

The Shadow Debate over Private Nondelegation in *DOT v. Association of American Railroads*

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I. Introduction

The nondelegation doctrine has an uneasy place in constitutional law. On the one hand, it’s a structural, separation-of-powers doctrine, founded on the Vesting Clause of Article I, Section 1 of the Constitution—and thus presumptively important. (Indeed, I spend about a week every year teaching it in my administrative-law course.) The Vesting Clause—“All legislative powers herein granted shall be vested in a Congress of the United States . . .”—has been interpreted as barring any delegation of legislative power.¹ Since our modern administrative state relies on agencies wielding massive rulemaking power, clearly compliance with the nondelegation doctrine—making sure that delegations of power aren’t forbidden delegations of *legislative* power—is crucial for preventing the unconstitutionality of the whole edifice.²

On the other hand, this interpretation of the Vesting Clause seems hardly obvious:³ Why should a power *vested* in Congress be non-transferable? Surely we can transfer our vested property rights or

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¹ See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (*Am. Trucking II*) (citing *Loving v. United States*, 517 U.S. 748, 771 (1996)).

² See Gary Lawson, *The Rise and Rise of the Administrative State*, 107 *Harv. L. Rev.* 1231, 1237–41 (1994).

³ See *Am. Trucking II*, 531 U.S. at 487–90 (Stevens, J., concurring in part and concurring in the judgment).

vested stock options.⁴ And indeed, some commentators deny that any nondelegation principle exists at all.⁵

Back to the first hand, though, the basic principle is surely sound. Imagine Congress passes a law saying, “President Obama, you get to make all laws (within Congress’s power, of course) through the end of the current Congress. We’ll just go home now.” Is that constitutional? Anyone who says “no” believes that there’s some sort of nondelegation doctrine, whatever its precise doctrinal basis; the only question is how strict the doctrine should be.

The other hand responds that, though the Supreme Court agrees with the soundness of the doctrine in principle and has long accepted the nondelegation reading of the Vesting Clause,⁶ it’s hard to find it in action, at least until this year. The nondelegation doctrine has been used only twice to strike down an act of Congress, both times in 1935.⁷ The current doctrine—do the terms of the congressional delegation state an “intelligible principle” sufficient to guide the delegate’s discretion?⁸—has been capacious enough to uphold virtually every statute, including one directing agencies to act in the “public interest”⁹ or set prices that are “fair and equitable.”¹⁰

Cass Sunstein argues that the doctrine has gone underground and now functions more as a canon of interpretation;¹¹ this may be true, but even in this new role, it’s not always easy to find. This shadow

⁴ See, e.g., *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 986 (9th Cir. 1999); Joseph William Singer, *Property Law: Rules, Policies, and Practices* 590 (2d ed. 1997) (quoting the traditional Rule Against Perpetuities: “No interest is good unless it must vest, if at all, no later than 21 years after the death of some life in being at the creation of the interest.”).

⁵ See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. Chi. L. Rev.* 1721 (2002).

⁶ See, e.g., *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825).

⁷ See *A.L.A. Schechter Poultry Co. v. United States*, 295 U.S. 495 (1935); *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935); Cass R. Sunstein, *Nondelegation Canons*, 67 *U. Chi. L. Rev.* 315, 315–16, 322 (2000) (“[T]he conventional doctrine has had one good year, and 211 bad ones (and counting).”).

⁸ *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

⁹ See *NBC v. United States*, 319 U.S. 190, 225–26 (1943); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932).

¹⁰ See *Yakus v. United States*, 321 U.S. 414, 420, 423–26 (1944).

¹¹ See Sunstein, *supra* note 7, at 315.

doctrine shows up explicitly in a couple of cases.¹² Otherwise, detecting its traces—possibly in places like the *Chenery I*¹³ doctrine of administrative law,¹⁴ or in the modern-day resistance to the expansive *Chevron* doctrine¹⁵—has been the subtle job of legal academics.

