C.1.a (discussing the possibility that only such uses of force, rather than ordinary arrests on suspicion of past law violation, qualify as "executive" tasks implicating "[t]he executive Power").

126. Ch. 66, §§ 2, 3, 1 Stat. 577, 577–78.

127. Act of Sept. 24, 1789, ch. 20, § 27, 1 Stat. 73, 87; *see infra* note 164.

This type of evidence might cast doubt on an approach that would require complete presidential control over all tasks in the execution of law, but does not necessarily undercut a flexible-control approach.[128]

Finally, for those tasks (if any) that are executive and that were not subject to presidential control, it might be that a state role in executing even federal law does not implicate "[t]he executive Power" of the President, for reasons explored in Section IV.B.1.

Historical practice evidence concerning the execution of law by private entities is sparser than that concerning state execution of law. Although private entities have played various roles in law's execution, the Sections that follow explore the possibilities that some did not involve executive tasks implicating "[t]he executive Power" and that some remained subject to substantial presidential control (albeit through varying means).

2. The Vesting Clause's Two Inquiries

To the extent that Article II's Vesting Clause entails a non-delegation understanding, two questions arise: what power would be subject to delegation restrictions, and who would be permitted to exercise it? The Clause seems to answer both of these questions at an abstract level.

On the first, it states that *"[t]he executive Power"* is the authority vested in the President. That singular and definite power—which, as the next Section explains, might consist of an ultimate supervisory authority to "take Care" of the laws' faithful execution—cannot be divested under the doctrine explored here. By that reasoning, authority over law's execution that implicates "[t]he executive Power" may not be delegated to entities beyond the President's power to "take Care." But Congress may, consistent with the doctrine, delegate that subsidiary executive power to particular entities—more precisely, it may authorize those entities to perform various tasks fundamental to the execution of law. On that understanding, to retain his "executive Power," the President must retain some oversight or control authority with respect to those tasks of executing the law, in order to take care that they are done faithfully.

Therefore, the first inquiry in this Article II non-delegation analysis is *whether the delegated task is one that implicates "[t]he*

128. *See* Driesen, *supra* note 120, at 714 (citing evidence that "the first Congress relied heavily on state officials to execute federal law" as suggesting that " 'the executive Power' granted in Article II does not necessarily mean the power to completely control the execution of each and every aspect of federal law, at least not directly").

executive Power." If the task is not such an executive task, the Article II inquiry ends. If it is, analysis proceeds to the second question.

That second question—to whom executive tasks may be delegated—also might be informed by the Clause. The Clause declares that the executive power "shall be vested in a President of the United States of America," so the second inquiry in this Article II non-delegation analysis is *whether the delegation divests "[t]he executive Power" from the President.* It has long been understood, however, that the President is not divested of that power simply because other individuals may perform tasks to assist him. The Constitution comprehends that "the President alone and unaided could not execute the laws. He must execute them by the assistance of subordinates."[129] Indeed, Article II's acknowledgement of "Officers of the United States" and "executive Departments" implies that those entities may assist the President in exercising his powers.[130] Article II's text and structure—including its various clauses providing for particular mechanisms of presidential oversight and control over executive tasks and those who perform them[131]—suggest that the President should have some role in the ongoing selection or supervision of those executive entities, in order to ensure that they truly remain his *subordinates*[132] so that he is not divested of the power to "take Care" that they execute the law faithfully. Therefore, the second inquiry in this Article II non-delegation analysis boils down to *whether the delegated task is to be performed by a proper Article II executive entity—that is, by the President or one of his constitutional subordinates.*

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129. Myers v. United States, 272 U.S. 52, 117 (1926); *see* Letter to Eléonor François Élie, Comte de Moustier (May 25, 1789), *in* 30 WRITINGS OF GEORGE WASHINGTON 333, 334 (John C. Fitzpatrick ed., 1939) ("The impossibility that one man should be able to perform all the great business of the State, I take to have been the reason for instituting the great Departments, and appointing officers therein, to assist the supreme Magistrate in discharging the duties of his trust."); NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787, at 324 (Gouverneur Morris, July 19, 1787, reported by James Madison) (Norton bicentennial ed. 1987) ("There must be certain great officers of State; a minister of finance, of war, of foreign affairs &c. These he presumes will exercise their functions in subordination to the Executive . . . . Without these ministers the Executive can do nothing of consequence.").

130. U.S. CONST. art. II, § 2; *see also id.* art. VI, cl. 3 (acknowledging the existence of "executive . . . Officers . . . of the United States").

131. *See, e.g., id.* art. II, § 2 (making the President Commander in Chief of the armed forces and state militias; authorizing him to require written opinions from principal officers of the executive departments; granting him the pardon power, treaty power, and appointment powers); *id.* § 3 (requiring the President to "take Care" of the laws' faithful execution and to commission all U.S. officers).

132. *See infra* Section III.D.

Justice Antonin Scalia espoused a similar conception of these two inquiries in his *Morrison* dissent, which stated that the independent counsel statute's invalidation

> must be upheld on fundamental separation-of-powers principles if the following two questions are answered affirmatively: (1) Is the conduct of a criminal prosecution (and of an investigation to decide whether to prosecute) the exercise of purely executive power? (2) Does the statute deprive the President of the United States of exclusive control over the exercise of that power?[133]

Justice Scalia's conception of the Article II doctrine is not entirely unlike the one that this Article examines, in that it inquires first into whether a task implicates "[t]he executive Power," and next into whether it has been divested from the President. In his view, any part of the implementation of various laws is "executive power, vested by the Constitution in the President";[134] and divestment occurs when a statute "deprives the President of exclusive control" over the power's exercise.[135] But both the nature of the tasks that implicate "[t]he executive Power" and the nature and form of the requisite control remain subject to debate.[136] Indeed, as to the latter, the disagreement between the majority and dissent in *Morrison* turned on the requisite scope of the President's control over officers who wield investigative and prosecutorial power.[137] Several unitary executive theorists have aligned themselves with the dissent's insistence on complete control through particular mechanisms—call this the rigid approach or the *complete-control thesis*.[138] This Article, in contrast, examines a less rigid view of the requisite control that permits certain tradeoffs between different control mechanisms and their respective degrees and directness—call it the *flexible-control thesis*.

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133. 487 U.S. 654, 705 (1988) (Scalia, J., dissenting).

134. Young v. United States *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 816–17 (1987) (Scalia, J., concurring in the judgment).

135. *Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting).

136. *See* Calabresi & Rhodes, *supra* note 18, at 1167 (noting that "both the text of Article II and our historical practice are of little help in identifying which . . . mechanism[ ] of presidential control, if any, is correct" (emphasis omitted)).

137. *See supra* note 88. *Compare* 487 U.S. at 691–92 (1988) (the statute did not "unduly trammel[ ] on executive authority" or "impermissibly burden[ ] the President's power to control or supervise the independent counsel"), *and id.* at 696 (the statute's features "give the Executive Branch sufficient control over the independent counsel to ensure that the President is able to perform his constitutionally assigned duties"), *with id.* at 708–09 (Scalia, J., dissenting) (all of the "purely executive powers of government must be within the full control of the President").

138. Calabresi & Rhodes, *supra* note 18, at 1167 & n.62, 1179–80, 1187, 1209–13; Calabresi & Prakash, *supra* note 18, at 595 (arguing that "all three mechanisms of control"—that is, removal, a power to act in executive officers' stead, and a power to nullify their acts when the President disapproves—"must be clearly encompassed within the President's grant of the executive power").

The key distinction between the flexible-control thesis and more rigid unitary executive theories rests on different visions of "[t]he executive Power." Because this Article conceptualizes that power as an authority to "take Care" and bear ultimate responsibility for the execution of law, rather than to execute it directly, the President might retain that power so long as he retains *some* ability to take meaningful steps to encourage the faithful execution of law. Accordingly, the presidential-control mechanisms required to avoid divesting that power from the President might depend on one another, and on the type of executive task at issue, in a manner that preserves the President's accountability for the execution of law.

Article II's Vesting Clause itself does not more specifically flesh out the two inquiries—that is, which tasks implicate "[t]he executive Power" or which presidential-control mechanisms are necessary to produce proper Article II executive entities. And broader constitutional text and history provide some, but incomplete, guidance. As this Part explains, however, the Supreme Court's jurisprudence offers more extensive guidance, in decisions interpreting Article II beyond the Vesting Clause (in particular, the Appointments and Take Care Clauses and the removal power), as well as in decisions on other separation-of-powers issues such as the legislative-power non-delegation doctrine. Thus, the executive-power non-delegation doctrine's two inquiries could simply reconceptualize and repurpose existing Court precedent.

C. The First Inquiry: Is the Delegated Task an "Executive Task"?

The executive-power non-delegation doctrine explored here starts from the relatively intuitive premise that "[t]he *executive* Power" that shall be vested in the President includes a power concerning the execution of law. In addition to the term's "executive" phrasing, many historical sources from before and surrounding the Constitution's framing describe "[t]he executive Power" by reference to law's execution;[139] and the Supreme Court has described the execution of law

139. *See, e.g.*, 1 ANNALS OF CONG. 481 (1789) (Joseph Gales ed., 1834) ("[I]f any power whatsoever is in its nature executive, it is the power of appointing, overseeing, and controlling those who execute the laws." (quoting James Madison)); *id.* at 474 ("The Executive powers are delegated to the President, with a view to have a responsible officer to superintend, control, inspect, and check the officers necessarily employed in administering the laws." (quoting Fisher Ames)); THE FEDERALIST NO. 77, at 462 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (referring to the "powers of the executive" as being "comprehended . . . in faithfully executing the laws," among other things); JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, § 144 (Crawford ed., Dover Publ'ns, Inc. 2002) (1690) (conceiving of "the . . . executive power" as including a power to "see to the execution of the laws that are made"); Letters of Helvidius No. 1 (Aug.–Sept. 1793), *in* 6 WRITINGS OF JAMES MADISON, at 138, 145, 149 (Gaillard Hunt ed., 1906) ("To see the laws

as implicating executive power and has highlighted the President's role in that execution.[140]

Other constitutional text supports a presidential power over law's execution. In particular, the Take Care Clause declares that the President "shall take Care that the Laws *be faithfully executed*."[141] Although that Clause is phrased as a duty or obligation, it implicitly assumes the President's power to discharge it.[142] The Clause therefore reinforces the understanding that the Constitution grants the President the power to see to the faithful execution of the laws through one or another form of oversight or influence,[143] whether that grant is conferred by the Vesting Clause,[144] by the Take Care Clause itself,[145] or by some broader structural implication.[146] Regardless of the specific constitutional source of the grant of that power over execution, Article II's Vesting Clause might entail a non-delegation understanding with respect to it.

Lawrence Lessig and Cass Sunstein have suggested, however, that the President's power over the execution of law extends only to laws that are "executive" (which effectuate the President's specifically enumerated Article II, Section 2 powers), but not those that are

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faithfully executed constitutes the essence of the executive authority[.]"); Letters of Pacificus No. 1 (June 1793), *in* 3 WORKS OF ALEXANDER HAMILTON 315, 320, 322, 325 (J. Seymour ed., 1810) (writing that "[t]he executive is charged with the execution of all laws"; and describing, as a "particular case[ ] of executive power," the President's role in "tak[ing] care that the laws be faithfully executed").

140. *See, e.g.*, Bowsher v. Synar, 478 U.S. 714, 732–33 (1986) (describing "execution of the law" as an "executive power[ ]"); Field v. Clark, 143 U.S. 649, 692–94 (1892) (extolling the propriety of the President's exercise of "discretion as to [the law's] execution").

141. U.S. CONST. art. II, § 3 (emphasis added).

142. 1 ANNALS OF CONG. 516 (1789) (Joseph Gales ed., 1834) ("If the duty to see the laws faithfully executed be required at the hands of the Executive Magistrate, it would seem that it was generally intended he should have that species of power which is necessary to accomplish that end." (quoting James Madison)); *see, e.g.*, Akhil Reed Amar, *Some Opinions on the Opinion Clause*, 82 VA. L. REV. 647, 658 (1996) (stating that the Take Care Clause both "empower[s]" and "oblige[s]" the President).

143. The Commander in Chief Clause, for example, authorizes the President to command state militias, which the Constitution elsewhere presumes to have a potential role in "execut[ing] the Laws of the Union." U.S. CONST. art. II, § 2; *id.* art. I, § 8, cl. 15.

144. Calabresi & Prakash, *supra* note 18, at 570–72.

145. *See* WILLIAM HOWARD TAFT: ESSENTIAL WRITINGS AND ADDRESSES 164 (David H. Burton ed., 2009) (declaring that "[t]he widest power and the broadest duty which the President has is conferred and imposed by" the Take Care Clause); Cass R. Sunstein, *What's Standing After* Lujan? *Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163, 212 (1992) ("[T]he Take Care Clause confers both a duty and a power . . . .").

146. *See, e.g.*, Kagan, *supra* note 117, at 2324 n.311 (referring to a power "deriving from the . . . Take Care Clause[ ]," which implies "some minimum amount of presidential oversight authority, on the theory that the President could not perform" his take care function without it); Strauss, *supra* note 68, at 573, 648–50 ("The charge to 'take care' implies that congressional structuring must in some sense admit of [the President's] doing so.")

"administrative" (which effectuate Congress's enumerated powers).[147] But the Supreme Court seems to have since rejected, albeit implicitly, that distinction.[148] The distinction also strains the constitutional text. The Necessary and Proper Clause, on which Lessig and Sunstein heavily rely,[149] offers a single description of Congress's authority to "make . . . Laws," rather than different ones entailing different implications, with respect to laws concerning Congress's "foregoing [Article I] Powers, and all other Powers vested by this Constitution."[150] And it might not be meaningful that, as Lessig and Sunstein emphasize, the Opinions Clause refers to "the principal Officer in each of the *executive* Departments" whereas the Appointments Clause refers simply to "Heads of Departments."[151] The Appointments Clause's juxtaposition of a "Head[ ]" and an "*inferior* Officer[ ]," and its description of their respective roles, suggests that "Heads of Departments" could just be a shorthand reference to the very "*principal* Officer[s] in each of the executive Departments" described earlier in the same section of Article II. Supreme Court opinions also somewhat undercut the notion that the Appointments Clause conceives of non-executive "Departments," particularly as to Lessig and Sunstein's primary claimed example: the Treasury Department.[152]

Lessig and Sunstein proffer certain post-ratification historical practice evidence to support their executive/administrative laws distinction.[153] But even if their examples undercut a thesis that the Vesting Clause requires *complete* presidential control over law execution, they do not undercut the less rigid position that this Article explores: that the President must retain sufficient control over tasks encompassed in the execution of law to preserve his accountability for them. That position seems consistent not only with Supreme Court precedent, but also with much historical practice. Close examination

147. *See* Lessig & Sunstein, *supra* note 18, at 44–46; *see also* Calabresi & Prakash, *supra* note 18, at 547, 586–87 (summarizing Lessig and Sunstein's argument).

148. *See* Printz v. United States, 521 U.S. 898, 922–23 (1997) (insisting that the President and his appointed officers must "administer the laws enacted by Congress," and applying this principle to the Brady Act, a law predicated upon Congress's Article I powers—that is, a law that, under Lessig and Sunstein's vision, need not be reserved for presidential control over execution); *id.* (citing Calabresi & Prakash, *supra* note 18).

149. Lessig & Sunstein, *supra* note 18, at 67.

150. U.S. CONST. art. I, § 8, cl. 18; *see also* Metzger, *supra* note 22, at 1878 n.179 (explaining other flaws in Lessig and Sunstein's arguments about the Necessary and Proper Clause).

151. U.S. CONST. art. II, § 2 (emphasis added); Lessig & Sunstein, *supra* note 18, at 34–36.

152. *See* Freytag v. Comm'r, 501 U.S. 868, 886 (1991); Buckley v. Valeo, 424 U.S. 1, 127 (1976) (per curiam); Burnap v. United States, 252 U.S. 512, 515 (1920); United States v. Germaine, 99 U.S. 508, 510 (1878).

153. *See* Lessig & Sunstein, *supra* note 18, at 14–32, 70–83.

reveals that substantial presidential control over the execution of law was maintained in the early Republic, albeit through various pragmatic arrangements rather than any "neat," rigid system involving a single organizational form.[154] "Supervisory control of executive action at the very top—that is, any matter involving the head of a department—was both informal and powerful."[155] And, although supervision of subsidiary officials like tax collectors was made practically difficult by their wide dispersion, Presidents and their cabinet asserted *authority* to supervise them on numerous occasions.[156] Even for those officials over whom Congress did not intend a power of direction by the President or one of his subordinates, Congress generally recognized other forms of control, such as removal.[157]

Accordingly, the executive-power non-delegation doctrine that this Article explores does not employ Lessig and Sunstein's distinction between executive and administrative laws. Instead, the Article examines how particular tasks in the administration of law might implicate the doctrine's requirements.

1. Administrative Tasks Encompassed in the Power To Execute the Laws

As the execution of federal law implicates "[t]he executive Power," the executive-power non-delegation doctrine must determine the tasks that are fundamental to law's execution. Under that doctrine, such executive tasks cannot be delegated, except to entities sufficiently subject to presidential control that their performance of those tasks does not divest the President of "[t]he executive Power." The Supreme Court has generally performed task-specific, or function-specific, analysis to assess whether particular government structures violate Article II requirements.[158]

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154. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 33, 42, 44 (2012) (noting that "presidential appointment and removal were common to all the departments" in the early Republic, and that all were subject to at least some presidential control, even though some were also "directed according to law").

155. Mashaw, *supra* note 110, at 1304.

156. *See id.* at 1305–08, 1308 n.154.

157. *See id.* at 1308.

158. *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 137–41 (1976) (per curiam); Bowsher v. Synar, 478 U.S. 714, 732–33 (1986); Morrison v. Olson, 487 U.S. 654, 689–90 (1988); *see also, e.g.*, Free Enter. Fund v. PCAOB, 561 U.S. 477, 509 (2010) (recognizing that a possible remedy to the executive-power divestment could have been to "blue-pencil a sufficient number of the [PCAOB]'s *responsibilities*" (emphasis added)).

Certain types of tasks that seem quintessentially executive can be grouped into two general categories: first, the tasks of law enforcement—that is, of forcing compliance with the law; second, the tasks of gap-filling that some refer to as "interstitial policymaking"[159] and others refer to as a "completion power"—that is, an "authority to prescribe incidental details of implementation necessary to complete an unfinished statutory scheme."[160] The analysis that follows examines those categories, but its conclusions are more tentative as to particular tasks at those categories' margins.

A task that is less clearly executive in nature might less clearly or strongly implicate "[t]he executive Power," if it implicates that power at all. Accordingly, the degree, directness, or form of presidential control necessary to avoid divesting that power might be diminished, because even lesser control over that task does not as fully preclude the President's authority and ability to take steps to see to the law's faithful execution. Alternatively, or in addition, a task that less clearly implicates "[t]he executive Power" might not demand as severe a consequence. That is, as Section IV.D discusses, where tasks less clearly implicate "[t]he executive Power," the appropriate course of action might be to structure or interpret the delegation to avoid constitutional questions, rather than to reject it outright.

a. Law Enforcement

More clearly than any other, the power to enforce the law seems to implicate "[t]he executive Power."[161] That proposition is consistent with constitutional history[162] and with the Supreme Court's current jurisprudence.[163]

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159. M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1140 n.44 (2000); *see also* City of Arlington v. FCC, 133 S. Ct. 1863, 1873 (2013) ("interstitial lawmaking"); Ford Motor Credit Co. v. Milhollin, 444 U.S. 555, 565, 568 (1980) ("filling the interstitial silences" and "interstitial lawmaking").

160. Jack Goldsmith & John F. Manning, *The President's Completion Power*, 115 YALE L.J. 2280, 2282, 2302 (2006).

161. *See* Kate Andrias, *The President's Enforcement Power*, 88 N.Y.U. L. REV. 1031, 1034, 1036, 1046 (2013) ("[A]ttending to enforcement is at the core of presidential duty and power. . . . If the Vesting Clause bestows any affirmative power in the President, it must include the authority to supervise enforcement.").

162. *See, e.g.*, 2 FARRAND'S RECORDS, *supra* note 111, at 389–90 (noting the Philadelphia Convention's agreement to a motion to strike "enforce treaties" from a clause including "to execute the Laws of the union" because the former was deemed "superfluous since treaties were to be 'laws' ").

163. *See, e.g.*, Nixon v. Fitzgerald, 457 U.S. 731, 749–50 (1982) (listing "the enforcement of federal law" as one of the areas over which the President has "supervisory responsibilit[y]" under the Vesting Clause); Springer v. Philippine Islands, 277 U.S. 189, 202 (1928) (describing enforcing laws and appointing the agents charged with the duty to enforce them as executive functions).