Our two hands also duel on the policy question of whether the nondelegation doctrine is a good idea: to David Schoenbrod's critique that extensive delegation to agencies reduces political accountability (of members of Congress) and leads to worse policy,¹⁶ there is Jerry Mashaw's defense (also found in cases like *Chevron*¹⁷) that agencies *should* make more political decisions since they're both more politically accountable (through the president) and more expert than Congress.¹⁸

For nondelegation doctrine buffs, then, this term has had good news and bad news. The good news is that there has finally been a

¹² See *Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion); *Nat'l Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336, 341–42 (1974); cf. *Arizona v. California*, 373 U.S. 546, 626–27 (1963) (Harlan, J., dissenting in part) (using constitutional doubts raised by a broad delegation to “buttress the conviction, already firmly grounded in [a statute] and its history,” that an agency lacked certain power under the statute).

¹³ *SEC v. Chenery Corp.*, 318 U.S. 80 (1943); see also Kevin M. Stack, *The Constitutional Foundations of Chenery*, 116 *Yale L.J.* 952, 981–1004 (2007).

¹⁴ Nondelegation concerns also show up in general concerns about limiting agency discretion and requiring reasoned decisionmaking. See, e.g., *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 536–37 (2009) (Kennedy, J., concurring in part and concurring in the judgment).

¹⁵ See *Michigan v. EPA*, 135 S. Ct. 2699, 2712–14 (2015) (Thomas, J., concurring); *City of Arlington v. FCC*, 133 S. Ct. 1863, 1877–86 (2013) (Roberts, C.J., dissenting); *United States v. Mead Corp.*, 533 U.S. 218 (2001); see also Laurence H. Tribe, *American Constitutional Law* § 5-19, at 997 n.71 (“[R]econciling *Chevron* deference with the nondelegation doctrine would appear to require a particularly heroic degree of self-deception.”); *id.* at 999 n.74 (“[W]hen courts treat agencies operating under *Chevron* delegations as free to pick any meaning they wish within a congressionally specified range (and then to change their minds as the political situation changes), those courts are effectively (even if inadvertently) conceding that what Congress delegates under *Chevron* is, contra nondelegation theory and the separation of powers, nothing less than the power to legislate.”).

¹⁶ See David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (1993).

¹⁷ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865–66 (1984).

¹⁸ See Jerry L. Mashaw, *Prodelegation: Why Administrators Should Make Political Decisions*, 1 *J.L. Econ. & Org.* 81 (1985).

major new nondelegation case—for the first time since *Whitman v. American Trucking Ass'ns* in 2001.¹⁹ The case is *DOT v. Ass'n of American Railroads*,²⁰ which centered on regulatory power delegated to the National Passenger Railroad Corp., colloquially called Amtrak.

The case had the added attraction that it presented the interesting question of whether congressional delegations to private parties were evaluated using the same “intelligible principle” rule that applies to public agencies. (The opinion below, written by D.C. Circuit Judge Janice Rogers Brown, had struck down the statute delegating power to Amtrak on the ground that private delegations by Congress were per se unconstitutional.)²¹ And it ended up producing an interesting separation-of-powers opinion by Justice Samuel Alito²² and an interesting originalist opinion by Justice Clarence Thomas.²³

The bad news for nondelegation buffs is that—in a display of the minimalism famously championed by Chief Justice John “Philip Glass” Roberts²⁴—the Supreme Court ignored all the interesting arguments (including the ones in my own amicus brief²⁵) by deciding the case on the narrowest possible, most Amtrak-specific theory. The Court held that Amtrak is in fact public, and not private, for purposes of the nondelegation doctrine, without explaining whether this matters. As a result, the troublesome question of whether there exists a special private nondelegation doctrine remains troublesome. Having held that Amtrak is public, the Court resolved no other question, but sent the case back to the D.C. Circuit for further litigation. We'll have to wait a bit longer to see how the case comes out, but the Supreme Court might no longer be involved, and the resolution may end up having nothing to do with the nondelegation doctrine.

¹⁹ 531 U.S. 457.

²⁰ 135 S. Ct. 1225 (2015) (AAR II).

²¹ *Ass'n of Am. R.Rs. v. DOT*, 721 F.3d 666 (D.C. Cir. 2013) (AAR I), vacated and remanded by AAR II, 135 S. Ct. 1225.

²² AAR II, 135 S. Ct. at 1234–40 (Alito, J., concurring).

²³ *Id.* at 1240–54 (Thomas, J., concurring in the judgment).

²⁴ See Chief Justice Says His Goal Is More Consensus on Court, N.Y. Times (May 22, 2006), <http://www.nytimes.com/2006/05/22/washington/22justice.html> (“If it is not necessary to decide more to a case, then in my view it is necessary not to decide more to a case,” Chief Justice Roberts said.”).

²⁵ See Br. of Prof. Alexander Volokh as Amicus Curiae in Support of Pet'rs, AAR II, 135 S. Ct. 1225 (No. 13-1080).

II. The Regulatory Scheme

Congress created Amtrak via a 1970 federal statute, the Rail Passenger Service Act, to act as a for-profit passenger railroad corporation; its purpose was to revive the national passenger railroad system.²⁶ Railroads that offered passenger service had been incurring heavy losses, and many of them had petitioned the Interstate Commerce Commission for permission to withdraw from that market. Now they could arrange for Amtrak to take over their passenger service responsibilities in exchange for agreeing to a number of other conditions—one of which was granting Amtrak preferential access to their tracks and other facilities. By statute, except in emergency conditions, an Amtrak passenger car has precedence over another railroad's freight car when they both need the same facilities. Most railroads were more than happy to agree to these conditions, which were formalized in various bilateral operating agreements.²⁷

Many years later, in 2008, Congress passed the Passenger Rail Investment and Improvement Act, requiring the development or improvement of “metrics and minimum standards for measuring the performance and service quality of intercity passenger train operations.”²⁸ These performance and service quality measures should include “cost recovery, on-time performance and minutes of delay, ridership, on-board services, stations, facilities, equipment, and other services.”²⁹

These metrics aren't just of academic interest: they're a way of enforcing Amtrak's statutory precedence over other railroads. If an intercity passenger train fails to meet these metrics and standards for two consecutive quarters, or if a complaint is filed, the statute authorizes the Surface Transportation Board (STB) to investigate who's at fault. If the STB determines that the failure to meet the standards is “attributable to a rail carrier's failure to provide preference to Amtrak over freight transportation as required,” the STB may assess

²⁶ See 49 U.S.C. § 24301 (2012).

²⁷ See AAR I, 721 F.3d at 668; Alexander Volokh, *A New Private Delegation Doctrine?*, Reason Found., (Aug. 1, 2013), <http://reason.org/news/show/private-delegation-doctrine-amtrak>.

²⁸ AAR I, 721 F.3d at 669 (quoting Passenger Rail Investment and Improvement Act of 2008 [hereinafter PRIIA], Pub. L. No. 110-432, § 207(a) (codified at 49 U.S.C. § 24101 (2012))).

²⁹ *Id.*

damages.³⁰ Moreover, the standards have an immediate regulatory effect: Amtrak and the railroads must incorporate them into their operating agreements “[t]o the extent practicable.”³¹

Amtrak has a special role in developing these standards. Both Amtrak and the Federal Railroad Administration, an agency within the Department of Transportation, must agree on any metrics or standards before they can be implemented; in the event of a disagreement, the statute allows Amtrak and the FRA to petition the STB “to appoint an arbitrator to assist [them] in resolving their disputes through binding arbitration.”³²

The FRA and Amtrak eventually developed the required metrics. These included

“effective speed” (the ratio of route’s distance to the average time required to travel it), “endpoint on-time performance” (the portion of a route’s trains that arrive on schedule), and “all-stations on-time performance” (the degree to which trains arrive on time at each station along the route).³³

But wait a minute: Wasn’t Amtrak created as a for-profit corporation? Believing that this was fishy, and that the statute giving Amtrak this (joint) rulemaking power was unconstitutional, the Association of American Railroads (AAR) sued to invalidate these metrics. Two of the principal arguments were that the statute (1) violates the nondelegation doctrine and separation-of-powers principles by giving Amtrak, a private entity, regulatory power over its own industry, and (2) violates the Due Process Clause by letting Amtrak self-interestedly regulate its own competitors.