As to which tasks constitute law enforcement, some examples seem relatively uncontroversial, such as wielding the government's coercive power forcibly against law violators to exact compliance or punish noncompliance with the law.[164] This is consistent with the Constitution's authorization of Congress "[t]o provide for calling forth *the Militia* to execute the Laws of the Union,"[165] for whom "[t]he President shall be Commander in Chief."[166] The reference to the militia's execution of laws reinforces that such law execution, over which the President has commanding (controlling) authority, inheres in the use of physical force to obtain compliance or exact punishment.

Ratification-era history further supports the understanding that law enforcement consists of forcing compliance or imposing sanctions on law violators. Hamilton wrote that one defect of the Articles of Confederation, cured by the Constitution, was a "total want of a SANCTION to [the government's] laws"—that is, a lack of an "express delegation of authority . . . to use force" against law transgressors, of a power "to *exact obedience, or punish disobedience* to [the Confederation's] resolutions."[167] He described this as a lack of "constitutional power to *enforce* the execution of [the] laws."[168]

The use or threat of force in the incarceration of prisoners seems to comprise this kind of enforcement of law that implicates "[t]he executive Power." Accordingly, an executive-power non-delegation analysis seems an appropriate framework for claims that the administration of punishment or discipline by private prisons that house federal prisoners is insufficiently subject to the control of the

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164. *See, e.g.*, Cunningham v. Neagle, 135 U.S. 1, 60–63 (1890) (upholding the Attorney General's direction of a deputy marshal to protect a judge, and describing "executive power" as including "physical force, exercised through its official agents," such as the "marshals . . . [who] belong emphatically to the executive department" and who are presidentially appointed and removable at will and "subjected . . . to the supervision and control of the department of justice, in the hands of one of the cabinet officers of the president"). Harold Krent notes that the 1789 Judiciary Act made federal *deputy* marshals subject to removal by the courts (thus, he presumes, not by the President). *See* Krent, *supra* note 121, at 286 (citing Judiciary Act of 1789, ch. 20, § 27, 1 Stat. 73, 87). But the deputy marshals were appointed by and under the control of the *marshals*, who were appointed by and "removable from office at pleasure" of the President, § 27, 1 Stat. at 87, and who enforced orders in response to instructions by heads of departments like the Secretary of State, who was in turn removable by the President and subject to his direction, Act of July 27, 1789, §§ 1, 2, 1 Stat. 28, 29. *See* LEONARD D. WHITE, THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY, 1789-1801, at 411–13 (First Free Press 1965) (1948).

165. U.S. CONST. art. I, § 8, cl. 15 (emphasis added).

166. *Id.* art. II, § 2.

167. THE FEDERALIST NO. 21, at 134 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (emphasis added).

168. *Id.* at 135 (emphasis added).

federal Bureau of Prisons,[169] an agency headed by an official "appointed by and serving directly under the Attorney General."[170]

The emphasis on the use or threat of force as inherent in law enforcement helps to illustrate which tasks are not so easily categorized as enforcement or execution of law. Merely investigating, reporting, or providing evidence to law enforcement officials, for example, is substantially attenuated from *enforcing* the law and so likely does not implicate "[t]he executive Power." Such a conclusion would be consistent with the observation that private individuals acting independently and not subject to executive-branch control—such as witnesses to crimes and grand jurors—have participated in such investigative and informational processes for centuries, including in the Founding era.[171]

The more complex example is that of arrests conducted by private citizens, which have a long pedigree under the common law.[172] Such arrests might entail the use of force—do they then constitute law enforcement?

A number of accounts might be offered for the example of private citizen arrest. For one, an arrest, in contrast to administration of punishment, is temporary and based on suspicion of violating the law but is not a direct act to force obedience with it. Accordingly, it might not qualify as an executive task that implicates "[t]he executive Power."

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169. *See, e.g.*, Hilario-Paulino v. Pugh, 194 F. App'x 900 (11th Cir. 2006) (challenging BOP delegation to private prison of disciplinary authority over inmates).

170. 18 U.S.C. § 4041 (2012). Of course, there is a long Anglo-American history of private administration of prisons. *See, e.g.*, Malcolm Feeley, *The Unconvincing Case Against Private Prisons*, 89 IND. L.J. 1401, 1412–14 (2014). But the more complex and relevant question is whether those private prisons that housed federal prisoners in the early years of the Republic were assumed to be free from any potential supervision or control of the presidentially headed executive branch. That history is very difficult to divine, as very few people were imprisoned for federal crimes in the late eighteenth and early nineteenth century, and many of them were housed in state and local prisons (over which a presidential-control requirement may be less certain, *see infra* Section IV.B); a federal prison system was not established until 1891. *See* PAUL W. KEVE, PRISONS AND THE AMERICAN CONSCIENCE: A HISTORY OF U.S. FEDERAL CORRECTIONS 8–34 (1991) (citing Act of Sept. 23, 1789, 1 Stat. 96); Three Prisons Act, ch. 529, 26 Stat. 839 (Mar. 3, 1891)). But U.S. marshals were responsible for arranging for the boarding of federal prisoners not housed in state prisons, and by 1873, positions in the Department of Justice were created that would include oversight of prisoner placements and on-site inspections and reporting on prisoner matters. *See* KEVE, *supra*, at 12–14; Act of Mar. 3, 1791, 1 Stat. 225; Act of Mar. 3, 1821, 3 Stat. 646. It at least does not appear to be unequivocally clear that private prisons housing federal prisoners were *not* potentially subject to any direct or indirect presidential control.

171. *E.g.*, WHITE, *supra* note 164, at 415–17; Krent, *supra* note 121, at 292–94.

172. *E.g.*, Holyday v. Oxenbridge, (1631) 79 Eng. Rep. 805 (KB) (approving a private citizen's arrest of a "common cheater" who "cozened with false dice"); Knot v. Gay, 1 Root 66, 66–67 (Conn. Super. Ct. 1774) (declaring that an arrest *by any person* would be justified where necessary to prevent an imminent breach of the peace or an escape); *see, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 331, 333 (discussing the common-law arrest power of private citizens).

Alternatively, or in addition, arrests might to some degree be subject to approval or legal nullification after the fact by some government decision. Where that decision is made by an official subject to presidential supervision or control, it might be that the private citizen performing the arrest is sufficiently executive because his decisions are subject to executive-branch revision.

Neither of these accounts, however, is fully satisfactory. The temporary nature of an arrest based on mere suspicion of legal violation is in tension with examples in which private arrest is done to prevent an imminent violation of the law, such as a breach of the peace.[173] And the government decisionmaker who approves or nullifies an arrest after the fact might be a court of law rather than an official in the executive branch.[174] Thus, private citizen arrest remains an example that could call into question the validity of even the less rigid executive-power nondelegation doctrine explored here. Ultimately, the best, albeit imperfect, explanation for private citizens' authority to conduct arrests regardless of executive control may be that an arrest is attenuated from the ultimate administration of a sanction for the violation of law.

The attenuation of pursuing a court judgment from the ultimate administration of a sanction for the violation of law also implies that such pursuit does not—in every instance—implicate "[t]he executive Power" or necessitate presidential control over that process, or at least might not do so as clearly or strongly. A court judgment could authorize the subsequent use of force against a particular individual in the course of the judgment's enforcement, such as to implement the court-ordered punishment. But the pursuit of that judgment does not itself entail the use of force and seems more attenuated from law's execution.

Still, despite these points, several scholars and Justices assert that at least the pursuit of a *criminal* judgment through prosecution implicates "[t]he executive Power," and its corresponding requirement of presidential control.[175] Others push back on this notion, relying among other things on a long history of criminal prosecutions by private individuals.[176] But, as those who favor the prosecution-as-execution view argue, even private criminal prosecutions historically may have been subject to at least some presidential control as a matter of

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173. *See Knot*, 1 Root at 66–67.

174. *See* Jeffries v. Thompson, 2 Yeates 482, 483 (1799) (rejecting a citizen arrest and ordering release on common bail).

175. *E.g.*, Calabresi & Prakash, *supra* note 18, at 658–60; Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1003 & n.63 (2006); Morrison v. Olson, 487 U.S. 654, 706 (1988) (Scalia, J., dissenting).

176. *See, e.g.*, Stephen L. Carter, *The Independent Counsel Mess*, 102 HARV. L. REV. 105, 126–27 (1988); Lessig & Sunstein, *supra* note 18, at 15–16.

executive-branch practice. Beyond the President's explicit Article II "power of countermand" to pardon the convicted,[177] the Attorney General—who was presumably removable by the President[178]—"brought some cases and could defeat a private prosecution by filing a writ of *nolle prosequi*" and "[i]n the first decades of the Republic, federal prosecutors . . . were appointed by the President."[179] Attorneys General attempted to direct federal prosecutors' activities,[180] and President Washington himself ordered a prosecutor to *nolle prosequi* an indictment.[181] These assertions of presidential control do not necessarily establish that such control was constitutionally required to be available, however. Furthermore, it is not clear whether federal executive-branch control was either asserted or available over prosecutions conducted in state courts by state officials for federal law violations, of which there was at least one.[182]

The Supreme Court's treatment of criminal prosecution is also mixed. In *Young v. United States ex rel. Vuitton*, the Court seemed open to the possibility of at least some private criminal prosecutions free from executive control—specifically, a criminal contempt prosecution for violating a prior civil injunction order.[183] But in *Morrison*, the Court referred to the independent counsel's prosecutorial powers and stated that "[t]here is no real dispute that the functions performed by the independent counsel are 'executive' in the sense that they are law enforcement functions."[184] It might be that the Court in its current composition would treat *Vuitton* as *sui generis* or exceptional, since it entailed a contempt prosecution following violation of a prior, civil court order (rather than a federal statute) and a corresponding implication of *judicial* power over the enforcement of the judiciary's own order.[185] Even in that event, however, the import of *Morrison*—which has not been overruled—seems to be that whatever presidential control

177. Amar, *supra* note 79, at 802; *see* U.S. CONST. art. II, § 2.

178. *See* MASHAW, *supra* note 154, at 43.

179. Carter, *supra* note 176, at 126; *see also* The Confiscation Cases, 74 U.S. 454, 456–59 (1868) (describing the authority over prosecutions, even when commenced by private individuals, as being exclusively "subject to the direction, and within the control of, the Attorney-General").

180. MASHAW, *supra* note 154, at 43.

181. *Id.* at 329 n.69; WHITE, *supra* note 164, at 31 n.15; *see also* Robertson v. United States *ex rel.* Watson, 560 U.S. 272, 279 (2010) (Roberts, C.J., dissenting from dismissal as improvidently granted) (discussing the English common law practice that "private parties could initiate criminal prosecutions, but the Crown—entrusted with the constitutional responsibility for law enforcement—could enter a *nolle prosequi* to halt the prosecution").

182. *See supra* note 124 and accompanying text.

183. 481 U.S. 787 (1987).

184. 487 U.S. 654, 691–92 (1988).

185. 481 U.S. at 789–802.

requirement might apply to criminal prosecution, it might be satisfied by less than complete control.[186]

Even if criminal prosecution qualifies as an executive task because of its relation to forceful criminal punishment, the same is not necessarily true of court actions to pursue civil sanctions. Such sanctions—which include things like license revocation and deprivation of public benefits, in addition to things like public fines and exclusion from future activities—often do not involve force or physical restraint in the way that criminal incarceration does, and so their pursuit is even less easily described as enforcement in its common sense. Yet Hamilton, in discussing the constitutional power "to enforce the execution of [the] laws," appears to have envisioned at least some such sanctions as implicating that power—for example, "pecuniary mulcts," or "suspension[s] or divestiture[s] of privileges"—if they are designed "to exact obedience, or punish disobedience" to federal law.[187] Hamilton's use of the terms "exact" and "punish," however, may be consistent with an understanding that physical force must be entailed in the implementation of such sanctions for their pursuit to qualify as law enforcement—that is, as an executive task implicating "[t]he executive Power."

Various Supreme Court opinions, for their part, have suggested that some types of civil suits, but not others, raise Article II concerns. *Buckley v. Valeo* suggests that agency actions in court seeking to obtain civil penalties against campaign violations of federal election statutes implicate the President's "take Care" duty and the Appointments Clause's requirements.[188] *Buckley* describes those actions as seeking to vindicate "public rights."[189] *Lujan v. Defenders of Wildlife*[190] suggests that federal court adjudication of two other categories of suits would pose no problem under Article II: first, suits by a private citizen seeking to vindicate an "individual right," even a statutory right to particular conduct by the executive branch; and second, suits concerning one private party's liability to another under the law.

To understand these implications of *Lujan*, which is primarily a case on Article III standing, it is necessary to examine the *Lujan*

186. *See supra* note 88 and note 137 and accompanying text.

187. THE FEDERALIST NO. 21, at 134 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

188. 424 U.S. 1, 111–13, 137–38, 140 (1976) (per curiam) (quoting U.S. CONST. art. II, §§ 2, 3).

189. *Id.* at 140. Following this thread, three current Justices in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.* flagged what they saw as potential Article II questions about delegations to private litigants to sue for enforcement of civil penalties that take the form of public fines, payable solely to the public treasury. 528 U.S. 167, 197 (2000) (Kennedy, J. concurring); *id.* at 209 (Scalia, J., dissenting, joined by Thomas, J.).

190. 504 U.S. 555 (1992).

opinions' reasoning relating to Article II. The majority opinion examined a private citizen suit to vindicate "the undifferentiated public interest in executive officers' compliance with the law," on the one hand, and a private citizen suit to vindicate "an 'individual right,'" including an individual right pursuant to statute against " 'unauthorized administrative power,' " on the other.[191] Adjudicating the former, the *Lujan* majority reasoned, would "transfer from the President to the courts" the Article II "take Care" duty, because it would render the courts " 'virtually continuing monitors of the wisdom and soundness of Executive action,' " a role that the Constitution reserves for the Chief Executive.[192] Adjudicating the latter—the suit to vindicate an individual right—does not present the same problem, the *Lujan* majority reasoned, because the court can then interfere with " 'law enforcement entrusted to administrative bodies only to the extent necessary to protect' " the individual right, a role the Constitution comprehends for the judiciary.[193] Similarly, although *Lujan* did not expressly address it, a court's adjudication of a suit by one private individual against another for violating the law might not appropriate any part of the President's "monitoring" or supervisory "take Care" authority over the action of executive officials, because—unlike in *Lujan*—the suit does not seek the court's supervision of, or direct order to change, the conduct of any such official in his execution of the law. Accordingly, the *Lujan* majority's Article II analysis might not apply with respect to most suits by a private plaintiff against a private defendant.

What of qui tam suits? Such suits, pursuant to statutes like the False Claims Act, are brought on behalf of the federal government by private litigants, who are then entitled to a share of the penalty or damages awarded in the suit.[194] The Supreme Court has not yet taken a position on the question of whether civil "*qui tam* suits violate Article II, in particular the Appointments Clause . . . and the 'take Care' Clause"—a question on which the Court majority in *Vermont Agency of Natural Resources v. United States ex rel. Stevens* declared it expressed no view.[195] Qui tam suits might be considered to vindicate public rights, because they pursue the federal government's claims. Or they might be considered to vindicate individual rights, because the qui tam statute

191. *Id.* at 577.

192. *Id.* (quoting Allen v. Wright, 468 U.S. 737, 760 (1984)).

193. *Id.* (quoting Stark v. Wickard, 321 U.S. 288, 309–10 (1944)); *id.* at 576.

194. *See* Stauffer v. Brooks Bros. Grp., Inc., 758 F.3d 1314, 1316 n.1 (Fed. Cir. 2014) (citing the definition of "qui tam" in BLACK'S LAW DICTIONARY (9th ed. 2009)).

195. 529 U.S. 765, 778 n.8 (2000); *see* VERKUIL, *supra* note 17, at 107.

creates an entitlement to monetary relief on the part of a successful private litigant.

The *Vermont Agency* opinion, in concluding that qui tam relators have Article III standing, relied extensively on evidence of "the long tradition of *qui tam* actions in England and the American Colonies."[196] That historical practice also bears on the Article II question of whether qui tam actions are an executive task that implicates "[t]he executive Power" and necessitates some form of presidential control. The practice evidence cuts against that conclusion, because it tends to show that various forms of executive-branch control over qui tam actions were foreclosed by statute or court decision. For example, Congress enacted approximately ten qui tam provisions authorizing private suit to enforce criminal statutes in the first decade after the Constitution's ratification, and at least some of those precluded executive officials like the district attorney from declining to pursue the action.[197] Moreover, some evidence suggests that a qui tam action's initiation, at least during the nineteenth and twentieth centuries, may have "precluded a subsequent criminal action predicated on the same conduct."[198] And courts in a few late-nineteenth-century cases rejected the availability of a government power to intervene in an ongoing qui tam action.[199]

By contrast, many modern qui tam statutes, including the False Claims Act, allow for at least some forms of presidential control, such as through notice to the executive and the opportunity to dismiss, intervene in, or settle the suit.[200] Accordingly, federal courts of appeals that have considered challenges brought to the False Claims Act under the Take Care and Appointments Clauses have rejected them, relying on the degree and nature of executive control over the suits or the private citizens who pursue them under the statute.[201]

Importantly, for any of the delegations to private entities to pursue court judgments (such as through private prosecution, private

196. 529 U.S. at 774–77.

197. Krent, *supra* note 121, at 296–97, 296 n.104, 297 nn.105–06 (quoting, for example, the Imported Spirits Tax Repeal Act of March 3, 1791, ch. 15 § 44, 1 Stat. 199, 209).

198. *Id.* at 300–02.

199. *Id.* at 302 (citing United States v. Griswold, 26 F. Cas. 42, 44 (D. Or. 1877) (No. 15,266); United States v. Bush, 13 F. 625, 629 (D. Or. 1882)).

200. *E.g.*, 31 U.S.C. § 3730(b), (c) (2012) (False Claims Act, requiring Attorney General consent to dismiss action; requiring service of complaint on, and disclosure of evidence to, the government; and providing that the government may intervene in the action and conduct it from that point forward, including settling the action regardless of qui tam relator's objection).

201. *E.g.*, United States *ex rel.* Stone v. Rockwell Intern. Corp., 282 F.3d 787, 806 (10th Cir. 2002); Riley v. St. Luke's Episcopal Hosp., 252 F.3d 749, 753–57 (5th Cir. 2001) (en banc); United States *ex rel.* Kelly v. Boeing Co., 9 F.3d 743, 751–55 (9th Cir. 1993) ("The [False Claims Act] permits a degree of executive control sufficient to satisfy the *Morrison* [*v. Olson*] standard.").

citizen suit for civil penalties such as public fines, or qui tam suit), even if, contrary to the above reasoning, the particular delegated task implicates "[t]he executive Power," the appropriate rule under an executive-power non-delegation doctrine likely would not be that the suit should be barred outright, but instead that the suit should be subjected to some form of executive-branch control (such as *nolle prosequi*, pardon power, notice and the opportunity to intervene, or executive appointment or removal of the litigant, among other forms). The courts would not lack "[t]he judicial Power" to decide a case because it was initiated by a private individual, they simply would be required to exercise that power in a manner that preserves whatever degree of presidential control necessary to keep "[t]he executive Power" vested in the President. For the Court to purport otherwise arguably could impermissibly divest the federal judiciary of its constitutionally vested "judicial Power."

b. Filling the Interstices of an Incomplete Law

Underlying the Court's modern legislative-power non-delegation doctrine is the theory that Congress makes the law by specifying an intelligible principle—that is, the law's basic substantive policy—to guide the law's execution.[202] An intelligible principle, however, may be a far-from-comprehensive source of guidance. This is so for nearly every law, at least to some degree. It is difficult, if not impossible, for a law to specify exactly how it is to be applied in the wide array of circumstances that may confront its executor.[203] Natural imprecisions in language, variance between the circumstances that confronted legislators and those arising later, and legislators' inevitable inability to anticipate every potential application of the laws they enact all ensure the existence of many laws whose particular applications will be uncertain or ambiguous. The execution of federal law is not mechanical, and "requires judgment in . . . the interpretation of laws."[204] Executive discretion, therefore, involves interpretation of statutory meaning.[205]

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202. *See supra* text accompanying notes 28–38.

203. *See* Lawson, *supra* note 23, at 339 ("Executive discretion can . . . involve matters concerning the meaning and content of a statute. Very few statutes can resolve every possible issue that can arise in every possible application."); Sunshine Anthracite Coal Co. v. Adkins, 310 U.S. 381, 399–400 (1940) ("The difficulty or impossibility of drawing a statutory line is one of the reasons for supplying merely a statutory guide [for the later execution of the law].").

204. Gary Lawson, *Delegation and the Constitution*, 22 REG. 23, 25 (1999).

205. Lawson, *supra* note 23, at 339; *see* John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 699–702 (1997) (describing how even textualists sanction law elaboration by executory institutions).