III. A New-Fangled Doctrine

The AAR lost at the district court, but convinced the D.C. Circuit, which ruled in favor of the AAR based on the nondelegation doctrine. This required the court to sign on to two nonobvious conclusions: first, that Amtrak is private; and second, that Congress “cannot

³⁰ *Id.*

³¹ *Id.* (quoting 49 U.S.C. § 24101 (2012)).

³² *Id.*

³³ *Id.* at 669–70.

delegate regulatory authority to a private entity," even with an intelligible principle.³⁴

A. Is Amtrak Private?

As an initial matter, any argument that Amtrak should be considered private for constitutional purposes runs into a problem: the Supreme Court's 1995 decision in *Lebron v. National Railroad Passenger Corp.*³⁵ In that case, Michael Lebron wanted to display a political ad, commenting on the Coors family's support of the Nicaraguan contras, in Amtrak's Penn Station. Amtrak—which, together with the billboard owner, had joint power to approve the content of ads—vetoed the ad. Lebron sued Amtrak for violating (among other things) his First Amendment rights. This claim would have been a non-starter unless Amtrak was a "state actor,"³⁶ which indeed is what the Supreme Court held.

Amtrak was created by federal statute to serve federal goals.³⁷ The whole board of directors is politically appointed in one way or another. At the time of the case, the president appointed six directors out of nine (some with Senate confirmation and some without, with the secretary of transportation serving *ex officio*). Two more directors were selected by the holders of Amtrak's preferred stock—but since all that stock was held by the federal government, those directors were in fact selected by the secretary of transportation. A ninth director, the president, was selected by the other eight. Amtrak was required to submit reports to the president and Congress, one of which was made part of the Department of Transportation's annual report to Congress.

Amtrak, the Supreme Court noted, is part of a long tradition of "corporations created and participated in by the United States for the achievement of government objectives," from the banks of the United States to the Tennessee Valley Authority and the Federal Deposit Insurance Corp.³⁸

³⁴ *Id.* at 670.

³⁵ 513 U.S. 374 (1995).

³⁶ See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982); *The Civil Rights Cases*, 109 U.S. 3 (1883).

³⁷ *Lebron*, 513 U.S. at 383–84.

³⁸ *Id.*

In light of all of this, the statutory labeling of Amtrak as “not an agency or establishment of the United States government”³⁹ doesn’t govern how it should in fact be treated for constitutional purposes:

It surely cannot be that government, state or federal, is able to evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form. On that thesis, *Plessy v. Ferguson* can be resurrected by the simple device of having the State of Louisiana operate segregated trains through a state-owned Amtrak.⁴⁰

Thus, the Court concluded, “where, as here, the Government creates a corporation by special law, for the furtherance of governmental objectives, and retains for itself permanent authority to appoint a majority of the directors of that corporation, the corporation is part of the Government for purposes of the First Amendment.”⁴¹ Because the state action doctrine is transsubstantive,⁴² a holding of state action as to the First Amendment also applies as to the Due Process Clause,⁴³ the Equal Protection Clause,⁴⁴ and other rights provisions.

How, then, could the D.C. Circuit panel in this case get around *Lebron* and hold that Amtrak was private? It did so by holding that, while Amtrak might be a state actor for purposes of constitutional *rights* provisions, it might still be private for purposes of the nondelegation doctrine.⁴⁵ The most important part of Judge Brown’s analysis was functional: the purposes of the public-private distinction in the nondelegation doctrine are to ensure democratic accountability and disinterested decisionmaking.⁴⁶ But the labeling of Amtrak as “not an agency or establishment of the United States government” distances Amtrak’s decisions from democratic accountability, and

³⁹ *Id.* at 391.

⁴⁰ *Id.* at 397 (citation omitted).

⁴¹ *Id.* at 400.

⁴² See Mark D. Rosen, Was *Shelley v. Kraemer* Incorrectly Decided? Some New Answers, 95 Calif. L. Rev. 451, 475 (2007).

⁴³ See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40 (1999).

⁴⁴ See, e.g., *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

⁴⁵ AAR I, 721 F.3d at 677.

⁴⁶ *Id.* at 675.

the statutory command to operate as a for-profit corporation actively discourages disinterested decisionmaking.⁴⁷

Where the *Lebron* Court worried that the government could insulate itself from constitutional rights provisions by using the corporate form, the D.C. Circuit worried that considering such corporations state actors for *all* purposes would likewise allow the government to insulate itself from structural provisions like the nondelegation doctrine.⁴⁸

B. The Rule Against Private Delegation?

But do we care? All this discussion assumes that whether Amtrak is public or private makes a difference to the nondelegation analysis. According to the D.C. Circuit, being private makes all the difference. “We open our discussion with a principle upon which both sides agree: Federal lawmakers cannot delegate regulatory authority to a private entity.”⁴⁹ While a public agency can receive delegated power as long as an intelligible principle exists, even an intelligible principle can’t save a statute that places regulatory authority in the hands of private parties. And, said the D.C. Circuit, the Supreme Court has never approved a private delegation of this extent.⁵⁰

Consider, for instance, *Currin v. Wallace*.⁵¹ The Tobacco Inspection Act of 1935 allowed the secretary of agriculture to designate a tobacco market; in a designated market, no tobacco could be sold until it had been inspected and certified according to certain standards.⁵² But the secretary wasn’t allowed to designate a market unless two-thirds of the growers approved the designation in a referendum.⁵³ The statute thus delegated to private parties—the regulated community—an “on-off switch,” the power to decide whether regulations would go into effect. The Supreme Court upheld this delegation.

The Supreme Court also upheld the statutory scheme in *Sunshine Anthracite Coal Co. v. Adkins*, where Congress allowed a commission

⁴⁷ *Id.* at 675–76.

⁴⁸ *Id.* at 675.

⁴⁹ *Id.* at 670.

⁵⁰ *Id.* at 671.

⁵¹ 306 U.S. 1 (1939).

⁵² *Id.* at 6.

⁵³ *Id.*

of private coal industry members to propose regulations.⁵⁴ There was nothing unconstitutional about this delegation, since the private parties were doing nothing more than proposing regulations; the decision to “approve[], disapprove[], or modify[]” them was left solely to the government agency.⁵⁵

But, said the D.C. Circuit, the statute here went far beyond both of those statutes. Amtrak’s authority was more than merely advisory and went further than merely vetoing a regulation written by another; in fact, Amtrak enjoyed regulatory authority equal to the FRA’s.⁵⁶ The government argued that the metrics and standards merely triggered future STB investigation—so the relevant regulatory activity, and a check on Amtrak’s power, would be the future STB investigation.⁵⁷ But the D.C. Circuit responded that the metrics and standards are the enforcement mechanism for the obligation to provide preference to Amtrak trains; moreover, the statute immediately imposes the regulatory requirement that the metrics and standards be incorporated in Amtrak’s operating agreements with other carriers.⁵⁸

The D.C. Circuit held that the delegation here was more similar to the kind that was invalidated in *Carter v. Carter Coal Co.*⁵⁹ That case concerned the Bituminous Coal Conservation Act of 1935, which allowed the producers of two-thirds of the coal in any “coal district” to set wages and hours for all coal producers in the district, after negotiation with unions representing a majority of mine workers in the district. The Supreme Court invalidated this delegation of coercive power to private actors, calling it “legislative delegation in its most obnoxious form.”⁶⁰ And the delegation to Amtrak, wrote the D.C. Circuit, “is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen.”⁶¹

⁵⁴ 310 U.S. 381, 387–88 (1940).

⁵⁵ *Id.* at 388, 397.

⁵⁶ AAR I, 721 F.3d at 671.

⁵⁷ *Id.* at 672.

⁵⁸ *Id.*

⁵⁹ 298 U.S. 238 (1936).

⁶⁰ *Id.* at 311.