The Supreme Court has recognized this principle.[206] Likewise, the scholarly consensus among those who contend that "[t]he executive Power" includes a law execution power appears to be that both comprehend the power to interpret the law and to fill in its gaps, consistent with the law's underlying substantive policy, in the course of implementing it.[207] And early executive practice included assertion of the authority by department heads to direct their subordinates on matters of law interpretation.[208]

Of course, interpretation of law, unlike some other tasks that implicate "[t]he executive Power," might in some circumstances constitute a permissible exercise of the "[t]he *judicial* Power" vested in the judicial branch under Article III.[209] *Marbury v. Madison* famously states, "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule."[210] But this does not necessarily preclude a conclusion that *non-judicial* law interpretation is authority that implicates "[t]he executive Power." Indeed, even *Marbury*'s description of those with the authority to

206. *E.g.*, Bowsher v. Synar, 478 U.S. 714, 732–33 (1986) ("Interpreting a law . . . is the very essence of 'execution' of the law" in constitutional terms); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928) (noting, in distinguishing legislative from executive power, that Congress "vest[s] discretion in [executive] officers to make public regulations interpreting a statute and directing the details of its execution"); *see supra* notes 36–38 and accompanying text.

207. *See* Lawson, *supra* note 23, at 339 (describing the " 'gap-filling' role" as perhaps central to the executive function, and as an "ordinary incident of the executive power"); Lawson, *supra* note 204, at 25 ("The meaning of 'executive power' is broad enough to include . . . some measure of interpretative freedom in the face of statutes of less than perfect clarity."); Calabresi & Prakash, *supra* note 18, at 595 ("[N]otwithstanding the text of any given statute, the President must be able to execute that statute, interpreting it and applying it in concrete circumstances."); Goldsmith & Manning, *supra* note 160, at 2282 (asserting the existence of a "President's completion power"—an "authority to prescribe incidental details needed to carry into execution a legislative scheme"—already recognized by courts and Presidents); Thomas W. Merrill, *Judicial Deference To Executive Precedent*, 101 YALE L.J. 969, 1004 (1992) (asserting a "constitutional basis for an inherent executive power to interpret the law"); *see also* Merrill, *supra* note 17, at 2099–100 (noting the long history of the Executive's role in rulemaking to flesh out statutory schemes); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735–36 (2002) (same).

208. Mashaw, *supra* note 110, at 1306–07 (explaining how Alexander Hamilton, as Secretary of the Treasury, "acted vigorously to stamp out the view that the [tax] collectors . . . should uphold their own construction of the laws rather than the Secretary's or to rely on private lawsuits to settle matters of interpretation. . . . As a consequence, field officials often corresponded with the Secretary seeking his opinion about doubtful or novel cases"); *e.g.*, 3 THE WORKS OF ALEXANDER HAMILTON 543–45 (John C. Hamilton ed., 1850) (asserting Hamilton's interpretation as Treasury Secretary that the relevant Act "[d]id not admit of an exemption of the duties" on exported and reimported goods, and directing that "the officers of the customs must govern themselves accordingly").

209. U.S. CONST. art. III (emphasis added).

210. 5 U.S. (1 Cranch) 137, 177 (1803).

interpret the law is capacious enough to encompass executive-branch actors, who are also charged with "apply[ing] the rule to particular cases" in the course of executing the law in particular circumstances.

These observations raise the question of which branch—executive or judicial—should reign supreme and bind the other branch on the interpretation of a statute where the two disagree, and to what extent.[211] Much scholarship addresses aspects of that question,[212] but it is largely orthogonal here. Where an entity is private in the sense of being none of the entities comprehended by Articles II or III (for example, if it is unaccountable via the President and does not qualify as an Article III court), no Vesting Clause would seem to authorize that entity to bind the President or federal courts in their exercise of "[t]he executive Power" or "[t]he judicial Power" to interpret federal statutes. Absent some other constitutional delegation of authority from the American people that encompasses federal statutory interpretation, the private entity would seem to have been delegated either "[t]he executive Power" or "[t]he judicial Power of the United States" in contravention of one or both of the Article II and III Vesting Clauses.

Likewise, it seems problematic when a "private"—that is, non-executive and non-judicial—entity issues an interpretation of federal law that has legally binding effect on other entities and their conduct. Leave aside situations in which all governed or affected entities consent to such an interpretation, the process by which it was rendered, or its binding nature. Imparting nonconsensual but binding legal effect to such interpretations—whether through traditional, physically coercive law enforcement means or through declaratory pronouncements that demand adherence and obedience—seems to implicate either or both of "[t]he executive Power" or "[t]he judicial Power of the United States" under Articles II and III.[213] In essence, such effect with respect to

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211. *See* Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027, 1030–34 (2004) (noting differences between departmentalist and judicial supremacist approaches to constitutional interpretation); Devins & Prakash, *supra* note 15, at 529–30 & nn.108–10 (same, with respect to constitutional *and statutory* interpretation).

212. *See, e.g.*, William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1808–09, 1834–35 (2008) (discussing the extent to which a court's interpretive ruling, embodied in a judgment, binds the Executive); Merrill, *supra* note 207, at 1005–12 (addressing a judicial obligation, or at least option, to adhere to prior executive interpretations).

213. *See, e.g.*, Merrill, *supra* note 17, at 2099–100, 2131 ("[T]he 'executive power' is broad enough to encompass the exercise of . . . the power to make rules that are legally binding on the public."); *OLC Executive Discretion Opinion*, *supra* note 74, at 143 & n.12 (conferral of substantial discretion over "federal regulations affecting the conduct of third parties" raises executive-power divestment concerns); Officers of the United States Within the Meaning of the Appointments Clause, 31 Op. O.L.C. 73, 77, 88 (2007) [hereinafter *OLC Officers Opinion*] (describing the power of "authoritatively interpreting the laws" as one of "binding" entities for the benefit of the public,

federal law implementation may entail the force of law that the American people allocated amongst and potentially only to the entities comprehended by Articles I, II, and III.

In contrast, non-binding interpretations do not raise these problems. Private litigants, for example, commit no constitutional violation simply by proffering arguments to courts about the law's meaning, nor do the courts violate the Constitution by adopting those arguments when persuaded by them. Likewise, private citizens or companies who offer comments to executive agencies on the consequences of a proposed regulation are not constitutionally precluded from doing so.

A binding interpretation might be issued in any of a number of forms, including through a rulemaking or policy document. But it also might be issued through an adjudication. Treating the adjudication as executive and necessitating some form of presidential control, however, raises concern. Perhaps because of adjudication's resemblance to an exercise of judicial power, for which impartiality is prized, it has long inspired discomfort to think that adjudications might be fully subject to the President's whims.[214] James Madison proposed giving the Treasury's Comptroller statutory protections from removal precisely because his duties included adjudication of individual claims.[215] Although Madison later withdrew the proposal,[216] its underlying concern has continued to resonate in administrative law.[217] The Supreme Court, too, has grappled with this concern, exhibiting ambivalence about the nature of presidential control, if any, that must be maintained over even executive adjudication.[218]

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and describing the "power to issue . . . authoritative legal opinions on behalf of the Government" as among "powers to execute the law"); Mistretta v. United States, 488 U.S. 361, 386–88 & n.14, 396 (1989) (indicating that not all legislatively delegated rulemaking is the Executive's exclusive prerogative, but implicitly recognizing that rules that "bind or regulate the primary conduct of the public," as opposed to merely having "substantive effects on public behavior," may "involve a degree of political authority inappropriate for a nonpolitical branch").

214. *See* Kevin M. Stack, *Agency Independence after* PCAOB, 32 CARDOZO L. REV. 2391, 2403 (2011) ("Adjudication . . . calls for procedural fairness, and a neutral decisionmaker."); *see also id.* (explaining how the concern about presidential control over adjudication was central to the Supreme Court's 1935 decision in *Humphrey's Executor*).

215. 1 ANNALS OF CONG. 635–36 (1789) (Joseph Gales ed., 1834).

216. *Id.* at 639.

217. *E.g.*, Strauss, *supra* note 68, at 622; Cynthia R. Farina, *Undoing the New Deal Through the New Presidentialism*, 22 HARV. J.L. & PUB. POL'Y 227, 233–34 (1998); Heidi Kitrosser, *Accountability and Administrative Structure*, 45 WILLAMETTE L. REV. 607, 616 n.39 (2009).

218. Myers v. United States, 272 U.S. 52, 135 (1926) (declaring the President ought not control outcomes, but must retain removal power over adjudicative officers); Wiener v. United States, 357 U.S. 349, 356 (1958) (upholding for-cause protections against an adjudicative officer's removal); Free Enter. Fund v. PCAOB, 561 U.S. 477, 507 n.10 (2010) (contrasting adjudicative functions

In essence, then, it is delegation of the authority to issue nonconsensual, legally binding statutory interpretations, at least outside of adjudication, that seems to raise Article II questions under an executive-power non-delegation doctrine.

D. The Second Inquiry: Is the Task To Be Performed by an "Article II Executive Entity"?

Who may perform an executive task that implicates "[t]he executive Power"? The Constitution comprehends that the President himself need not perform each and every one, but may delegate to subordinates who satisfy Article II.[219] Article II's structure (and in particular, the Appointments Clause's existence) suggests that those delegates must remain meaningfully *subordinate* to the President, however, based on the understanding that the non-divestible "executive Power" is a power of supervision or control—a power to "take Care" that others faithfully execute the law. Thus, the President must have whatever mechanism (or mechanisms) of control the Constitution mandates over those subordinates who perform executive tasks.[220] Entities over whom he has the requisite control may be called, in short, "Article II executive entities."

Which entities qualify? This question, of the nature of presidential control over subordinates required to avoid divestment of "[t]he executive Power," is "the key question in the unitary executive debate."[221]

The flexible-control thesis rests on an observation that control is not discrete and binary, but a continuous measure that depends on the particular combination of mechanisms of control involved and on those mechanisms' permutations, in terms of their nature, strength, and directness.[222] For example, removability could be at will, or it might be limited by time period, political balance, or cause—and those limits might take any number of forms.

Because control mechanisms interdependently impact overall control, tradeoffs might be made to some degree among these various

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with "enforcement of policymaking functions" in suggesting that administrative law judges, who perform the former set, might not necessitate presidential control).

219. *See supra* notes 129–132 and accompanying text.

220. *See supra* notes 133–138 and accompanying text.

221. Christopher R. Berry & Jacob E. Gersen, *The Unbundled Executive*, 75 U. CHI. L. REV. 1385, 1401–02 (2008); *see* Lawson, *supra* note 46, at 1243.

222. *Cf.* Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 824–26 (2013) (rejecting a binary view in favor of a continuum view in describing forms of administrative agencies by reference to their relative insulation from presidential control).

mechanisms and their respective forms. Therefore, the required control mechanisms might include the power to initially select the individual for appointment, or to remove him, or to exercise more direct supervisory control over his performance of executive tasks—such as by supplanting his action, nullifying its legal effect, or vetoing it.[223] Or perhaps they might include any number of other methods of influence, including some catalogued explicitly in Article II—such as through the pardon power, the Opinions Clause, the Commander-in-Chief Clause, or the duty to commission officers, among potential others.[224] Or perhaps some combination of those mechanisms is required, or—as *Morrison* suggests—the required mechanisms might vary with the nature of the executive function at issue.[225]

Beyond the Appointments Clause—which requires a presidential role, even if indirect, in selecting executive entities—"the text of Article II and our historical practice are of little help in identifying which of these [other] mechanisms of presidential control, if any, is correct"[226] or the degree to which a given mechanism must remain unfettered and unattenuated. The Vesting Clause provides only limited additional guidance. Although its underlying theory seems predicated on maintaining the President's accountability to the people for executive power's exercise,[227] debate continues over what is necessary to maintain that accountability.

One reasonable position in that debate is as follows: The President may be said to be ultimately accountable for law execution only if he plays *some* role—even if somewhat attenuated—in controlling or influencing it, in "tak[ing] Care" that it is done faithfully. That is, it would seem there ought to be an accountability chain traceable from the individual with authority to perform the executive task to the President.[228] If the President cannot directly influence that individual through any mechanism, he ought to have a mechanism to influence the

223. *See* Calabresi & Rhodes, *supra* note 18, at 1166–67.

224. *See* Kevin M. Stack, *The President's Statutory Power to Administer the Laws*, 106 COLUM. L. REV. 263, 294 (2006) (noting that "the President has a wide variety of means to influence executive officials," including through appointment, informal and ex parte communication, vetting of high-level staff, regulatory review, control over agency litigation, removal, etc.).

225. 487 U.S. 654, 691 & n.30 (1988). The nature of the executive function might also affect the requisite degree and directness of presidential control thereover. *See* text accompanying notes 214–218 (discussing the Supreme Court's ambivalence about the requisite presidential control, if any, over adjudication under Article II).

226. Calabresi & Rhodes, *supra* note 18, at 1167 (emphasis omitted).

227. *See supra* notes 113–115 and accompanying text.

228. *See* 1 ANNALS OF CONG. 499 (1789) (Joseph Gales ed., 1834) (describing the need for a presidential removal power so that "the chain of dependence be preserved; the lowest officers, the middle grade, and the highest will depend, as they ought, on the President" (quoting James Madison)).

individual who does, or the individual who influences that influencing individual, and so on, down the chain at least until the role of the subsidiary individual under evaluation is a sufficiently limited one.

But which of the possible control mechanisms must comprise each particular link in that chain? The following Sections consider this issue to an extent under current Supreme Court precedent, while examining how the Court's jurisprudence on particular control mechanisms is largely consistent with—and may be fitted into—an executive-power non-delegation focus on overall presidential accountability and control. Importantly, a number of the Court's opinions on appointment, removability, and directive authority by the President are consistent with the notion that a stronger or more direct form of one type of control (such as removability at will rather than for cause, or by the President rather than by his subordinate) might compensate for a weaker or less direct form of another (such as appointment as an inferior, rather than as a principal, officer).

1. Appointment

The Appointments Clause contains Article II's clearest, albeit incomplete, textual guidance about requisite presidential-control mechanisms. It provides that "Officers of the United States, whose Appointments . . . shall be established by Law," are to be *presidentially* appointed with Senate confirmation; and allows for an alternative appointment procedure for "inferior Officers" if "Congress . . . by Law" prescribes it.[229] The alternative procedure, however, must be selected from a finite list of options: appointment by "the President alone" or by an official who has himself been appointed by the President—that is, "the Courts of Law, or . . . the Heads of Departments."[230] That latter, presidentially appointed official, is generally known as a "principal officer."

The Appointment Clause's text is relatively vague in defining who is an "Officer" subject to the Clause's procedures and in drawing the line between inferior and principal officers.[231] The next two Sections analyze the basic executive-power non-delegation principles pertinent to this question, also reflected in the Court's jurisprudence. As those

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229. U.S. CONST. art. II, § 2.

230. *Id.*

231. *See* Morrison v. Olson, 487 U.S. 654, 671 (1988) (noting the principal/inferior officer line is "far from clear, and the Framers provided little guidance into where it should be drawn"); *see also* The Constitutional Separation of Powers Between the President and Cong., 20 Op. O.L.C. 124, 149 (1996) [hereinafter *OLC Separation-of-Powers Opinion*] ("[T]he Court's own decisions provide only modest additional guidance.").

Sections explain, the criteria for determining whether the Clause requires "Officer" appointment or particularly principal-officer appointment depend largely on an assessment of the scope and executive nature of the official's duties and the availability of presidential control through other mechanisms. And, for a given executive task, to the extent that an official is *not* appointed as an "Officer" or is appointed by an entity other than the President as an inferior officer, it might be that the need for presidential control through *other* mechanisms is strengthened (and vice versa).

a. "Officers . . . whose Appointments . . . shall be established by Law"

The Supreme Court has ruled that "Officers of the United States" (here, "Officers" for short) in the Appointments Clause is "defined to include 'all persons who can be said to hold an office under the government.' "[232] The Court distinguishes them from non-officers (sometimes termed "employees"); Officers might implicate the Clause's appointment procedures, but employees do not.[233] The Court seems to employ two essential factors to conclude that someone is an Officer who must be appointed in accordance with the Clause: first, whether the individual exercises significant governmental duties pursuant to federal law;[234] and second, whether his role for those duties is "continuing," as opposed to "temporary," "episodic," or confined to "the special case."[235]

For the first factor, the Court treats the individual's independent discretion with respect to his duties—that is, discretion not subject to review or approval of a higher official—as indicating significant authority.[236] This element relates well to an executive-power non-delegation analysis and its focus on presidential control. Where an

232. Buckley v. Valeo, 424 U.S. 1, 125–26 (1976) (per curiam) (quoting United States v. Germaine, 99 U.S. 508, 510 (1878)).

233. *E.g.*, *Edmond*, 520 U.S. at 662; Freytag v. Comm'r, 501 U.S. 868, 880 (1991).

234. *Buckley*, 424 U.S. at 126, 141.

235. *Freytag*, 501 U.S. at 881; *Buckley*, 424 U.S. at 126 n.162; Auffmordt v. Hedden, 137 U.S. 310, 326–27 (1890); *Germaine*, 99 U.S. at 512; *see* Krent, *supra* note 17, at 536; *OLC Officers Opinion*, *supra* note 213, at 100–13; *cf.* United States v. Hartwell, 73 U.S. 385, 393 (1867) (stating that the statutory meaning of a government office "embraces the ideas of tenure [and] duration").

236. *Buckley*, 424 U.S. at 126 n.162 (comparing "employees" who were "lesser functionaries subordinate to officers of the United States" to the appointees there at issue who were "not subject to the control or direction of any other executive, judicial, or legislative authority"); *id.* (citing *Auffmordt*, 137 U.S. at 327, and *Germaine*, 99 U.S. 508, which inquired into appointees' duties and emphasized facts about their discretion therein); *Freytag*, 501 U.S. at 881–82 (emphasizing that special trial judges "exercise significant discretion" in their functions); *see OLC Officers Opinion*, *supra* note 213, at 93 (contending that discretion is relevant but not required for significant authority).

individual has substantial independent discretion in performing executive duties, his performance thereof is not subject to the President's oversight, nor to the oversight of a higher official controlled by the President. This would seem, under an executive-power non-delegation analysis, to strengthen the need for presidential control over the individual's appointment in order to preserve the President's accountability for the individual's actions and avoid divesting the President of "[t]he executive Power."[237]

Yet the Court's first factor also seems to focus on whether the significant authority wielded by the individual is "established by Law."[238] That is, the Court seems to inquire whether the duties are stipulated by statute, even if the position itself is not.[239] That "statutory duties" element seems less clearly relevant to an executive-power non-delegation analysis. The need for presidential control over an individual who has been delegated significant executive authority, under that analysis, would not seem to dissipate simply because his duties were not formally described by Congress. Likewise, the second factor—a continuing role—seems in some tension with an uncabined executive-power non-delegation analysis. The brief nature of a role in the execution of law that otherwise implicates "[t]he executive Power," yet entirely escapes the President's authority to "take Care" that such execution is faithful, would, under an executive-power non-delegation analysis, seem to indicate only that the Constitution was violated briefly.

Because the Appointments Clause explicitly applies only to "Officers of the United States, whose Appointments . . . shall be established by Law," however, the Clause's required procedures extend only to those appointments, whether the Vesting Clause would seem to require some greater presidential control or not. One way to reconcile these Clauses' requirements, not foreclosed by existing precedent, might be to insist on the President retaining *other* means of controlling the individuals who either temporarily or extrastatutorily perform executive tasks—such as through the ability to remove them or to nullify their actions, directly or indirectly—if those individuals do *not*

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237. *See, e.g.*, THE FEDERALIST NO. 72, at 434 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (those who administer the government are the President's assistants and "ought to derive their offices from his appointment").

238. U.S. CONST. art. II, § 2.

239. *Buckley*, 424 U.S. at 131–41 (referring to "responsibility under the public laws" and duties "exercised pursuant to a public law"); *Freytag*, 501 U.S. at 881 (noting that the special trial judge's duties were "specified by statute" and contrasting special masters as having "duties and functions . . . not delineated in a statute"); *see OLC Officers Opinion*, *supra* note 213, at 78, 117–19.

meet the criteria to be Officers referenced by the Appointments Clause and subject to its strictures. Those other control mechanisms might be necessary for some of the Appointments Clause's Officers as well, but that conclusion is less clear and might depend on the nature of the executive tasks they perform, or a lesser degree of strength or directness of those control mechanisms might be required.

An alternative way to reconcile the Clauses, also not foreclosed by existing precedent, would be to confine the executive-power non-delegation analysis and its presidential-control requirement to only those who are Officers within the meaning of the Appointments Clause, treating the Appointments Clause's scope as informative of the Vesting Clause's. The Supreme Court's *PCAOB* opinion could be read to permit, or even suggest, this approach.[240] Under such an approach, whole categories of officials would be exempt from a presidential-control requirement. By limiting the scope of an executive-power non-delegation doctrine, this approach could mitigate the doctrine's ability to require accountability to the American people via the President on the part of those officials not subject to its analysis, but also could mitigate implementation concerns about the doctrine that are discussed in Section IV.D. Notably, this approach would not entirely obviate an executive-power non-delegation analysis with respect to appointments. As the next Section explains, the Supreme Court has treated the availability of certain forms of presidential control as central to determining who may be considered an inferior (as opposed to a principal) officer, which renders the official eligible for a potential method of appointment that is less directly susceptible to presidential influence.