⁶¹ AAR I, 721 F.3d at 673.

C. *Nondelegation vs. Due Process*

Perhaps, as the court said, both sides did agree that the nondelegation doctrine prohibits Congress from “delegat[ing] regulatory authority to a private entity,” and that the source of this prohibition was *Carter Coal*.⁶² But then both sides, and the court, were wrong. *Carter Coal*, properly read, is a case about the Due Process Clause. There is therefore no Supreme Court case that strikes down a delegation to private parties based on the nondelegation doctrine: *Currin v. Wallace* should be taken to stand for the proposition that private delegations are not per se illegal.

I would go even further. In *Currin*, the Court upheld the delegation by stating that it was comparable to the delegation to *the president* that was upheld in *J.W. Hampton, Jr. & Co. v. United States*.⁶³ Thus, *Currin* stands for a stronger proposition: that private delegations should be judged by the same nondelegation doctrine that applies to public officials. I’ve argued elsewhere that *Currin* was wrongly decided on its own terms, since the “on-off” power delegated to the industry participants was so unconstrained as to lack an intelligible principle.⁶⁴ But whether or not *Currin* properly applies the nondelegation doctrine, it’s still good law on the more general question of whether the doctrine should apply identically in public and private cases.

And that general proposition has the added advantage of being correct: The nondelegation doctrine is about whether Congress has given up so much authority as to have abdicated its legislative power. It’s about whether too much power has been given up, not about who receives that power.⁶⁵

⁶² The government accepted the characterization that *Carter Coal* prevents Congress from making an “absolute delegation of regulatory authority to private parties,” Br. for the Appellees, AAR I, 721 F.3d 666, at 28, but argued that *Carter Coal* was distinguishable because of the government’s “structural control” over Amtrak, *id.* at 29–31, the involvement of the FRA and the other railroads in the development of the standards, *id.* at 31, and the requirement that STB itself find a violation of the “separate and longstanding statutory preference requirement” before any fines can be assessed. *Id.* So the D.C. Circuit seems to be correct in characterizing the government’s position: a private delegation (unlike a public delegation) violates the nondelegation doctrine if not accompanied by sufficient safeguards.

⁶³ 276 U.S. 394 (1928).

⁶⁴ Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Non-Delegation, and Antitrust Challenges*, 37 *Harv. J.L. & Pub. Pol’y* 931, 960–61 (2014).

⁶⁵ *Id.* at 957 n.134.

1. How to Interpret *Carter Coal*

My thesis on *Currin v. Wallace* and the (nonexistence of the) private nondelegation doctrine depends on undermining the association of *Carter Coal* with the nondelegation doctrine. So it's important to read *Carter Coal* carefully. Here's the text from the portion of *Carter Coal* that supposedly invokes that doctrine:

The power conferred upon the majority is, in effect, the power to regulate the affairs of an unwilling minority. This is legislative delegation in its most obnoxious form; for it 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. . . . The difference between producing coal and regulating its production is, of course, fundamental. The former is a private activity; the latter is necessarily a governmental function, since, in the very nature of things, one person may not be entrusted with the power to regulate the business of another, and especially of a competitor. And a statute which attempts to confer such power undertakes an intolerable and unconstitutional interference with personal liberty and private property. The delegation is so clearly arbitrary, and so clearly a denial of rights safeguarded by the due process clause of the Fifth Amendment, that it is unnecessary to do more than refer to decisions of this court which foreclose the question.⁶⁶

Two things about this block quotation could be taken to suggest that the Court might be referring to the nondelegation doctrine: the Court says “delegation” three times, and it cites the nondelegation case *Schechter Poultry*.