Even under this latter approach, however, many private entities could be subject to an executive-power non-delegation analysis because they are Officers necessitating the Appointments Clause's procedures. That is, private entities could meet the aforementioned factors and thereby qualify as Appointments Clause Officers. Although more recent executive-branch interpretation reinforces that observation, earlier executive-branch opinions incorrectly interpreted the Clause as entirely inapplicable to private entities administering federal law. Specifically,

240. *See* Free Enter. Fund v. PCAOB, 561 U.S. 477, 503, 506, 507 n.10 (2010) (describing its decision as concerning "officers wielding the executive power of the United States"; declaring that "[w]e do not decide . . . whether 'lesser functionaries subordinate to officers of the United States' must be subject to the same sort of control as those who exercise 'significant authority pursuant to the laws' "; and distinguishing independent-agency civil servants and administrative law judges because they would not undisputedly qualify as "Officers of the United States").

a 1996 OLC opinion—contrary to later OLC opinions[241]—contended that a necessary condition to be an "Officer[ ]" is formal employment by the federal government.[242] It consequently concluded that government contractors are per se exempt from Appointments Clause procedures; and that "[t]he Appointments Clause simply is not implicated when significant authority is devolved upon non-federal actors," such as state officials and private parties.[243] The Supreme Court's *Printz* opinion is in tension with the latter conclusion,[244] and both conclusions seem strained. True, many contractors or other private entities might not implicate the Clause because they do not meet one of the aforementioned factors. And some may escape an executive-power non-delegation analysis because they do not perform executive tasks. But neither the Appointments Clause, nor the Court's jurisprudence pursuant thereto, declares federal employment essential for, or frees everyone in ordinary contractual privity with the government from, the Clause's procedures; and *Buckley* seems inconsistent with such per se rules.[245]

Relatedly, practice around the time of ratification undercuts the assumption that an individual must be on the federal payroll to be an Officer. "In the first decade under the Constitution, most federal officers, particularly those outside the capital, received no compensation from the Government, much less a regular one. Instead, they received authority to collect fees."[246] And the same was true of officers in early American practice leading up to the Founding. Nicholas Parrillo recounts extensive evidence of fees for services and bounties set as a share of tax forfeitures that were regularly paid to government officers in colonial America and the early Republic; and notes that such

241. *See OLC Officers Opinion*, *supra* note 213, at 78, 121–22; *OLC Executive Discretion Opinion*, *supra* note 74, at 143, 143 n.12.

242. *See OLC Separation-of-Powers Opinion*, *supra* note 231, at 140–42.

243. *Id.* at 145–46.

244. 521 U.S. 898, 922–23 (1997) (citing Article II, including the Appointments Clause, to invalidate a "transfer[ ] [of] responsibility" for federal law administration to state law enforcement officers; and emphasizing the importance of "meaningful Presidential control" over the program's implementation, including through the President's "power to appoint").

245. Buckley v. Valeo, 424 U.S. 1, 126 (1976) (per curiam) (declaring that "*any* appointee" who exercises significant authority pursuant to federal law implicates the Clause (emphasis added)).

246. *OLC Officers Opinion*, *supra* note 213, at 120; *see also* WHITE, *supra* note 164, at 298 ("[T]he larger number of federal officials were compensated by fees for services rendered. Nearly the whole of the field service was paid on this basis . . . . [Officials] were paid on the spot, by those whom the law required to deal with them."); MASHAW, *supra* note 154, at 60–61 (describing "officers" in the early Republic as often receiving pay for services, a share of fines collected, or other commissions).

fee-taking and bounty-seeking was not replaced by fixed salaries out of concern for corruption until well into the nineteenth century.[247]

This evidence also illustrates an error in the D.C. Circuit's private non-delegation approach in *Association of American Railroads*. The D.C. Circuit held that private entities—"to whom the Constitution commits no executive power"[248]—are barred from wielding regulatory authority, regardless of presidential control through, for example, the President's appointment and removal powers.[249] This misapprehends which type of entity would raise constitutional questions under Article II by assisting the execution of law. The D.C. Circuit concluded that Amtrak is such an entity based on the statute's indication that "Amtrak 'shall be operated and managed as a for-profit corporation.' "[250] But, as just noted, numerous government officers were compensated by permitting them to reap private profit from their official acts in the constitutional ratification period, yet the Constitution does not explicitly forbid that practice nor does there appear to have been discussion about its constitutional invalidity in the nation's early years. Moreover, a per se bar on the wielding of government power by private entities is hard to square with the understanding that every government official is, in some sense, a private entity, who has a private capacity in which she may act. Every appointment to an office under the Constitution is an appointment of a private individual that renders her an officeholder as well, but does not deprive her of her simultaneous private capacity. This was particularly true in the early Republic, where "office-holding was an ambiguous station. . . . Many simultaneously pursued other occupations and operated in their official and private capacities out of the same premises. They were, in short, citizens who also carried out certain public functions."[251] These considerations tend to undercut the D.C. Circuit's conclusion that the Constitution per se forbids entities motivated by profit, or private entities, from ever assisting the execution of law.

An Article II executive-power non-delegation analysis would not depend on whether an entity is "private" as determined by whether, for example, it earns profits as opposed to a government salary. An entity's

247. NICHOLAS R. PARRILLO, AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940, at 58–80, 111–12, 221–24 (2013).

248. Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013).

249. *Id.* at 668, 674, 677.

250. *Id.* at 675–77 (quoting 49 U.S.C. § 24301(a) (2012)).

251. MASHAW, *supra* note 154, at 76; *see also* Mashaw, *supra* note 110, at 1268 ("The idea of 'office' . . . was highly ambiguous—an unsettled blend of public and private stations."); *id.* at 1313 ("These officers . . . occupied some hybrid category that fused salaried employment, independent local standing, and private entrepreneurship.").

mode of compensation does not change whether its functions are executive in nature or whether there is presidential control over or accountability for the entity and its decisions—considerations relevant for determining if the entity must be, and is, a proper executive entity under Article II.[252] Such impressions of private versus public status are ungrounded in Article II's text, history, and structure. Thus, even if for-profit motive or related private status might be relevant (although not per se dispositive) in some circumstances to determining the decisionmaker's impartiality for a *due process* analysis,[253] it would be a misplaced focus for an executive-power non-delegation analysis, which instead centers on whether the delegee performing an executive task is subject to sufficient presidential control.

b. Principal Officers vs. Inferior Officers

The Court has drawn the principal-officer/inferior-officer distinction, like the "Officer" determination, by reference to presidential control. As for the form of that control, the Supreme Court has, in various cases, relied on different combinations of control mechanisms, and to different degrees of strength.[254] Importantly, however, the Supreme Court has generally predicated the inferiority of an officer on one or both of two factors: (1) the extent to which he is removable by a superior officer, and (2) the extent to which his duties and discretion are limited, such as by a superior officer's review.[255]

Both of these factors are proper considerations under an executive-power non-delegation analysis, as they pertain to the degree of presidential control over the officers in question. Where control over an officer is stronger, he may be considered inferior, and hence subjected to a less direct version of another mechanism of presidential control—that is, to potential appointment by a head of a department or a court of law (which are themselves presidentially appointed with

252. *See supra* Sections III.C and III.D.

253. *See supra* notes 59–65 and accompanying text.

254. *See* Edmond v. United States, 520 U.S. 651, 661 (1997) ("Our cases have not set forth an exclusive criterion for distinguishing between principal and inferior officers . . . .").

255. *Id.* at 664–65 (finding an officer "inferior" by relying upon his removability at will by a superior officer (other than the President)—"a powerful tool of control"—as well as the fact that he "ha[s] no power to render a final decision on behalf of the United States unless permitted to do so by other Executive officers"); Free Enter. Fund v. PCAOB, 561 U.S. 477, 510 (2010) (same, based on the officer's removability-at-will by a superior officer, along with "other oversight authority" over him, like higher agency approval and alteration of rules and sanctions imposed); Morrison v. Olson, 487 U.S. 654, 671–72 (1988) (same, based on the officer's removability by the Attorney General, as well as the officer's limited duties, tenure, and jurisdiction; although noting that the fact that the officer "possesses a degree of independent discretion to exercise [her delegated] powers" cut the other way).

Senate confirmation), should Congress so choose, rather than direct presidential appointment with Senate confirmation. This compensatory control structure serves the purposes of a flexible executive-power non-delegation analysis. In essence, the Court seems to have applied the principal/inferior officer distinction in such a manner as to ensure that the President retains at least one form of stronger or more direct control over his subordinates who assist in the execution of law.

2. Removability

A presidential power with respect to the removal of certain officials might inhere in Article II's Vesting Clause. The Supreme Court's opinion in *Myers v. United States* cites extensive historical evidence, which need not be recounted in detail here, to support that conclusion.[256] Under modern Court precedent, both the justification for inferring a removal power and the criteria that determine whether a less fettered or more direct form of the power must be available have focused on the executive nature of the authority of the official in question and the degree of presidential control available over him or his performance of executive tasks through other mechanisms of influence and control, consistent with an executive-power non-delegation approach.

A removal power's inherence in the Vesting Clause can be conceptualized in two different ways. First, a removal power might be itself part of "[t]he executive Power" that the Vesting Clause requires to be vested in the President.[257] Second, a removal power might be a mechanism of presidential control necessary to ensure that some *other* power that comprises "[t]he executive Power"—the power to see to the laws' faithful execution, for example—is not divested from the President.[258] This latter conception seems theoretically richer, and more easily inferred from the Vesting Clause's "*executive* Power"

256. 272 U.S. 52, 109–18 (1927). A full historical examination of the specific scope of such a removal power is beyond this Article's project.

257. *See* Calabresi & Prakash, *supra* note 18, at 644; Myers v. United States, 272 U.S. 52, 122, 161, 163–64 (1926) (the removal power is "in its nature an executive power"); *see also PCAOB*, 561 U.S. at 492 (describing the prevailing congressional view when the first executive departments were created "that the executive power included a power to oversee executive officers through removal").

258. *Myers*, 272 U.S. at 118 (reasoning that because the President is "charged specifically to take care that [the laws] be faithfully executed," and because "his selection of administrative officers is essential to the execution of the laws by him, so must be his power of removing [them]"); *PCAOB*, 561 U.S. at 492–93, 508 (reasoning that because "[t]he buck stops with the President," he must have removal power over those who assist in executing the law; and invalidating a removability structure that "deprive[s] the President of adequate control" over a "regulator of first resort and the primary law enforcement authority for a vital sector of our economy").

phrasing. It may also better cohere with a flexible-control approach, given its functionalist nature. The Court has in certain cases seemed to ascribe its removal power jurisprudence only or primarily to the latter conception,[259] and in other cases has seemed to ascribe it to both, using the rationale of the latter to reinforce the former.[260]

The scope of the presidential removal power under the Court's jurisprudence has varied with the function and type of official, but also has shifted over time. The current landscape of removal power precedent generally reflects a complex tug-of-war between formalist and functionalist approaches.

Myers establishes a general rule, which still applies today, that the President must retain at least *some* removal power over those who assist him in law execution.[261] A prior Court decision had held that Congress may limit the removal of inferior officers whose appointments it has vested in the heads of departments.[262] *Myers* left that holding undisturbed, but held that removability *at will*, free from congressional restrictions, was required for those appointed as *principal* officers.[263] *Myers* distinguished principal from inferior officers by reference to the Appointments Clause, explaining that the Clause's inferior-officer appointment provisions evince that inferior officers were an exception that "le[ft] unaffected the executive power of the President to appoint and remove" those not meeting that description.[264]

Humphrey's Executor v. United States narrowed *Myers*' removability-at-will holding, distinguishing *Myers* on the ground that it involved a "purely executive officer" and ruling that commissioners of the Federal Trade Commission (FTC) did not meet that description.[265] *Humphrey's Executor* thereby upheld a statute's restriction of the President's power to remove the commissioners to the causes of "

259. *Morrison*, 487 U.S. at 685–93 (stating that "[t]he analysis contained in this Court's removal cases is designed . . . to ensure that Congress does not interfere with the President's exercise of the 'executive power' "; and focusing on whether removal restrictions "impermissibly burden[ ] the President's power to control or supervise" an executive official executing his statutory duties or deprive the President of "means . . . to ensure the 'faithful execution' of the laws").

260. *See supra* note 258; *see also Myers*, 272 U.S. at 122 (explaining that the President's important role in the execution of law, including to "take care that the laws be faithfully executed," "emphasizes the necessity for including within the executive power as conferred the . . . power of removal").

261. *See Myers*, 272 U.S. at 161; *Morrison*, 487 U.S. at 692 (implying the unconstitutionality of "*completely* stripp[ing]" the President's power to remove executive officials).

262. United States v. Perkins, 116 U.S. 483, 485 (1886).

263. 272 U.S. at 127, 163–64.

264. *Id.* at 127.

265. 295 U.S. 602, 619, 631–32 (1935).

'inefficiency, neglect of duty, or malfeasance in office.' "[266] *Morrison* similarly upheld a statute imposing a good-cause removal restriction.[267] Although *Morrison* acknowledged the independent counsel's executive duties, it found she was—in the Court majority's view—an inferior officer, as she was subject to removal and other forms of supervision by the Attorney General.[268] *Morrison* thus might not have disturbed *Myers*' presidential removability-at-will rule for at least some *principal*, purely executive officers.[269] But *Morrison*'s reasoning rejected *Humphrey's Executor*'s formal distinction between the "rigid category" of "purely executive" officials and others, and instead adopted a function-based approach addressed toward "the real question . . . whether the removal restrictions are of such a nature that they impede the President's ability to perform his constitutional duty."[270] After *Morrison*, the relevant question became that underlying functional one: whether removal restrictions "interfere with the President's exercise of the 'executive power' and his constitutionally appointed duty to 'take care that the laws be faithfully executed' under Article II."[271]

Taking their cue from Justice Scalia's blistering dissent,[272] some criticize *Morrison* as being necessarily inconsistent with unitary executive theory and a Vesting Clause principle requiring presidential control over law's execution or its executors.[273] But whatever *Morrison*'s flaws or merits, it does not foreclose an executive-power non-delegation doctrine. To the extent that *Morrison* left standing a rule that principal, purely executive officers (who by definition engage in executive tasks) must be presidentially removable at will, it approved a strong presidential-control requirement for some officials' executive task performance.[274] For all others who perform executive tasks, *Morrison* required analysis of what level of removability is necessary to avoid divesting the President of his executive power to take care that the laws be faithfully executed—a question whose answer might be (and was for PCAOB members, according to *PCAOB*) presidential removability at will. And although *Morrison* allowed an inferior officer to be removable

266. *Id.* at 619–20, 626–32 (quoting the Federal Trade Commission Act, ch. 311, § 1, 38 Stat. 717, 718 (codified at 15 U.S.C. § 41 (2012))).

267. 487 U.S. 654, 691–93 (1988).

268. *Id.* at 671, 689–92, 695–96.

269. *See id.* at 690 ("*Myers* was undoubtedly correct in its holding, and in its broader suggestion that there are some 'purely executive' officials who must be removable by the President at will if he is to be able to accomplish his constitutional role.").

270. *Id.* at 688–91.

271. *Id.* at 689–90; *supra* note 158 and accompanying text.

272. *See Morrison*, 487 U.S. at 705–06 (Scalia, J., dissenting).

273. *See supra* note 138.

274. *See Morrison*, 487 U.S. at 690.

only for cause, it did so in part because the President could still control that office somewhat via the Attorney General, a principal officer he could remove at will.[275] Thus, *Morrison* did not necessarily disregard the requirement that "[t]he executive Power" be vested in the President; it simply disagreed with rigid unitary executive theorists about whether the Constitution requires *complete* and *direct* presidential control over every official performing executive tasks.[276] It applied an executive-power non-delegation analysis, whether in an ideal form or not.

Most recently, the Court decided *PCAOB*, in which it rejected the PCAOB's multi-level protection from removal—an arrangement whereby the PCAOB members, and the commissioners of the Securities & Exchange Commission (SEC) who could remove them, were removable only for cause—as "contrary to Article II's vesting of the executive power in the President."[277] *PCAOB* therefore extended a removability-at-will requirement to the PCAOB members, a set of inferior executive officers who were removable only by for-cause-protected principal officers.[278] For all others, *PCAOB* seems to have left standing a rule of direct resort to the executive-power non-delegation analysis described in *Morrison*. In this sense, *PCAOB* might be read as a functionalist opinion that decided for the case at hand but adopted no bright-line rule for other cases; or it might be read to embody a hybrid approach combining aspects of formalism and functionalism—specifically, a *functionalist formalism*[279]—by adopting a formal bright-line rule against multi-level for-cause protection from removal for a category of officers that perform executive tasks, but justifying that rule by reference to a functionalist assessment of the nature and extent of control that Article II demands.[280]

PCAOB also signifies that at least the current Court has taken account of the attenuation of presidential control over the performance

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275. *Id.* at 692, 696; *see* Free Enter. Fund v. PCAOB, 561 U.S. 477, 483, 494–95 (2010) (describing *Morrison*).

276. *See supra* note 88 and text accompanying notes 137–138.

277. 561 U.S. at 484, 496.

278. *See id.* at 496, 508.

279. I use the term "functionalist formalism" to describe generally the use of functionalist reasoning to justify a formal rule. Other scholars have employed the terms "functionalist formalism" or "functional-formalism" to describe approaches that may have hybrid formalist and functionalist features, but without specifying how those features interact. *See* Eskridge & Ferejohn, *supra* note 90, at 1217; Günter Frankenberg, *Stranger than Paradise: Identity & Politics in Comparative Law*, 1997 UTAH L. REV. 259, 267. "Formalist functionalism" could correspondingly describe the use of a formal legal rule as the authority for applying a functional legal standard.

280. *See* Stack, *supra* note 214, at 2401 (agreeing that *PCAOB* employed a "largely functionalist analysis of the way in which the dual layer of removal protection impedes the President's ability to perform his constitutional duties").

of executive tasks.[281] That is, *PCAOB* rests on the premise that, for at least some tasks in the execution of law, there may be certain tradeoffs between the directness of the chain of accountability to the President and the requisite strength of control that comprises one or more links in that chain.

Attenuation of control might be relevant under an executive-power non-delegation approach. The President's ability to ensure that an official's conduct is consistent with the faithful execution of federal law might be mitigated where he may exercise control over an official only indirectly, via another official. He must rely on the intermediate official to administer his preferences with respect to the subsidiary official's continued authority. Restriction of the President's authority to remove the intermediate official could diminish that official's incentive to be responsive to the President's personnel preferences. Likewise, restriction of the intermediate official's authority to remove the subsidiary official could diminish the subsidiary official's incentive to follow the intermediate official's (or, via him, the President's) policy instructions. Where both forms of insulation apply, the subsidiary official has the least incentive to effectuate the President's executive policy. The President's weakened ability to enforce the loyalty of his subsidiary agent increases the risk that the agent will conduct himself in a manner inconsistent with the American people's wishes, as represented by the President. At some point, that risk may become too great, absent strengthening of that or another form of presidential control or adjusting the subsidiary official's duties in the execution of law.

That said, this Article does not necessarily endorse *PCAOB*'s specific conclusion that the attenuation there at issue deprived the President of sufficient control. Among other potential issues, the Court in *PCAOB* may have been too dismissive of the SEC's "[b]road power over Board functions,"[282] which provided the SEC a substantial measure of influence over the Board's performance of even potentially executive tasks.[283] Still, *PCAOB* is consistent with at least some form of a flexible-control approach to an executive-power non-delegation analysis, as it acknowledged other potential trade-offs that might be

281. 561 U.S. at 495–98.

282. *Id.* at 504.

283. *See id.* (noting the SEC's powers over PCAOB functions included budget approval, binding regulations, relieving the Board of authority, amending Board sanctions, and enforcing Board rules on its own); *id.* at 524, 547, 588 (Breyer, J., dissenting) (contending that agency independence and executive power are not matters solely concerning for-cause removal protection, but might be affected also by authority over the agency's budget and functions).

made between unrestricted removability and other mechanisms of presidential influence or control.[284]

3. Decision Direction, Supplantation, or Nullification

Some scholars argue that even removability is not enough, that the President must always retain complete authority to impose his own will by directing an official to render a particular decision, supplanting an official's decision before it takes legal effect, or nullifying it afterward (call these forms of "directive authority").[285] Their arguments assume too much.

Calabresi and Prakash, for example, reason that any official performing executive tasks is acting in the President's stead because they assume that "[t]he executive Power" is a power of the President to execute the laws himself.[286] But, as this Article explores, it could instead be a power, per the Take Care Clause's phrasing, to "*take Care* that the Laws be faithfully executed"—that is, to see to, and to bear ultimate control and responsibility over, the laws' execution by others. Thus, the President's executive power might be protected so long as he may act to encourage or ensure the laws' faithful execution—such as through power to remove, ex post, an officer who deviated from faithful execution and thereby to deter that deviation ex ante.

Lawson's argument—that lack of directive authority would permit an official to exercise executive power contrary to the President's wishes, thereby divesting the President of that power[287]—rests on a narrow view of the President's wishes that may not be contravened. An official who takes a specific executive action other than that which the President would have preferred—for example, seizing particular property of an individual tax debtor—has, in one sense, deviated from the President's wishes. On a broader level, however, the President's wishes included his selection of that officer and perpetuation of that officer's selection by declining to remove him on an ongoing basis. The official has not deviated from *those* preferences. The President might

284. *See id.* at 504–05 (implicitly suggesting that "Commission preapproval or direction" or "effective power to start, stop, or alter individual Board investigations" might have affected the presidential-control calculus if either had been available in the case at hand); *infra* notes 324–327 and accompanying text (explaining how the Court's *PCAOB* opinion applied those trade-offs between strength of control through removability and through appointment, and how it recognized that the remedy for insufficient presidential control might take any of a number of forms).

285. *See* Lawson, *supra* note 46, at 1254; Calabresi & Prakash, *supra* note 18, at 591.

286. *See* Calabresi & Prakash, *supra* note 18, at 591, 595 ("[B]ecause the President alone has the constitutional power to execute federal law, it would seem to follow that, notwithstanding the text of any given statute, the President must be able to execute that statute.").

287. Lawson, *supra* note 46, at 1242–44.

retain the requisite accountability for his subordinates' actions, since he might be held to account by the American people for authorizing his subordinates' actions through his appointment and non-removal decisions.[288]

But what about where presidential removability is restricted? Removal timing or for-cause restrictions would not necessarily invalidate an executive delegation or raise the need for an offsetting supplantation or nullification power to substitute for a restricted removal power, as many such restrictions leave the President ample room to influence the execution of law. This Article does not question the continuing validity of *Humphrey's Executor*'s and *Morrison*'s approval of for-cause removal restrictions or removal by an executive official other than the President, even as applied to removal of officers performing some executive tasks.[289] In particular, restriction of an official's removal to causes related to her performance of executive tasks, as opposed to non-executive tasks, seems unproblematic, because the latter tasks do not implicate the President's "executive Power." But extensive removability restrictions—particularly those that preclude the President and every official subject to his control from removing particular officials at all, for any reason—could raise questions about whether alternative forms of control must be available to compensate in preserving presidential accountability, at least for some types of executive tasks and at least with respect to Appointments Clause "Officers."[290] In appropriate circumstances, directive authority (whether wielded directly by the President or indirectly by an official who is subject to presidential influence), might serve as one such alternative form of control.

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288. Under longstanding common-law agency principles, a principal is legally responsible for his agents' actions in contract or tort, even if they deviate from his specific wishes or preferences. *See, e.g.*, RESTATEMENT (FIRST) OF AGENCY § 215 (AM. LAW INST. 1933) (principal is liable in tort for even unintentionally authorized conduct of agent); RESTATEMENT (SECOND) OF AGENCY § 215 (AM. LAW INST. 1958) (same); *id.* § 108 cmt. e (if agent "acts reasonably in the belief that the principal wishes his authority to continue . . . his conduct is authorized, although he does something which is contrary to what the principal in fact wishes"); RESTATEMENT (THIRD) OF AGENCY § 2.01 & cmt. c, § 7.04 (AM. LAW INST. 2006) (tort liability for acts within agent's actual authority, which can be defined generally by the "*types* of acts the principal wishes to be done" and hence may extend even to an agent's decision that is not "the decision the principal would make individually" (emphasis added)). Not every action of an agent is *ultra vires* simply because the principal would have acted differently.

289. *See supra* text accompanying notes 266–268; *see also* Free Enter. Fund v. PCAOB, 561 U.S. 477, 483 (2010) (noting that *Morrison* sustained for-cause restrictions on the removal by principal executive officers of their (presumably also executive) inferiors).

290. *See supra* text accompanying note 240 (discussing the possibility that the executive-power non-delegation analysis might be applied only to "Officers" within the meaning of the Appointments Clause).

Some scholars have contended that the President cannot possess directive authority "unless Congress *explicitly* grants it to him."[291] But to the degree that they reason that presidential directive authority is unnecessary given the opportunity for removal as the President's remedy for an unfaithful executive official,[292] their reasoning lacks application in the assumed compensatory-control scenario of complete or severe removal restrictions. At least one scholar reasons that directive authority would undercut the Senate's advice and consent power over appointments by allowing the President to circumvent confirmed appointees' judgments by overriding them.[293] But a presidential authority to direct appointees, once confirmed, would not prevent the Senate from determining whether to confirm them. The Senate's power to advise and consent on appointments need not itself guarantee each of those appointees an independent authority over the execution of law, especially where such authority would conflict with the Constitution's vesting of "[t]he executive Power" in the President.

Supreme Court precedent on the possibility of presidential directive authority is sparse,[294] and essentially none addresses it in the context of foreclosed or severely restricted removal authority. *Myers* noted in dictum that "there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance."[295] But *Myers* did not describe those duties, and it reasoned that "even in such a case he may consider the decision after its rendition as a reason for removing the officer" so that he could fulfill his "constitutional duty of seeing that the laws be faithfully executed."[296] And although *Marbury v. Madison*[297] and *Kendall v. United States ex rel. Stokes*[298] address, to some extent, the President's directive authority,[299] each seemed to reject only the President's authority to direct officials not to perform

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291. Percival, *supra* note 70, at 2538 (emphasis added); *see also, e.g.*, Harold H. Bruff, *Presidential Management of Agency Rulemaking*, 57 GEO. WASH. L. REV. 533, 539 (1989); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1, 24–25 (1995) (describing the "conventional view").

292. *See, e.g.*, Bruff, *supra* note 291, at 539; Pildes & Sunstein, *supra* note 291, at 25.

293. *See* Percival, *supra* note 70, at 2533–34.

294. *See* Calabresi & Rhodes, *supra* note 18, at 1200 (noting, as of 1992, that "[n]o case law bars recognition of such a presidential power" to "direct or nullify all actions taken by independent counsels or agencies").

295. Myers v. United States, 272 U.S. 52, 135 (1926).

296. *Id.*

297. 5 U.S. (1 Cranch) 137 (1803).

298. 37 U.S. (12 Pet.) 524 (1838).

299. *See* Stack, *supra* note 224, at 272–74.

purely ministerial statutory duties like delivery of commissions or compensation.[300] Moreover, neither case concerned directive authority over an official whose removability was clearly restricted.[301] Thus, these cases do not foreclose the possibility that, for the kinds of discretionary duties that comprise most executive tasks, the need for a President's directive authority could be strengthened by his lack of control or oversight authority in other forms, such as through removability.

Historical evidence from the early Republic is similarly unclear but arguably consistent with the potential for directive authority to compensate for lack of removability. Lawson has said, for example, that debates in the First Congress on the appointment and removal powers "did not once focus on a presidential power to make discretionary decisions or to veto actions by subordinates."[302] Jerry Mashaw, though, has noted that supervisory control of department heads was informal and powerful, that at least some department heads asserted authority to supervise and direct subsidiary officials in the interpretation of law, and that Congress generally recognized other forms of control such as removal over those officials for which it did not intend directive authority.[303] Likewise, some nineteenth-century Attorney General opinions that reject the President's authority to act in lieu of subsidiary officials designated to execute the law predicate their reasoning on his power of removal over them.[304] A later Attorney General opinion, however, is to the contrary.[305]

Recent presidential practice has been mixed and, to some degree, opaque on this issue. Robert Percival, who argues against presidential directive authority as a constitutional matter, has characterized practices of the eight most recent presidential administrations as refraining from and disclaiming directive authority.[306] But he acknowledges that Presidents have issued

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300. *See id.*; *Marbury*, 5 U.S. at 166; *Kendall*, 37 U.S. at 610–11, 613.

301. *See Kendall*, 37 U.S. at 543 (argument on behalf of the Attorney General) (asserting that the relevant officer—that is, the officer over whom directive authority was in question—was removable by the President at pleasure); *Marbury*, 5 U.S. at 138–39 (officer over whom directive authority was in question was the Secretary of State, who was at least arguably removable by the President, *e.g.*, Act of July 27, 1789, § 2, 1 Stat. 28; *Myers*, 272 U.S. at 111–15; *but see* Lessig & Sunstein, *supra* note 18, at 25–26 & n.19).

302. Lawson, *supra* note 46, at 1245 (citing 1 ANNALS OF CONG. 384–412, 473–608, 614–31, 635–39 (1789) (Joseph Gales ed., 1834)).

303. *See supra* notes 154–157, 208, and accompanying text.

304. *See, e.g.*, The President and Accounting Offices, 1 Op. Att'y Gen. 624, 625–26 (1823); Power of the President Respecting Pension Cases, 4 Op. Att'y Gen. 515, 516 (1846).

305. Office and Duties of Att'y Gen., 6 Op. Att'y Gen. 326, 339–46 (1854) (*affirming* the President's and his department heads' directory power over subsidiary officials, and without regard to removability).

306. *See* Percival, *supra* note 70, at 2495–38.

directives or similar pronouncements on several occasions;[307] scholars who advance the contrary constitutional position have claimed various examples in a number of the presidential administrations from George Washington to George H.W. Bush;[308] and other scholars have proffered similar examples of assertions of directive authority, potentially absent statutory authorization, by the Clinton and Bush II Administrations.[309]

Presidents have generally refrained from using their potential directive authority in the face of mild removability restrictions, although seemingly without disclaiming it, and particularly not for more severe potential removability restrictions. Executive orders requiring review of agency regulations by the Office of Management and Budget (OMB), for example, have generally exempted certain independent agencies—many of which are led by officials with statutory removal protections—from that requirement.[310] The OLC opinion accompanying the first of those executive orders also carefully distinguished independent from executive agencies.[311] It did so, though, for an inference of congressional intent, rather than a constitutional requirement;[312] and acknowledged that although the President's supervision of agencies must generally "conform to legislation enacted by Congress," "[i]n certain [other] circumstances, statutes could invade or intrude impermissibly upon the President's 'inherent' powers."[313] Presidents have issued pronouncements to independent agencies that seem to pertain to the execution of law, although usually using softer

307. *See id.* at 2507, 2511–12, 2527–28, 2530–32.

308. *See, e.g.*, STEVEN G. CALABRESI & CHRISTOPHER S. YOO, THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH 420–21 (2008) (referring to "Washington specifically direct[ing] federal prosecutors in the manner in which they enforced federal law, notwithstanding the absence of specific statutory authority to do so" and "Andrew Jackson's directive to his treasury secretaries to remove federal deposits from the second Bank of the United States").

309. *See, e.g.*, Stack, *supra* note 224, at 311–12 (highlighting President Clinton's food-safety directive and President George W. Bush's executive order concerning notice of workers' union-nonparticipation rights); *see also, e.g.*, Kagan, *supra* note 117, at 2294–95 (noting directives issued by Presidents Reagan through Clinton).

310. *See* Exec. Order 12,291, §§ 1(d), 6, 46 Fed. Reg. 13,193, 13,193, 13,196 (Feb. 17, 1981) (exempting agencies listed in 44 U.S.C. § 3510 (1982), which include, among others, the FTC and National Labor Relations Board (NLRB), which are subject to removal protections, *see* 15 U.S.C. § 41 (2012); 29 U.S.C. § 153 (2012)); Exec. Order 12,866, §§ 2(b), 3(b), 58 Fed. Reg. 51,735, 51,737 (Sept. 30, 1993) (exempting "independent regulatory agencies," as defined in 44 U.S.C. § 3502(10) (1988), which include the FTC and NLRB, among others); Exec. Order 13,563, §§ 1(b), 6–7, 76 Fed. Reg. 3,821, 3,821–22 (Jan. 18, 2011) (adopting the same exemption as Exec. Order 12,866).

311. Proposed Exec. Order Entitled 'Fed. Reg.,' 5 Op. O.L.C. 59, 61 (1981).

312. *See id.* (noting, as part of a discussion of "congressional intent," that "*Congress is also aware* of the comparative insulation given to the independent regulatory agencies, and it has delegated rulemaking authority to such agencies when it has *sought to minimize presidential interference*" (emphases added)).

313. *Id.* at 61 & n.3.

language.[314] Presidents Clinton and Obama, however, have issued certain directives designed to diminish the distinctions between independent and executive agencies, including as to regulatory planning and procedures for various regulatory actions.[315] And recently, President Obama made a pronouncement concerning the *substance* of a particular rule on net neutrality issued by the Federal Communications Commission (FCC), whose commissioners have statutorily fixed terms.[316] His oral statement to the public adopted somewhat stronger language describing his pronouncement to the independent agency,[317] but his letter to the public stated, "The FCC is an independent agency, and ultimately this decision is theirs alone."[318]

Adjudication provides a particularly tricky case.[319] Dictum in *Myers v. United States* suggests that directive authority with respect to specific adjudicative outcomes might be inappropriate.[320] Although *Myers* fell back on the propriety of removal as a tool of control in such circumstances, the Court in *Wiener v. United States* affirmed that an adjudicator might be removable only for cause.[321] It is unclear whether a more severe restriction on the removability of a pure adjudicator might justify compensatory control, or simply be constitutionally unsustainable. To the extent that adjudication requires any form of presidential control, it could even be that the task's nature and

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314. *See* Cary Coglianese, *Presidential Control of Administrative Agencies: A Debate Over Law or Politics?*, 12 U. PA. J. CONST. L. 637, 639 (2010) (noting, for example, that President Bush "requested" independent agencies comply with a memorandum and "President Clinton 'asked,' 'encouraged,' and 'requested' independent agencies to comply with his directives").

315. *See, e.g.*, *id.* at 639 (offering President Obama's Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (Jan. 21, 2009), as an example in which the same verb, "should," was used for executive branch and independent agencies alike); Exec. Order No. 13,579, 76 Fed. Reg. 41,587 (July 11, 2011) (indicating that "[t]o the extent permitted by law, independent regulatory agencies should comply with" provisions on "public participation, integration and innovation, flexible approaches, and science" in Exec. Order No. 13,563, 76 Fed. Reg. 3,821 (Jan. 18, 2011), and that "[i]ndependent regulatory agencies, no less than executive agencies, should promote" the goal of that prior executive order).

316. 47 U.S.C. § 154(c) (2012).

317. Barack Obama, *Net Neutrality: President Obama's Plan for a Free and Open Internet*, WHITEHOUSE.GOV, https://www.whitehouse.gov/net-neutrality [https://perma.cc/RQ6W-858X] (Obama video message at 0:37–0:54) (last visited Sept. 21, 2015) (stating that "I am *urging* the Federal Communications Commission to do everything they can to protect net neutrality," and stating that "they *should* make it clear that" internet providers may not block or limit a consumer's access to a website).

318. *See id.* (Obama Nov. 10, 2014 letter).

319. *See supra* notes 214–218 and accompanying text, and note 225.

320. 272 U.S. 52, 135 (1926) ("[T]here may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President cannot in a particular case properly influence or control.").

321. 357 U.S. 349, 356 (1958).

demands for impartiality permit fewer, less strong, and less direct forms of control than for other tasks in the execution of law. And, where a statutory power of the President (or of someone subject in some way to his control) to review and revise the adjudicator's decision *does* exist, it might further diminish the need for as stringent or direct a form of appointment or removal.

As the foregoing discussion demonstrates, although presidential directive authority might suffice under the Vesting Clause, or might even be necessary for certain tasks where the President's other powers of control—such as the removal power—are foreclosed or excessively cabined, its absolute necessity in all circumstances is doubtful. Moreover, it may be that the President himself need not retain the directive authority over executive tasks where he retains sufficient control through one or more mechanisms over those who do hold that authority.

4. Further Interactions Between Presidential-Control Mechanisms

Under a flexible-control thesis, presidential control need not necessarily be through one particular mechanism regardless of circumstances, but may depend on various mechanisms and their respective natures, strengths, and degrees of directness. By this theory, for a given executive task, the necessity of one control mechanism in the accountability chain might well depend on the unavailability of another.

As the preceding Sections illustrate, the Supreme Court's jurisprudence is largely consistent with such an approach. As to appointment and removal, for example, the Court has held that proper appointment as an Officer does not obviate the removability requirement and that removability of an entity does not obviate the Appointments Clause,[322] but has accounted for the strength and directness of each of those mechanisms in determining the requisite strength or directness of the other. There is a paucity of precedent on the trade-off between directive authority and removal authority. As to the relationship between directive authority and appointment under the Court's precedent, however, an official's subjection to a principal officer's directive authority may help to support the conclusion that the official may be appointed according to less stringent (mere inferior-officer or even non-Appointments-Clause) procedures.

322. *See* Myers v. United States, 272 U.S. 52, 106–08 (1926); Free Enter. Fund v. PCAOB, 561 U.S. 477, 3162–64 (2010).

The Court's decisions addressing potential interactions between control mechanisms present other complexities. The Court often accounts for the availability or strength of one control mechanism (as determined by the delegating statute's terms) in deciding that Article II does or does not require the availability, or strengthening, of others. For example, in *Morrison v. Olson*, the Court concluded that the independent counsel could be appointed as an inferior, rather than principal, officer in part because he was statutorily removable by a superior officer.[323] Occasionally, however, the Court uses a particular control mechanism's *constitutional necessity*, in light of the insufficiency of another control mechanism available under the statute, to determine whether yet another control mechanism must be made available. In essence, the Court sometimes uses the output of one constitutional ruling as the input for another. For example, in *PCAOB*, the Court concluded that PCAOB members constitutionally *must* be removable at will (reasoning in part about the SEC's insufficient control of PCAOB members' functions), and then relied on that conclusion to find them eligible for inferior-officer (as opposed to principal-officer) appointment procedures.[324] An examination of the Court's Article II precedent, therefore, can feel like a study in many moving parts.

At bottom, though, recognizing the executive-power non-delegation theory underlying these rulings requires viewing the Court's jurisprudence on appointments, removals, and other forms of presidential control as a unified body of case law, rather than as atomistic categories of cases. It is thereby apparent that an Article II violation might inhere not simply in the absence of one control mechanism, but in its interaction with other control mechanisms and powers of the entity in question. As the Court decided for the Act at issue in *PCAOB*, "a number of statutory provisions . . . , working together, produce a constitutional violation."[325] The mix the Court found unconstitutional in that case included provisions restricting removal to good cause, specifying "the [PCAOB's] responsibilities" for executive tasks, rendering its enforcement powers binding rather than "purely recommendatory," and precluding its members' removability *directly* by the President.[326] *PCAOB* illustrates, without explicitly recognizing, an executive-power non-delegation doctrine's core insight: it is the delegated authority or duty to perform tasks that implicate "[t]he executive Power" by an entity not subject to sufficient presidential

323. 487 U.S. 654, 670–73 (1988).

324. 561 U.S. at 503–05, 510.

325. *Id.* at 509.

326. *Id.* at 509–10.

control that comprises the violation. As such, the Court reasoned, the cure might rest in removing power from the entity, subjecting the entity to greater presidential control in one form or another, or both.[327]

E. Relevance of the Delegating Branch: Congress or the Executive

Perhaps most interestingly, the doctrine explored here would restrict not only delegations by Congress, but also those accomplished by executive action. Because prior literature did not conceptualize Article II as imposing a *non-delegation* doctrine, particularly as to private administration of law, this implication has gone essentially unexamined. Although many unitary executive theories insist on the President's control over the execution of law, they ironically overlook the potential for the President himself to obviate—or at least purport to obviate—his own continued control in structuring his selection or supervision of subordinates.

That oversight might derive from a misperception that although Congress may not permissibly delegate its lawmaking power to anyone, the President may delegate law-execution power to any others of his choosing, regardless of whether he retains control over them or their execution of law afterward. In fact, the difference between the branches might lie not in whether their delegations are subject to restriction, but in the nature of the restriction for each—that is, in the nature of the vested power for each and the control it requires over subordinates involved in the exercise of the delegated authority. Most would agree that Congress has not divested its Article I legislative power to "make all Laws" under the Necessary and Proper Clause where Congress delegates bill-drafting authority to legislative assistants, so long as Congress retains the authority to supplant those assistants' drafting decisions by revising them prior to enactment (that is, to "make" those laws). Likewise, the President has not divested his Article II "executive Power" over law's execution by enlisting assistants to perform that execution if he retains authority to reject their decisions beforehand. But, unlike Congress, the President also might not have divested that power if he retains authority to nullify the legal effect of their decisions once made, or perhaps if he solely retains some other control mechanism like removability, assuming that the power is one simply to "take Care" of law's faithful execution.

The Supreme Court's opinions reinforce that presidential action could violate an executive-power non-delegation doctrine. The Court has insisted that the President, like other federal government actors, is

327. *Id.*

constitutionally prohibited from waiving, assenting to, or effecting Article II violations.[328] Justice Breyer has suggested more specifically that certain presidential delegations might violate Article II's Vesting Clause and its unitary executive structure, by stating that the constitutional objectives of that structure—such as democratic accountability—"explain why a President, though able to delegate duties to others, *cannot delegate* ultimate responsibility or the active obligation to supervise that goes with it."[329]

Most recently and relevantly, the Court acknowledged that presidential action could effect an Article II violation—a violation, in essence, of an executive-power non-delegation doctrine. In *PCAOB*, the Court held that "[b]y granting the Board executive power without the Executive's oversight, [the statute] subverts the President's ability to ensure that the laws are faithfully executed—as well as the public's ability to pass judgment on his efforts," in a manner "incompatible with the Constitution's separation of powers."[330] The *PCAOB* opinion announced that its theory also applies to the President's role in such statutory delegations:

> Perhaps an individual President might find advantages in tying his own hands. But the separation of powers does not depend on the views of individual Presidents, nor on whether "the encroached-upon branch approves the encroachment." The President can always choose to restrain himself in his dealings with subordinates. He cannot, however, choose to bind his successors by diminishing their powers, nor can he escape responsibility for his choices by pretending that they are not his own.[331]

Under this theory, the President might violate Article II by "tying his own hands" rather than merely "choos[ing] to restrain himself"—that is, by binding the presidency irrevocably to his delegees' later actions, foreclosing any potential for revision or removal. A President might have any number of reasons for insulating his subordinates from control in this manner, such as rewarding loyal campaign supporters with tenure-protected positions free from public scrutiny,[332] protecting preferred occupants of particular offices from removal by his successor, or creating plausible deniability of responsibility for officials' actions that prove to be unpopular.

Conceptual difficulties arise as to how the President could act alone to divest himself (or his successor) of "[t]he executive Power." The President generally has at least some constitutional power to effect the removal of each official who assists him in the execution of law, and the

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328. *E.g.*, Freytag v. Commissioner, 501 U.S. 868, 880 (1991).

329. Clinton v. Jones, 520 U.S. 681, 712 (1997) (Breyer, J., concurring) (emphasis added).

330. *PCAOB*, 561 U.S. at 498.

331. *Id.* at 497.

332. *See* VERKUIL, *supra* note 17, at 188.

official's removability (even if he were never actually removed and the President disclaimed any desire or intent to remove him) might suffice, at least under current Court precedent, to comply with Article II's Vesting Clause. Were the President to issue an executive order declaring his own removal authority void, he would seem to retain the power to revoke that order, and hence to exercise that removal authority, at any time.[333] Thus, it might seem that no divestment of his "executive Power" would lie. Were the President to declare his own revocation power void, one might argue he simply lacks power under the Constitution to do so because executive orders are inherently revocable.

Ultimately, however, this thread of reasoning unravels. Consider situations in which the President delegates by way of legal instruments that are generally understood to have independent binding authority. Just as the legislative-power non-delegation doctrine holds that Congress may not make any law delegating to another the power to make law, an executive-power non-delegation doctrine would hold that the President (with or without the Senate's consent) may not enter into a self-executing treaty purporting to confer upon the Supreme Leader of North Korea the permanent, unremovable, unnullifiable, and exclusive power to completely dictate the terms of the execution of U.S. law against U.S. citizens within U.S. jurisdiction. Whether or not—as a matter of realpolitik or justiciability—a domestic court could undo such action, affording it legal effect would present constitutional problems. The same would be true if the President were to enter into a contract purporting to confer that same power upon his unelected dog sitter, or to bequeath that same power to his alma mater in a will. At a minimum, the President's denial of responsibility for those delegees' actions tends to undermine the accountability principle of Article II's Vesting Clause. But what these examples further illustrate is that the impulse to say that these legal instruments would necessarily lack legal effect is itself an application of the executive-power nondivestment principle that might be enshrined in the Vesting Clause—the principle that underlies an executive-power non-delegation doctrine.

So, too, with the executive order. Indeed, executive orders might be considered inherently revocable precisely *because* one President may not constitutionally limit "[t]he executive Power" of himself or a future President to issue a new executive order repealing the old one. That is,

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333. *See* Heidi Kitrosser, *Supremely Opaque?: Accountability, Transparency, and Presidential Supremacy*, 5 U. ST. THOMAS. J.L. & PUB. POL'Y 62, 98 (2010) ("[T]he President is not irrevocably bound by his own Executive Orders . . . ."); Jack M. Beermann, *Presidential Power in Transitions*, 83 B.U. L. REV. 947, 994 (2003) ("Executive orders are also freely revocable and revisable by a subsequent President.").

one occupant of the office of the Presidency cannot divest the *institution* of the "President of the United States," of that power. That same concern about divestment of "[t]he executive Power"—and the same constitutional provision it might violate, i.e., Article II's Vesting Clause—underlies the executive-power non-delegation doctrine. Thus, an executive order that purports to confer, irrevocably, the unremovable and unrevisable power to execute the laws could be found unconstitutional because "[t]he executive Power" must be vested in the President. Which aspect(s) of the hypothetical executive order—its delegation of power, its declaration of unremovability and unrevisability, and/or its declaration of irrevocability—should be deprived of legal effect is a question that goes more to the appropriate remedy than to the order's constitutionality.[334]

Notably, the Subdelegation Act, a statute that purports to authorize the President to delegate certain of his functions to executive department or agency heads, generally seems to track the basic requirements of an executive-power non-delegation doctrine. That Act not only requires that any such delegation remain "revocable at any time by the President in whole or in part," but it also preserves the President's accountability for the delegated functions by declaring that "nothing contained herein shall relieve the President of the responsibility in office for the acts of any such head or other official designated by him to perform such functions."[335]

The foregoing discussion has focused on how a *presidential* delegation could present problems under an executive-power non-delegation doctrine. But even readers not persuaded of that analysis might accept that forbidden delegations could be made instead by an agency or official entrusted with responsibility for assisting in the execution of law.[336]

For example, take the circumstances of *PCAOB* as a starting point. Now, imagine that the Sarbanes-Oxley Act does not itself create the Public Company Accounting Oversight Board (the "Board," for short), but simply instructs the SEC to ensure that certain specified tasks are performed.[337] SEC regulations then create the Board in the

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334. *See supra* note 327 and accompanying text.

335. 3 U.S.C. § 301 (2012).

336. *See OLC Executive Discretion Opinion*, *supra* note 74, at 143, 147 (noting that if the Attorney General, through a hypothetical legally enforceable settlement, "irrevocably conferred substantial administrative discretion" upon private entities, that "could . . . raise [Article II executive-power vesting] concerns").

337. One might argue that if the statute does not authorize the delegation, then the delegation merely violates the statute, not Article II, and that if the statute *does* authorize the delegation, then it is the *statute*—not the executive agency performing the delegation—that has violated the Constitution. But the delegation of an executive power to a non-executive entity outside the terms

same form it had in *PCAOB*, conferring upon it the same duties and declaring that its members may only be removed by the same procedures and "for good cause shown" restriction as under the Act in *PCAOB*.

This hypothetical presents a similar situation to the one in *PCAOB*. By delegating the stipulated duties to the Board, whose members have the stipulated removal protections, the hypothetical regulations would attenuate presidential control over what the Court viewed as executive activities.[338] Assuming for the moment the correctness of the decision and reasoning in *PCAOB* (or at least accepting it as governing precedent), that attenuation could be problematic. Moreover, as in *PCAOB*, the President might have little recourse to hold the SEC accountable for its regulations creating and structuring the Board if, as *PCAOB* reasoned, the removal protections purport to render him "powerless to intervene" in the SEC's decisions "unless [their] determination is so unreasonable as to constitute 'inefficiency, neglect of duty, or malfeasance in office.' "[339] The hypothetical statute does not expressly forbid the enactment of those regulations, so the argument that they constitute a "neglect of duty" or "malfeasance" might itself need to rest on an executive-power non-delegation rationale. Similarly, absent some form of directive authority over the SEC made explicit in the statutes or implied by an executive-power non-delegation doctrine, the President could not replace or revoke those regulations. Thus, absent some other sufficient mechanism of control or influence over the SEC, the Board, or their regulations or decisions, the hypothetical regulations could violate an Article II executive-power non-delegation doctrine consistent with *PCAOB*.

A real-world example of a potentially problematic executive-branch delegation might be found in the context of private prisons. As noted in the Introduction, the BOP, by a Memorandum issued during the George W. Bush Administration, purported to authorize private prison employees to serve as discipline hearing officers (DHOs) who

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of a statute could violate *both* the statute and Article II. And it might be that the statute, by its terms, *permits* a delegation that the statute does not itself *perform*. In such an event, it is not the statute, but the executive agency that performs the delegation, that is more directly responsible for the constitutional violation (in that the executive delegation is a more proximate cause). *Cf.* Dina Mishra, *Municipal Interpretation of State Law as 'Conscious Choice': Municipal Liability in State Law Enforcement*, 27 YALE L. & POL'Y REV. 249, 252–54 (2008) (contending that where a municipality enforces an unconstitutional interpretation of an ambiguous state law, it is the municipality—not the state law—that has caused and is at fault for the constitutional violation under the tort principles underlying 42 U.S.C. § 1983 (2012)).

338. Free Enter. Fund v. PCAOB, 561 U.S. 477, 504 (2010).

339. *Id.* at 496.

issue sanctions to inmates in those private prisons.[340] That delegation is arguably consistent with, but not required by, the statute, which indicates that the BOP must "provide for the . . . discipline" of all federally charged or convicted prisoners, not that the BOP must itself impose that discipline.[341] Private DHOs have imposed disciplinary sanctions on numerous inmates,[342] and, by reference to its Memorandum, the BOP has denied administrative appeals that challenged that authority.[343] By the Memorandum's terms, however, only the private DHOs' decisions *withholding or forfeiting good-conduct time* are subject to BOP review and certification in advance; the DHOs' decisions imposing other, even more severe sanctions, such as "disciplinary segregation" (also known as solitary confinement),[344] seemingly are not.[345] Assuming that no other adequate form of direct or indirect presidential control was available over private DHOs (such as authority to remove them, or perhaps authority to nullify their decisions after the fact through an administrative appeal process or otherwise),[346] it might be that they were unaccountably executing, on behalf of the American public, a punishment that Supreme Court Justices have described as entailing " 'a further terror and peculiar

340. *BOP 2007 Memorandum*, *supra* note 1; *see, e.g.*, Arellano v. Benov, No. 1:13-cv-00558, 2014 WL 1271530, at *3 (E.D. Cal. Mar. 27, 2014) (interpreting the Memorandum to "authorize[ ] private prison employees to serve as DHOs and discipline inmates").

341. 18 U.S.C. § 4042(a)(3) (2012); *see, e.g.*, Hilario-Paulino v. Pugh, 194 F. App'x 900, 903 (11th Cir. 2006) (upholding as reasonable the BOP's interpretation that the statute "*permits* the agency to delegate a portion of its authority to discipline prisoners in privately run institutions to private actors" (emphasis added)).

342. *E.g.*, Arredondo-Virula v. Adler, 510 F. App'x 581, 582 (9th Cir. 2013); Torres-Sainz v. Benov, No. 1:13-cv-00896, 2015 WL 3730190, at *1 (E.D. Cal. June 12, 2015); *Arellano*, 2014 WL 1271530, at *1; Herrera v. Benov, No. 1:13-cv-00619, 2014 WL 1285683, at *1 (E.D. Cal. Mar. 28, 2014); Pena-Morfe v. Wells, 2010 WL 3360462, at *1 & n.1, *6 & n.6 (S.D. Ga. July 29, 2010). To the extent that the DHOs' status as "Officers" might be necessary to trigger an executive-power non-delegation analysis, they might so qualify since they arguably exercise "significant authority" over the statutorily specified duty ("discipline," 18 U.S.C. § 4042(a)(3) (2012)) that might be "continuing" in nature, *see Herrera*, 2014 WL 1285683, at *3 (describing how the same DHO as in *Arredondo-Virula* also disciplined Herrera). *See supra* text accompanying notes 234–240 (describing the Supreme Court's factors to qualify as an "Officer" implicating Appointments Clause procedures and allowing the possibility that an executive-power non-delegation doctrine might apply only to such "Officers").

343. *See, e.g.*, *Arellano*, 2014 WL 1271530, at *3; *Herrera*, 2014 WL 1285683, at *2.

344. FED. BUREAU OF PRISONS, *supra* note 2, at § 541.3 & tbl. 1 (Aug. 1, 2011) (DHO-imposed sanctions can include "disciplinary segregation" (solitary confinement)).

345. *BOP 2007 Memorandum*, *supra* note 1, at 1.

346. *See, e.g.*, Taylor v. Bauknecht, C/A No. 6:06-2268, 2007 WL 2021880, at *6 (D.S.C. July 6, 2007) (concluding that the BOP has sufficient control over private DHOs' decisions that impact calculation of an inmate's federal sentence "through the Administrative Remedy procedure" and "through the certification of the sentence computation prior to release").

mark of infamy.' "[347] If another adequate form of presidential control was arguably available over private DHOs or their disciplinary decisions, an executive-power non-delegation analysis at least might provide additional basis to interpret the governing contracts and regulations to permit that alternative form of control.[348]

As this Section demonstrates, therefore, the perception that existing Article II jurisprudence "would not prevent *executive branch officials* from delegating decisional authority to private individuals"[349] may be mistaken. In fact, that jurisprudence suggests such delegations might be unconstitutional if structured to preclude sufficient presidential control over those private individuals.

IV. IMPLICATIONS AND ASSESSMENT OF AN EXECUTIVE-POWER NON-DELEGATION DOCTRINE

A. Relationship to Existing and Competing Doctrines

How would this potential executive-power non-delegation doctrine fit with the other—established or potential—constitutional doctrines restricting delegations of administrative powers to private entities? This Section explains that the executive-power doctrine seems in certain ways to complement the existing two doctrines (the legislative-power non-delegation and due process doctrines) and their underlying values. And an executive-power doctrine might be more consistent than a private non-delegation doctrine with the existing two doctrines, with other Supreme Court precedent (such as precedent interpreting Article II), and with the Vesting Clause's text.

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347. Davis v. Ayala, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring) (quoting *In re* Medley, 134 U.S. 160, 170 (1890)). Some courts have found the BOP memorandum's delegation to private DHOs to be contrary to the BOP's regulations at various times. *Compare, e.g.*, *Arellano*, 2014 WL 1271530, at *16 (interpreting the BOP's regulations, 28 C.F.R. §§ 500.1, 541.2, 541.8 (2011), to require a BOP-employed DHO), *with Torres-Sainz*, 2015 WL 3730190, at *2 (interpreting the same BOP regulations to allow a DHO employed by the private prison, although inferring from the regulatory purpose statement in 28 C.F.R. § 541.1 (2011) a BOP authority to "review and certify" the DHO determination); *see also* Arredondo-Virula, 510 F. App'x at 582 (interpreting 28 C.F.R. § 531.10(b)(1) (2010), which is no longer in force, to require the DHO to be employed by the BOP or Federal Prison Industries, Inc., not by the private prison). Even if those courts are correct, however, the fact that the BOP has delegated authority in a manner or to an entity inconsistent with its own regulations only provides an additional basis for challenge. *See, e.g.*, *Arellano*, 2014 WL 1271530, at *15–16 (granting habeas corpus relief for the BOP's failure to follow its own regulations). It does not excuse any constitutional problems that the delegation might pose.

348. *See infra* text accompanying note 428.

349. Krent, *supra* note 17, at 537 (emphasis added).

1. As Complement to Existing Doctrines

The legislative-power non-delegation doctrine operates to reserve lawmaking power for Congress, a body of officials elected by, and thereby responsive to, the American people. Yet it does nothing to address the allocation of regulatory power in the *execution* of law, as it draws a line between making and executing law at the statutory making of a basic policy—or intelligible principle—to guide legal action in the law's name. In that sense, the executive-power doctrine could pick up where the legislative-power doctrine leaves off, confining the set of potential private delegees to those sufficiently subject to presidential oversight and control—that is, to those subject to a chain of accountability to the American people via the popularly elected President. Both doctrines together could help to ensure that the powers allocated by the American people to Congress and the President, respectively, would remain in the hands of those politically accountable heads of branches, rather than of unaccountable private entities.

Indeed, much of the reasoning for the Supreme Court's modern approach to the legislative-power non-delegation doctrine—which retreated from aggressively enforcing that doctrine and adopted an expansive view of what constitutes a sufficiently intelligible principle—is consistent with an executive-power non-delegation doctrine. That reasoning appears to rest in considerations about the complementary roles of Congress and the Executive.[350] Court opinions explain, for example, " 'the inherent necessities of the government co-ordination' " between the legislative and executive branches of government,[351] and that Congress cannot be expected to spell out all the details of a law's execution in advance because that would "divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."[352] They have permitted many delegations to the executive branch because "a certain degree of discretion . . . inheres in most executive . . . action."[353] In essence, it is the Court's concern for preserving the *executive*'s prerogatives and discretion that motivates its more recent legislative-power non-delegation decisions, which have refused to invalidate delegations of power to the executive branch. That

350. Manning, *supra* note 51, at 241–42; Mistretta v. United States, 488 U.S. 361, 372 (1989); Loving v. United States, 517 U.S. 748, 758 (1996);

351. *Mistretta*, 488 U.S. at 372 (quoting J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 406 (1928)); *id.* at 415–16 (Scalia, J., dissenting).

352. *Loving*, 517 U.S. at 758; *cf. Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) ("[N]o statute can be entirely precise, and . . . even some judgments involving policy considerations, must be left to the officers executing the law . . . .").

353. Whitman v. Am. Trucking Ass'ns, Inc., 531 U.S. 457, 475 (2001) (quoting *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting)).

concern could also motivate a doctrine that would find delegations of executive power to private entities to be permissible only where there remains sufficient presidential oversight or control.

The due process doctrine operates to prevent an individual from making at least certain types of legal decisions on behalf of the American people that are plagued by a conflict between the people's public interest and the individual's private interest. Yet although that doctrine may police the clearest, most egregious departures from the public interest, it fails to remedy situations in which the decisionmaker might be biased but that bias is difficult to prove on the particular case record, or situations in which a decisionmaker simply decides in a manner inconsistent with the public interest out of lack of attention or care rather than bias. In contrast, a requirement of oversight or control by the popularly elected President, or by an official subject to his oversight or control, provides a mechanism to align the decisionmaker's interest more generally with that of the public.[354]

Accordingly, an executive-power non-delegation doctrine grounded in Article II might complement the legislative-power non-delegation and due process doctrines by filling a gap in their coverage and by assisting the doctrinal scheme in more comprehensively promoting the public accountability of private decisionmakers.

2. As Compared to a Private Non-Delegation Doctrine

Various jurists and scholars have advocated or assumed the existence of a private non-delegation doctrine—that is, a constitutional doctrine that would absolutely forbid (or, in less extreme forms, substantially restrict) the delegation of particular governmental authority to private entities, based on their private status.[355] As Part II explains, however, under either of the Supreme Court's two established constitutional doctrines that apply to federal delegations to private entities, an entity's private, as opposed to governmental, status is not actually dispositive. This Section assesses the alternative of a novel private non-delegation doctrine in lieu of an executive-power non-delegation doctrine.

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354. *Cf.* Krent, *supra* note 22, at 75–76 (noting the importance of Article II presidential accountability to ensure that public policy is "public-regarding").

355. *E.g.*, Metzger, *supra* note 22, at 1914–15; Metzger, *supra* note 16, at 1456–1500; Krent, *supra* note 17, at 538–54; Dep't of Transp. v. Ass'n of Am. RRs, 135 S. Ct. 1225, 1236–37 (2015) (Alito, J., concurring); Ass'n of Am. R.Rs. v. U.S. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013), *vacated and remanded*, 135 S. Ct. 1225 (2015); *see also Ass'n of Am. R.Rs.*, 135 S. Ct. at 1252 (Thomas, J., concurring in the judgment) (referring, skeptically, to "our so-called 'private nondelegation doctrine' "); Volokh, *supra* note 16, at 956, 965 (describing the State of Texas's "private non-delegation doctrine").

One relatively extreme form of that private non-delegation alternative was proffered by the D.C. Circuit's 2013 decision in *Association of American Railroads v. Department of Transportation.* That decision forged a new doctrinal path by invalidating what the court perceived as a delegation of regulatory power to a private entity.[356] The case concerned the role of Amtrak, which the D.C. Circuit concluded was a for-profit railroad carrier, in setting railroad performance metrics and standards under a complex statutory scheme that also entailed roles for the Federal Railroad Administration and potentially for an arbitrator appointed by the Surface Transportation Board.[357] Although the court purported to invoke an established non-delegation doctrine by citing *Schechter Poultry* and *Carter Coal*,[358] its rule went far beyond the existing doctrines by rejecting the core intelligible principle standard of the legislative-power non-delegation doctrine[359] and imposing a per se "no private regulation" bar that is not justified by the due process doctrine.[360] Importantly for purposes of this Article, the court also alluded to concerns about executive power that would be better founded in an Article II doctrine,[361] yet the court failed to develop that as-yet-unrecognized doctrine or its intellectual foundation.

As Part III demonstrates, the D.C. Circuit's analysis would not be proper under an executive-power non-delegation doctrine. First, the court did not cite Article II or recognize the theory's roots therein. Nor

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356. 721 F.3d at 666.

357. *Id.* at 668–69, 675.

358. *Id.* at 670.

359. *Compare id.* at 670–71 (declaring that the intelligible principle rule does not apply "in the case of private entities"), *with, e.g.*, Volokh, *supra* note 16, at 955, 957, 961 (stating that the intelligible principle requirement applies regardless of the "private" or "public" status of the delegee). *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)—the only Article I legislative-power non-delegation decision of the Supreme Court to invalidate a statutory delegation to private industry—turned on the lack of an intelligible principle. *See supra* text accompanying note 43.

360. The traditional due process doctrine in the administrative-delegation context inquires into specific evidence about even a "private" decisionmaker's impartiality. *See supra* notes 59–65 and accompanying text. Yet the D.C. Circuit in *Association of American Railroads* held that no private entity may wield regulatory authority. 721 F.3d at 670, 675.

361. *See, e.g., Ass'n of Am. R.Rs.*, 721 F.3d at 670 (emphasizing that private entities are problematic in part because, in the court's view, they are entities "*to whom the Constitution commits no executive power*" (emphasis added)); *id.* at 670–71 (decrying the impermissible transfer of "regulatory authority" to private parties—an alleged power to set the content of regulations and make them binding despite an executive agency's disagreement); *id.* at 675 (contending that such delegations "sap[ ] our political system of democratic accountability," a "threat [that] is particularly dangerous where both Congress *and the Executive* can deflect blame for unpopular policies by attributing them to the choices of a private entity" (emphasis added)). In essence, the D.C. Circuit inferred from the Constitution and early-twentieth-century Supreme Court jurisprudence a per se rule prohibiting private entities a prerogative that is reserved to executive-branch agencies.

did it analyze unitary executive theory, or any other authority or theory on executive power. Second, the court conducted an inquiry ill fitted to an Article II analysis.[362] Because the court per se rejected regulatory delegation to private entities, the court focused its inquiry on whether Amtrak is a *private* entity, rather than whether Amtrak is a proper Article II *executive* entity—that is, one who may perform executive tasks that implicate "[t]he executive Power" under Article II.[363] The court concluded that Amtrak is private because "Congress has both designated it a private corporation and instructed that it be managed so as to maximize profit," treating that conclusion as dispositive to preclude Amtrak from wielding regulatory power.[364] But, as Part III explains, even a private entity may be an Article II executive entity, and an executive-power non-delegation analysis would require an inquiry into the latter status, informed by Article II, rather than by impressions of where an entity falls on the public-private spectrum that are untethered to Article II. The D.C. Circuit brushed off facts pertaining to that inquiry, such as the selection procedures for Amtrak's board and various executive agencies' involvement in rendering the standards binding.[365]

The Supreme Court unanimously vacated the D.C. Circuit's *Association of American Railroads* decision earlier this year.[366] The opinion for eight Justices held that, "for purposes of determining the validity of the metrics and standards, Amtrak is a governmental entity," rather than a private one.[367] But the Court made no other legal ruling in consequence of that determination, instead remanding to the D.C. Circuit for further proceedings.[368]

Justice Samuel Alito wrote a concurring opinion, and Justice Clarence Thomas wrote an opinion concurring in the judgment. Both opinions primarily analyze the case as involving a delegation of the legislative power to make law—and they seemingly depart from the

362. *See, e.g.*, *id.* at 671 (inferring a definition of the non-delegable "regulatory authority" at issue from *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940) and *Currin v. Wallace*, 306 U.S. 1 (1939), even though those decisions concerned delegations of *legislative* power and anyway found such delegations permissible, *Sunshine Anthracite*, 310 U.S. at 396–400; *Currin*, 306 U.S. at 15–18).

363. *Id.* at 668, 670–71, 674–77.

364. *Id.* at 677.

365. *Id.* at 674–76.

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

367. *Id.* at 1228, 1233–34. Justice Thomas concurred only in the judgment. *Id.* at 1240 (Thomas, J., concurring in the judgment).

368. *Id.* at 1234.

modern Court's approach to the intelligible principle test in doing so.[369] But both also at least hint at the notion that certain delegations to private entities might impermissibly delegate *executive* power.[370] Justice Alito's opinion, however, like the D.C. Circuit's, suggests that private entities are per se barred from wielding regulatory authority.[371] In contrast, Justice Thomas's opinion takes the position that "subordinates of the President [may] exercise [executive] power, so long as they remain subject to Presidential control"[372]—that is, so long as they do not divest the President of "*the* executive Power" to oversee them. This Article explores a view of the requisite degree of presidential control that may be distinct from Justice Thomas's,[373] but does not take issue with his rejection of a per se bar on private entities' regulatory roles.

Indeed, absolute disqualification of a delegee merely because of its private status—as adopted by the D.C. Circuit's and Justice Alito's *Association of American Railroads* opinions—seems somewhat strange. After all, unlike for a legislative-power or executive-power non-delegation doctrine, for which the Vesting Clauses provide textual hooks that focus on what is legislative or executive,[374] the Constitution's text generally does not speak in terms of public or governmental vs. private when it structurally allocates particular authority to particular actors.[375] Nor does our constitutional history or structure suggest a

369. *See id.* at 1237–39 (Alito, J., concurring) (omitting any mention of the intelligible principle test); *id.* at 1246–49 (Thomas, J., concurring in the judgment) (rejecting the intelligible principle test).

370. *Id.* at 1237 (Alito, J., concurring) (stating that private entities are neither vested with " 'legislative Powers' " nor vested with "the 'executive Power' " (quoting U.S. CONST. art. I, § 1; *id.* art. II, § 1)); *id.* at 1241, 1252–53 (Thomas, J., concurring in the judgment).

371. *Id.* at 1237 (Alito, J., concurring) (noting that if a particular actor in the statutory scheme "can be a private person, this law is unconstitutional" because "Congress 'cannot delegate regulatory authority to a private entity' " (quoting Ass'n of Am. R.Rs. v. Dep't of Transp., 721 F.3d 666, 670 (D.C. Cir. 2013)).

372. *See id.* at 1254 (Thomas, J., concurring in the judgment).

373. *See id.* (criticizing the statute as permitting the President "only . . . limited control").

374. Or, in the case of Article III's Vesting Clause, what is "judicial." U.S. CONST. art. III, § 1.

375. One possible exception is the Necessary and Proper Clause's reference to "Powers vested by this Constitution in the *Government* of the United States," U.S. CONST. art. I, § 8, cl. 18 (emphasis added), which has led at least one scholar to infer that some constitutional powers are vested in the federal government generally, not solely in Congress or other Departments or Officers of the United States, *see* John Mikhail, *The Necessary and Proper Clauses*, 102 GEO. L.J. 1045, 1047 (2014). One might argue that, as those powers are "vested" in the government, they cannot be delegated beyond it to private entities. The Necessary and Proper Clause, however, unlike the Vesting Clauses, does not specifically declare that any powers "*shall be* vested" in the federal government. *E.g.*, U.S. CONST. art. II, § 1. Thus, even if Mikhail is correct to infer that the Necessary and Proper Clause assumes the *existence* of such governmental powers, the subsequent argument I hypothesize does not necessarily follow: the Clause might not impose a *non-delegation* principle upon whatever such governmental powers might exist, because it does not *mandate* the

concern about every private entity's involvement in governmental tasks.[376] To the contrary, entities that are considered private may be best situated to play at least some role in the performance of particular government functions, offering advantages in terms of expertise and efficiency, for example.[377]

Some scholars have proposed adoption of a private non-delegation doctrine in more nuanced forms. Gillian Metzger, for example, has proposed a doctrine whereby the government must adequately supervise those private entities whom it authorizes to interact with third parties on its behalf.[378] Her proposed doctrine singles out private delegations for enhanced constitutional scrutiny.[379] Likewise, Harold Krent's proposed doctrine would require sufficient government checks against arbitrary or self-serving conduct, but only with respect to entities as to which "any doubt exists as to the[ir] 'public' status."[380]

Like the per se bar approach, these proposals resort to a public/private distinction that assumes the constitutional inferiority of private entities to public entities in the implementation of law.[381] That distinction can be difficult and cumbersome to apply.[382] Many entities that assist in implementing federal law, even including the U.S. Postal Service, are difficult-to-categorize boundary or hybrid organizations that seem to exhibit both public and private elements.[383] Although the Supreme Court's *Association of American Railroads* opinion described potentially relevant factors to draw that distinction, those factors are neither exhaustive nor particularly clear for future cases.[384]

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vesting of such powers in the Government, and so does not as clearly envision the prescriptive permanence of that vesting. *See supra* text accompanying notes 88–92.

376. *See* Freeman, *supra* note 4, at 584 ("[T]here are few public functions that were not either once private or conceivably executable by private actors.").

377. *See infra* Section IV.C.2.

378. *See* Metzger, *supra* note 16, at 1457–86; Metzger, *supra* note 22, at 1914.

379. Metzger, *supra* note 16, at 1461.

380. Krent, *supra* note 17, at 538.

381. *E.g.*, Metzger, *supra* note 16, at 1484 (adopting a "public-private divide for constitutional purposes" in non-delegation analysis).

382. *See* Krent, *supra* note 17, at 546 (admitting that "an increasing number of cases exist in which it is not possible to conclude whether the group in fact is public or private" because "lines between government and non-governmental entities and individuals have become so blurred"); *OLC Separation-of-Powers Opinion*, *supra* note 231, at 147 ("Determining whether an individual occupies a position of private employment or federal employment can pose difficult questions.").

383. O'Connell, *supra* note 17, at 843–51.

384. 135 S. Ct. 1225, 1231–33 (2015) (considering the entity's "ownership and corporate structure," including who holds its common stock and its preferred stock, who appoints its Board members, who removes its Board members, and the qualifications required for its Board members; "statutorily mandated supervision" over the entity's "priorities and operations," including annual reporting requirements, application of the Freedom of Information Act, requirement of an

These scholarly private non-delegation proposals differ from a per se bar approach by permitting greater flexibility to government, however. Likewise, they seemingly offer more flexibility to government than would an executive-power non-delegation doctrine, as the latter focuses specifically on the availability of *presidential* control, whereas the proposals presumably would permit a broader array of government controls to suffice.[385]

Because the slate in this area is not blank, adopting a private non-delegation doctrine might present at least three additional complexities as compared to an executive-power non-delegation doctrine.

First, a private non-delegation approach might interact awkwardly with the existing legislative-power non-delegation doctrine by redundantly forbidding the delegation of legislative power to private entities. A court might engage in the extensive and complex inquiry into whether an entity is private, only to conclude that it matters not, because that entity is not Congress (and hence cannot make law, under the legislative-power doctrine) in any event. In contrast, an executive-power non-delegation doctrine opens with the same kind of inquiry into the authority wielded by the entity as does the legislative-power non-delegation doctrine.

Second, although these private non-delegation proposals insist on some accountability to the American people through control or supervision by elected government officials, they do not grapple with the particular reasoning for the *President*'s role with respect to the execution of law. As explained, a unitary executive could provide a more robust form of accountability to the people because the single President, unlike the multiple members of Congress, can act quickly to guide future executive action or bring errant officials back into line.[386]

Third, an executive-power non-delegation doctrine could be predicated upon the Supreme Court's extensive Article II jurisprudence; but the private non-delegation proposals innovate far beyond existing Court precedent. Accordingly, an executive-power non-delegation doctrine—whether of this form or another—might have a more realistic prospect of judicial recognition than those proposals.

Inspector General, and congressional oversight hearings; statutorily mandated goals; statutory mandates over day-to-day operations, including improvement priorities and purchasing requirements; and federal funding).

385. *See, e.g.*, Krent, *supra* note 17, at 546 (inquiring not only into appointment by the President, oath of office, and "executive branch controls"; but also into "pan-government restrictions such as the Ethics in Government and Hatch Acts," as well as subjection to impeachment).

386. *See supra* text accompanying notes 117–119.

B. Delegations to States

Some statutes or regulations delegate power to implement federal programs to states or state officials, rather than to private entities. Do these delegations violate an executive-power non-delegation doctrine, and if so, when?

Most scholarly and Supreme Court consideration of delegations of federal program implementation authority to states has focused on the Court's federalism doctrines, which have been understood to restrict the commandeering of state officials to implement federal law[387] and the coercion of states to accept particular federal conditions on federal funding to those states to implement federal programs.[388] A smaller body of scholarship, however, attends to the potential implications of those federal-state relationships for the separation of powers—and in particular, for the role of the federal Executive.[389] Nearly two decades ago, the Supreme Court's opinion in *Printz* gestured toward Article II concerns about those implications.

In *Printz*, the Court decided the constitutionality of a federal delegation that required state law enforcement officers to perform an arguably executive task (conducting gun-control program background checks).[390] Although the decision's anti-commandeering holding rested on federalism grounds, Justice Scalia, writing for the Court, also alluded to the effect a contrary ruling might have had for the federal separation of powers. Specifically, Justice Scalia suggested that the Act would have "effectively transfer[red]" the President's Take Care Clause responsibility to state officials, and reasoned that "unity [in the federal executive] would be shattered, and the power of the President would be subject to reduction, if Congress could act as effectively without the President as with him, by simply requiring state officers to execute its laws."[391] In a footnote, Justice Scalia sought to explain why *voluntary* State administration of federal programs would not violate this constitutional principle: although "control by the unitary Federal Executive is also sacrificed when States voluntarily administer federal

387. *See, e.g.*, New York v. United States, 505 U.S. 144 (1992); Printz v. United States, 521 U.S. 898 (1997).

388. *See* South Dakota v. Dole, 483 U.S. 203, 210–11 (1987); *see also* NFIB v. Sebelius, 132 S. Ct. 2566, 2601–07 (2012) (plurality opinion of Roberts, C.J.).

389. *E.g.*, Jessica Bulman-Pozen, *Federalism as a Safeguard of the Separation of Powers*, 112 COLUM. L. REV. 459 (2012) (explaining how state enforcement of federal law can act to check the power of the federal executive); Miriam Seifter, *States, Agencies, and Legitimacy*, 67 VAND. L. REV. 443, 481–88 (2014) (explaining how federal agency consultation with states can undercut agency responsiveness to national preferences by mitigating presidential control).

390. 521 U.S. 898 (1997).

391. *Id.* at 923.

programs, . . . the condition of voluntary state participation significantly reduces the ability of Congress to use this device as a means of reducing the power of the Presidency."[392]

That footnoted explanation is cursory and obscure. To the extent it can be parsed, its grounds for finding constitutional significance in the distinction seem questionable. The observation that "the condition of voluntary state participation significantly reduces [congressional] ability to use this device as a means of reducing the power of the Presidency" might simply reflect the fact that such a condition requires state officers to—in effect—collude with Congress, and that such collusion between the state officers and Congress is, by its nature, more difficult to obtain than the unilateral commitment of Congress. But even if that were true, it seems to go only to the *likelihood that Congress would enact* such a scheme as a means of aggrandizing its own power at the expense of the President, not to the scheme's constitutional innocence under *Printz*'s unitary executive theory.

A number of alternative perspectives on delegations to states might exempt at least some state implementation of federal programs from scrutiny under Article II. One might be predicated upon a distinction between state and federal law. Specifically, it might be that "[t]he executive Power" that cannot be delegated away from the President is a supervisory power over execution of federal law, not state law. This understanding is consistent with the notion that "[t]he executive Power" is the power corresponding to the "take Care" duty. Although the Take Care Clause refers to the faithful execution of "the Laws" without specifying federal or state, its context in Article II's provisions defining federal power supports reading it to mean "the *federal* Laws." On this understanding, once a state enacts even one state law that effectuates a federal program (assuming that state law is not preempted), the state's or its officers' implementation of that federal-state scheme—such as Medicaid—would not be pure execution of federal law implicating "[t]he executive Power" of the President. Instead, the implementation could comprise an exercise of the states' own executive power—their power to execute state law—and hence might not raise Article II questions, even under a rigid unitary executive theory.[393]

A second such argument might focus upon independent grants or reservations of state executive power under the Federal Constitution.

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392. *Id.* at 923 n.12.

393. *See* Evan Caminker, *The Unitary Executive and State Administration of Federal Law*, 45 U. KAN. L. REV. 1075, 1078 (1997) (making a similar argument and concluding that "unitary executive theory . . . applies, at most, only to state administration of federally-defined law, not to state administration of state laws designed to serve federal regulatory objectives").

Some state constitutions grant governors authority such as "[t]he chief executive power," which could be argued to extend even to state execution of federal law. States might be different from private entities, on that view, because the state constitutional grants constitute delegations of sovereign authority to execute federal law that preexisted and were not displaced by the Federal Constitution.[394] Another form of the argument might be that the Tenth Amendment reserved to the states a separate power to execute federal law that was not delegated by the Federal Constitution (even as "[t]he executive Power" was delegated to the President). The history of state execution of federal law in absence of overarching presidential control, including examples of federal criminal prosecution, might reinforce that type of reserved power understanding.[395]

This Article does not take a firm position on any of these additional arguments. And debate over still other arguments for distinguishing states from private parties for Article II purposes can be found in other scholarship.[396]

This Article does note one additional distinction between states and private entities that pertains to remedy. The appropriate remedy for a problematic delegation of authority to execute federal law under an executive-power non-delegation analysis is not always to strike the legal instrument that delegates the authority, but may be instead to strike, revise, or reinterpret one or more parts of it that preclude sufficient presidential control.[397] For states, that remedy might not be available in many instances because of the Court's federalism jurisprudence limiting federal control—including presidential control—over various state actions. But in the context of private entities, such federalism concerns do not complicate the analysis.

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394. *See OLC Officers Opinion*, *supra* note 213, at 99 ("State officers, even when enforcing federal law, generally exercise the sovereign law enforcement authority of *their State*, ultimately delegated by the people of that State . . . . They hold authority independently of a delegation from the federal Government, and they and those who appoint them are accountable for their actions to the people of the State."); *OLC Separation-of-Powers Opinion*, *supra* note 231, at 146 n.63 (rejecting application of Appointments Clause to state officials, even when they exercise federally derived authority, because "[w]here state officials do exercise significant authority under or with respect to federal law, they do so *as state officials*, by the decision and under the ultimate authority of the state").

395. *See supra* notes 103,120–124, and accompanying text.

396. *Compare, e.g.*, Krent, *supra* note 22, at 67, 111 (treating delegations to states as more easily acceptable than delegations to private entities from a unitary executive perspective), *with, e.g.*, Leah M. Litman, *Taking Care of Federal Law*, 101 VA. L. REV. 1324–37 (2015) (assessing skeptically certain arguments for distinguishing states from private entities for Article II purposes).

397. *See supra* notes 325–327 and accompanying text.

C. Impact on Administrative-Law and Other Values

An executive-power non-delegation doctrine, applied to private entities' administration of law, also has implications for various values that derive from administrative law and pragmatic considerations. Those values include, among others, promoting accountability, uniformity, and efficiency in law's execution; availing the executive branch of sources of expertise; maintaining the perceived legitimacy of the government's law-execution choices; and preserving the independence of law-executing entities from undue interest group or political pressures.

1. Accountability

As explained, a core value of the unitary executive structure is accountability to the American people for the execution of federal law. By ensuring that the President retains sufficient control over subordinates, the structure helps voters to know whom to blame for transgressions.[398] It offers other advantages as well, in terms of facilitating coordination within the executive branch, and thereby promoting greater uniformity in the law and promptness in its execution.[399]

Some might question the wisdom of an executive-power non-delegation doctrine based on concerns about the legislative-power non-delegation doctrine. But scholarship criticizing the legislative-power doctrine has promoted the President's superior accountability to popular will.[400] And the concerns underlying the Court's more relaxed modern legislative-power non-delegation jurisprudence—for protecting executive prerogatives and for improving coordination between the legislative and executive branches[401]—are accommodated to a large extent by an executive-power non-delegation doctrine, which insists on

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398. *See supra* notes 113–115 and accompanying text.

399. *See* Calabresi & Prakash, *supra* note 18, at 619 & n.336; Lessig & Sunstein, *supra* note 18, at 2–3, 119; *id.* at 61 (quoting Kendall v. United States *ex rel.* Stokes, 37 U.S. (12 Pet.) 524, 545 (1838)); *supra* note 112 and accompanying text.

400. *See supra* text accompanying notes 117–118. Of course, even that accountability is imperfect. Particular presidential enforcement policy decisions may lack transparency or saliency to voters who select the President only once every four years, based on his aggregate package of policy positions rather than any one alone. And the President's *authority* to supervise decisions made in the execution of law would not, in its own right, afford him the *ability* to actively supervise each and every such decision. *See* Lisa Schultz Bressman, *Beyond Accountability: Arbitrariness and Legitimacy in the Administrative State*, 78 N.Y.U. L. REV. 461, 504–05 (2003) ("[T]he mere presence of presidential control is not sufficient.").

401. *See supra* text accompanying notes 350–353.

the retention of executive control by a government accountable to the American people rather than by unaccountable private entities.

For private entities, market competition may provide an alternative accountability mechanism in certain circumstances.[402] Where multiple corporations exist to compete for a particular administrative role—such as in the case of private prison companies—their "[p]rivate shareholders or members on [their] board of directors . . . know that irresponsible decisions in operating their corporations may undermine their corporations' ability to compete," by raising their costs (and hence, raising their prices or reducing their quality to those who would select them) relative to their competitors.[403] "Market discipline may [thereby] ensure a measure of public-regardedness,"[404] at least with respect to taxpayer expense.

But for various reasons, market constraints alone may be inadequate or ill fitted to the policy or purposes of the execution of law in many circumstances. The byzantine rules that apply to the government contracting and procurement process, for example, tend to deter would-be competitors from submitting bids, or to obscure which bidders possess the best talents for the contract rather than for the contracting process, thereby diminishing controls that might otherwise be provided by market competition.[405] The process, in essence, imposes high fixed costs that are barriers to entry, leading to market failure. And affording uncabined coercive, executive authority to private companies can itself produce market distortions—such as when such companies use their governance power over other companies to

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402. *E.g.*, Jon D. Michaels, *The (Willingly) Fettered Executive: Presidential Spinoffs in National Security Domains and Beyond*, 97 VA. L. REV. 801, 887 (2011); John D. Donahue, *The Transformation of Government Work: Causes, Consequences, and Distortions*, *in* GOVERNMENT BY CONTRACT, *supra* note 55, at 41, 45.

403. Krent, *supra* note 22, at 103.

404. *Id.*

405. *See, e.g.*, David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 YALE L.J. 616, 672 n.180 (2013) (referencing the "byzantine," two-thousand-page Federal Acquisition Regulations that govern the federal government's contracting and procurement processes); Steven R. Koltai, *How the Healthcare.gov Mess Happened and How To Fix It*, BROOKINGS INST. (Nov. 25, 2013, 2:30 AM), http://www.brookings.edu/blogs/fixgov/posts/2013/11/25-healthcare-website-procurement-koltai [http://perma.cc/G3WX-3DLW] ("In the face of onerous and impenetrable procurement rules, these are organizations whose primary talent is not a particular industry expertise, but rather simply winning major government contracts."); Michaels, *supra* note 402, at 887–88 ("Often . . . competition is not robust, replacing an incumbent contractor is difficult, and the pursuit of profits (and the possibility of extracting extra rents) leads contractors not to increase efficiency but rather to cut corners."); Freeman & Minow, *supra* note 119, at 1, 3 (explaining that "markets can fail to exert meaningful control over contractors" because "[f]or many contracts, the government itself creates the market by generating demand and then, through [various] devices . . . , fails to use market discipline").

aggrandize their market power with respect to them.[406] Agreements executed in the shadow of such unconstrained governance power by private entities can produce further anticompetitive effects.[407]

Importantly, even where market constraints promote accountability, the question must be asked, "[A]ccountab[ility] to whom?"[408] A given market might efficiently serve market participants' interests, maximizing the welfare of the market's consumers and producers collectively; but it might have little to offer to those external to its processes, and could have adverse effects on them for which the market mechanism does not account.[409] By contrast, the mechanisms of political accountability (including such accountability of executive agencies and their officers through presidential control), although also imperfect and often inefficient, are at least designed to reflect the views and policy preferences of the broader swath of the voting public. Those who execute the law wield the coercive and monopolistic power of the government; such power, it seems, should be responsive not to the interests of only a subset of the American public, but to the American public at large. This serves the value of popular sovereignty that underlies an Article II doctrine, as well as other doctrines, in the private administrative context.

2. Expertise, Efficiency, and Legitimacy

In particular circumstances, private entities—even those not accountable to the President under Article II—might offer other pragmatic advantages for the administration of federal law. They might offer expertise that exceeds that of even specialized executive-branch bureaucrats, particularly through industry self-regulation or government partnerships with companies operating in highly technical areas. Alternatively, market discipline might promote greater efficiency in the administration of federal law by these private entities than by executive-branch agencies. And, some argue, enlisting private entities

406. *See, e.g.*, Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) (contending that standard-setting organizations "can be rife with opportunities for anticompetitive activity," such as the opportunity of the organization's officials "to harm their employers' competitors through manipulation of [the organization's] codes").

407. Michael P. Vandenbergh, *The Private Life of Public Law*, 105 COLUM. L. REV. 2029, 2073 (2005).

408. Jerry L. Mashaw, *Accountability and Institutional Design: Some Thoughts on the Grammar of Governance*, *in* PUBLIC ACCOUNTABILITY: DESIGNS, DILEMMAS, AND EXPERIENCES 115, 118 (Michael Dowdle ed., 2006).

409. *See id.* at 122–24 (emphasizing differences between markets and public law accountability systems); *see also* Krent, *supra* note 22, at 104 n.149 ("[M]arket-based incentives may or may not serve as an adequate watchdog for public-regarding policy.").

in the administration of law can improve those entities' perception of the legitimacy of the government's actions.[410]

A defender of an executive-power non-delegation doctrine might answer that these considerations cannot trump the Constitution, which, the defender would contend, entails some basic Article II non-delegation understanding. To the extent that Article II's Vesting Clause imposes a unitary executive structure to channel governmental power toward promotion of the American people's general welfare, that structure might be subverted by the exercise of executive power by those not accountable, via their subjection to sufficient presidential control, to the American people.[411]

It might also be that our governmental system may avail itself of many of these expertise and efficiency advantages of private administration of law even where it is subject to executive-branch oversight or selection/removal authority. For example, notice-and-comment rulemaking, or negotiated rulemaking requiring executive-agency approval of the recommended rules, permits those with a deep understanding of a particular industry to assist in drafting or revising the content of proposed rules, while maintaining executive-branch control over and accountability for final, binding rules. Efficiency improvements might be accomplished through public-private partnerships that also retain executive-branch control.[412] And, when properly structured, an executive-agency gatekeeping role with respect to certain private litigation in the public interest can preserve expertise and efficiency advantages.[413]

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410. *E.g.*, Krent, *supra* note 17, at 521–22 (arguing that "involving respected members of the private sector lends more legitimacy to government actions" by permitting the government to defend its regulations by reference to those private-sector members' expertise and experience); VERKUIL, *supra* note 17, at 4 ("Privatization demonstrates efficiency principles that can improve government performance."); PETER H. SCHUCK, WHY GOVERNMENT FAILS SO OFTEN AND HOW IT CAN DO BETTER 101 (2014) (noting that studies indicate that certain government services, such as corrections, "can usually be provided better and more cheaply by private groups due to competition, more access to capital, nonunion labor, technology, cost consciousness, and other efficiencies").

411. *See* VERKUIL, *supra* note 17, at 4, 11 (rejecting the notion that efficiency from privatization should take precedence over democratic accountability principles).

412. *See id.* at 171–72 ("Partnerships not only keep the government in the picture, but, assuming it serves as the senior partner, keep government in control as well. The private side of the partnership allows the market to do what it does best, which is to look for and incorporate flexible, creative solutions that the bureaucracy might not have considered on its own.").

413. *See, e.g.*, Engstrom, *supra* note 405, at 685–86 (explaining how executive gatekeeping with respect to private litigation can "add significant value . . . in especially complex regulatory areas" and that there exist "tools [that regulatory designers can use] to mitigate agencies' worst bureaucratic tendencies by shaping agency incentives"); Matthew C. Stephenson, *Public Regulation of Private Enforcement: The Case for Expanding the Role of Administrative Agencies*, 91 VA. L. REV. 93, 94–95 (2005) (arguing for executive-agency authority to create private rights of action based on separation-of-powers concerns and various pragmatic advantages).

Likewise, a concern for perceived legitimacy may favor executive-branch control over private entities involved in the execution of law.[414] As the recent debacle involving a private contractor's rollout of HealthCare.gov under the Affordable Care Act suggests, the public's impression of legitimacy may be somewhat remediated where the executive branch—and in particular, the President—is in a position to control, be held accountable for, and accept responsibility for problematic actions of private entities in administering the law.[415]

Finally, where executive-branch control would impede private-sector advantages in a given area, that might counsel more persuasively for deregulating the area than for delegating coercive, executive authority to a private entity's uncabined control.[416] The former might harness advantageous market competition that the latter could stifle.

3. Independence

An executive-power non-delegation doctrine, as applied to delegations to private entities, might also be assessed for its impact on those entities' freedom to act independently of political actors. Some argue, as to agencies, that independence fosters values of expertise or efficiency.[417] The preceding Section assesses the extent to which this doctrine's restrictions would impact such values. But another common justification proffered for independence is impartiality. Immunization from political influence, some scholars argue, tends to free the decisionmaker from contaminating conflicts of interest between the

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414. *Cf.* VERKUIL, *supra* note 17, at 62 ("Symbols of authority and accountability cannot be delegated to private contractors."); *id.* at 171 ("The legitimating function of government is something that cannot be outsourced.").

415. *See* Andrew Rafferty, *Obama Says Health Care Website Will 'Get Fixed ASAP,'* NBCNEWS.COM (Oct. 30, 2013), http://www.nbcnews.com/news/other/obama-says-health-care-website-will-get-fixed-asap-f8C11498831 [http://perma.cc/PW95-D9AF] (reporting President Obama's statements that there was "no excuse" for the problems with the health insurance exchange website and that he would "take full responsibility for making sure it gets fixed ASAP"); Juliet Eilperin & Amy Goldstein, *Obama Administration to End Contract with CGI Federal, Company Behind Healthcare.gov*, WASH. POST (Jan. 10, 2014), http://www.washingtonpost.com/politics/obama-administration-to-end-contract-with-cgi-federal-company-behind-healthcaregov/2014/01/10/001eb05a-719e-11e3-8b3f-b1666705ca3b_story.html [http://perma.cc/8PHE-M2V8] (describing the Obama administration's decision to "jettison" that private contractor).

416. *See* VERKUIL, *supra* note 17, at 7 (noting that privatization can be "regulatory or deregulatory in character" since it might merely shift regulatory authority into private hands).

417. *See* Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 19 (2010) ("The classic explanation for agency independence is the need for expert decision making."); Stavros Gadinis, *From Independence to Politics in Financial Regulation*, 101 CAL. L. REV. 327, 336 (2013) ("In the United States, independent agencies were a hallmark of the New Deal effort to build an efficient bureaucracy.").

public and politically powerful subgroups, and thereby to address the problem of capture by those groups.[418]

An executive-power non-delegation doctrine need not broadly strip private entities or independent agencies of all political independence. As an initial matter, the doctrine explored here would apply only to those executive tasks that implicate the President's "executive Power." Many tasks performed by private entities or independent agencies are tasks in which such entities act more like ordinary market participants than like law enforcers or binding interpreters. The provision of ordinary goods by government contractors, or each Federal Reserve Bank's authority to buy and sell federal government bonds and other financial instruments on the open market or to set the discount rate (the "price") at which other banks may borrow from it,[419] may be some such examples. Such tasks might not implicate "[t]he executive Power" and so might not raise questions about the sufficiency of presidential control under an executive-power non-delegation doctrine. Moreover, the doctrine explored here would allow for flexibility among mechanisms of presidential oversight and control, and for certain tradeoffs among them, so it would permit a large measure of independence—whether of governmental agencies or private entities—even in the execution of law.

In addition, agencies are often subject to "conventions of independence," unwritten public norms by which the President or executive branch generally refrain from exercising even those formal mechanisms of oversight or control to which they might be constitutionally or statutorily entitled.[420] Indeed, Presidents and high-ranking officials and political parties may experience pressure from the public to so refrain, particularly where independence is highly valued, as the controversy following the political dismissals of U.S. Attorneys during the George W. Bush Administration illustrates.[421] In essence, executive-branch officials may be held politically accountable for undermining political independence in practice. Where appropriate, statutory, regulatory, and judicial solutions designed to foster transparency of those officials' decisions could facilitate executive-

418. *E.g.*, Paul R. Verkuil, *The Purposes and Limits of Independent Agencies*, 1988 DUKE L.J. 257, 275; Barkow, *supra* note 417, at 15, 17, 19–20; Gadinis, *supra* note 417, at 336–37.

419. *See* 12 U.S.C. §§ 353–357 (2012).

420. *See generally* Adrian Vermeule, *Conventions of Agency Independence*, 113 COLUM. L. REV. 1163 (2013) (describing these conventions).

421. Driesen, *supra* note 120, at 710 (noting that "[a] DOJ request that several U.S. Attorneys resign created a public furor in 2007, ultimately leading Attorney General Alberto Gonzales to resign under pressure," and that "[a] President may remove a U.S. Attorney, but in the past, Presidents have rarely used this power to replace attorneys retained or appointed during their administration").

branch accountability to the public for deviations from conventions of independence, in substitution for more direct legal requirements of independence.

In light of all this, the question must be: Is *greater* independence needed? There must be a limit to the principle that "[a] more insulated agency will better protect the public interest against interest group pressure,"[422] particularly where the agency to whom authority is delegated is itself a private interest group. Complete independence, in that context, comes at the expense of accountability to the public and its interests.

But of course, this Article does not deny that there may be contexts in which the need for political impartiality is particularly strong. Adjudication might be one such context;[423] the substantive field of financial regulation might be another.[424] An executive-power non-delegation doctrine, by constitutionalizing a baseline requirement that presidential control be available (even if not exercised) over the execution of law, could politicize such areas and thereby undercut the benefits that statutorily mandated independence could achieve in them. To the extent that exceptions to limit executive control over those areas do not exist within that doctrine, some might be found in the due process doctrine's policing for egregious bias or self-dealing (including strong political bias). Ultimately, however, if the arguments for independence in enough particular areas are sufficiently powerful, and sufficiently ill addressed by other potential solutions, those arguments may counsel against the recognition of *any* executive-power non-delegation doctrine, even one as flexible as the one this Article explores.

D. Implementing an Executive-Power Non-Delegation Doctrine

As the previous Section suggests, fully recognizing and rigorously enforcing an executive-power non-delegation doctrine might impose significant costs. The doctrine's holistic assessment of presidential control might more accurately assess the degree of accountability for executive action, but entail too few bright-line rules or too many close-call determinations to facilitate comfortable judicial administration. The doctrine poses tricky remedial questions where multiple mechanisms of control might be adjusted: Should the particular delegation be invalidated; or should one or more particular

422. *See* Barkow, *supra* note 417, at 19–20 (explaining that independence may "insulate [implementers'] decisions from the sort of political horse-trading that is anathema to impartial decisionmaking").

423. *See supra* text accompanying notes 215–218 and 319–320.

424. *See, e.g.*, Gadinis, *supra* note 417, at 382–89.

mechanisms of control or influence be read into it, strengthened, or made more direct? And the doctrine's application to delegations by the President or executive branch may pose practical difficulties. The judiciary might worry about performing invasive inquiries into the internal functioning of a co-equal branch of government.[425] Indeed, the executive branch's very features that derive from its unitary structure that gives rise to the doctrine—such as its capacity for expedition—could be undercut by the doctrine's rigorous judicial enforcement. The doctrine's aggressive enforcement could ossify traditional forms of executive-branch structuring and thereby deter some of the flexible adaptation to circumstances that otherwise comprises part of the executive branch's comparative advantage.[426] Moreover, the doctrine's aggressive enforcement could invite an onslaught of burdensome litigation.[427]

Some of these concerns might be mitigated, however, if legal institutions were to implement the doctrine primarily through statutory interpretation, as opposed to aggressively enforcing the doctrine as a constitutional prohibition. Courts might, for example, apply the doctrine through the canon of constitutional avoidance—in the course of interpreting statutes, executive orders, regulations, policy documents, government contracts, and the like.[428] They might adopt an interpretive presumption that presidential control in at least one form remains available over an agency's or entity's execution of a particular law, or that statutes or regulations do not perform a questionable executive-branch delegation, absent clear indications to the contrary.[429] Likewise, the doctrine, operating in the form of a non-delegation canon,

425. *See* Metzger, *supra* note 22, at 1907 (describing judicial hesitance to police the other branches for excessive delegations).

426. *See* Jonathan Macey, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2418–30 (2006) (outlining the many reasons why "executive branch agencies are better situated to respond quickly and decisively to emergencies"); Eric A. Posner & Adrian Vermeule, *Crisis Governance in the Administrative State: 9/11 and the Financial Meltdown of 2008*, 76 U. CHI. L. REV. 1613, 1614 (2009) (describing how, in times of crisis, "demands for swift action" counsel for "hand[ing] the reins to the executive").

427. *See* Andrew Coan & Nicholas Bullard, *Judicial Capacity and Executive Power*, 101 VA. L. REV. (forthcoming), http://ssrn.com/abstract=2558177 [http://perma.cc/PMX5-9RAQ] (exploring how concerns about inviting excessive litigation could motivate Supreme Court deference to congressional interference with the unitary executive).

428. *See supra* text accompanying note 348; *cf. supra* note 51 and accompanying text (describing how the *legislative*-power non-delegation doctrine has been implemented through canons and constitutional avoidance).

429. *See* Kagan, *supra* note 117, at 2326–28 (advocating a presumption of retained presidential control in the context of delegations of authority to *executive-branch* agencies, although not based on constitutional requirement).

might inform the legislative and executive drafting and structuring of delegations in the first instance.

In the alternative, one or more potential approaches might be devised in administrative law with an eye to deterring or obviating problematic delegations[430]—such as a heightened standard of review with respect to an agency's decision to delegate to private entities over which there is less retained executive-branch control,[431] or weakened judicial deference to the substantive legal decisions of private entities over whom executive-branch control is weak.[432] As another example, perhaps private entities' proposed rules that are not otherwise subject to executive-branch approval or influence could be subjected to executive-branch review, such as by OMB's Office of Information and Regulatory Affairs.[433] This Article does not opine on the merits, validity, or efficacy of these or other subconstitutional approaches, which may be explored in future scholarship.

V. CONCLUSION

An executive-power non-delegation theory has thus far remained trapped in an undercurrent in the Supreme Court's jurisprudence. Its logic imbues many of the Court's Article II decisions, although it has not been expressly invoked. Where allusions to executive-power issues have recently surfaced, those issues have been incompletely analyzed or misunderstood. This Article seeks to dispel

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430. *Cf.* Metzger, *supra* note 22, at 1918–20 (explaining how a constitutional "duty to supervise," which includes a component derived from the Take Care Clause, could be enforced through administrative law).

431. *Cf.* Catherine M. Sharkey, *State Farm "With Teeth": Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589 (2014) (advocating heightened judicial scrutiny of agency decisions that were not vetted by executive oversight).

432. *Cf.* David J. Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 201–02, 240–46 (advocating against *Chevron* deference to agency decisions made pursuant to internal delegations to lower-level officials, in part because of those officials' lesser political accountability to the public through, for example, the President); Kagan, *supra* note 117, at 2372–80 (advocating an approach that "would link [*Chevron*] deference to presidential involvement" and "giv[e] greater deference to executive than to independent agencies"); FCC v. Fox Television Stations, Inc., 556 U.S. 502, 547 (2009) (Breyer, J., dissenting) (arguing that the FCC's "comparative freedom from ballot-box control," via its commissioners' fixed terms and relative freedom from political oversight or control, "makes it all the more important that courts review its decisionmaking to assure . . . that major policy decisions [are] based on articulable reasons").

433. *Cf.* Aziz Z. Huq, *Removal as a Political Question*, 65 STAN. L. REV. 1, 29–30, 29 n.156, 30 n.159 (2013) (noting that proposals have been made to subject independent agencies' rules to substantive review by OIRA (citing Independent Agency Regulatory Analysis Act of 2012, S. 3468, 112th Cong. § 3(c) (as introduced by Sen. Robert Portman, Aug. 1, 2012))).

some of that confusion, particularly as to the potential doctrine's application to delegations to private entities.

The potential doctrine explored here would be grounded in Article II's text and structure, especially the Vesting Clause. This Article has examined possible roots and basic contours for the doctrine, including its two core inquiries. In so doing, it has derived a key and as-yet-unrecognized implication of the doctrine: that Article II might limit delegations made by the executive branch, not just those made by Congress. It has noted various other complexities and implications concerning the doctrine and its potential implementation, and has contextualized and preliminarily assessed the doctrine, including with respect to various values underlying administrative law. Ultimately, therefore, the Article has provided an organizing framework for a nascent doctrine that might one day achieve formal legal recognition and that, in the meantime, is worthy of scholarly consideration.

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