But the citation to *Schechter Poultry* isn't highly probative, since *Schechter Poultry* wasn't actually decided on the basis of delegation to private parties. The statutory scheme in *Schechter Poultry* involved industry codes of “fair competition”—comprehensive regulations of entire industries—which members of that industry could propose and the president could then adopt. The Supreme Court was, in the first place, highly dubious that Congress could delegate such

⁶⁶ *Carter Coal*, 298 U.S. at 311 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); *Eubank v. City of Richmond*, 226 U.S. 137 (1912); *Washington ex rel. Seattle Title Trust Co. v. Roberge*, 278 U.S. 116 (1928)).

comprehensive regulatory power over industries to the industries themselves:

[W]ould it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in [the preamble to the statute]? The answer is obvious. Such a delegation of legislative power is unknown to our law, and is utterly inconsistent with the constitutional prerogatives and duties of Congress.⁶⁷

But this is dictum. The Court went on to strike down the statute because *the president* had insufficient guidance on whether or not to approve the industry-proposed codes. And this isn't a blanket disapproval of all private delegation—just of extremely broad private delegation. Phrased that way, I agree: of course Congress couldn't delegate such an unconstrained power to private industry, because it couldn't delegate such an unconstrained power to *anyone*, not even the president.

In any event, this dictum just says the delegation would be unconstitutional, without being totally clear on why: Is it unconstitutional because it violates the nondelegation doctrine, or because it violates some other constitutional doctrine? (Admittedly, the block quotation, with its talk of “trade or industrial associations or groups be[ing] constituted legislative bodies” and “the constitutional prerogatives and duties of Congress,” does suggest a separation-of-powers, i.e. nondelegation, rationale, but it doesn't come out and say it.)

This last point is important: saying the word “delegation” doesn't mean one is talking about the nondelegation doctrine. For example, a delegation of governmental power to religious groups can violate the Establishment Clause.⁶⁸ An excessively vague delegation of power to

⁶⁷ Schechter Poultry, 295 U.S. at 537.

⁶⁸ See *Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet*, 512 U.S. 687 (1994); *Larkin v. Grendel's Den, Inc.*, 459 U.S. 116 (1982).

courts and juries to determine what acts are criminal violates the Fifth and Sixth Amendments.⁶⁹ A delegation of “private attorney general” power to a *qui tam* plaintiff might violate the Appointments Clause.⁷⁰ And a delegation of regulatory power to self-interested private parties could also violate the Due Process Clause.⁷¹

Thus—now leaving *Schechter Poultry* and going back to *Carter Coal*—when the *Carter Coal* Court talks about “legislative delegation in its most obnoxious form,” it’s much more plausible that this refers to the Due Process Clause. First, note that *Eubank* and *Roberge* are cited right after *Schechter Poultry*. While *Schechter Poultry* may be a problematic citation, *Eubank* and *Roberge* are precisely on point, since they’re exactly about the unconstitutionality of delegations of regulatory authority to self-interested private parties—under the Due Process Clause alone, since these cases involved state governments. (Not that there’s any specific due process doctrine against regulation by private parties: the same line of cases also bars regulation by *public* actors whose compensation gives them incentives not to act disinterestedly.⁷² But obviously non-disinterestedness can be easier to show when the regulators have a clear profit motive, which in turn is easier to find in the case of private actors.)

Carter Coal also explicitly mentions the “denial of rights safeguarded by the due process clause of the Fifth Amendment.” And it notes that the statutory scheme works “an intolerable and unconstitutional interference with personal liberty and private property”—reciting the terms “liberty” and “property,” which are predicates for the Due Process Clause to apply.⁷³

Perhaps this is why the Supreme Court has characterized *Carter Coal* as a due process case, and not a nondelegation case, on the few occasions the question has come up over the last 30 years.⁷⁴

⁶⁹ *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 92 (1921).

⁷⁰ See *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 778 n.8 (2000) (noting this argument but not deciding it).

⁷¹ See *Roberge*, 278 U.S. 116; *Eubank*, 226 U.S. 137.

⁷² See, e.g., *Aetna Life Ins. v. Lavoie*, 475 U.S. 813 (1986); *Ward v. Vill. of Monroeville*, 409 U.S. 57 (1972); *Tumey v. Ohio*, 273 U.S. 510 (1927).

⁷³ See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 572 (1972).

⁷⁴ See *Am. Trucking II*, 531 U.S. at 474 (noting that *Schechter Poultry* and *Panama Refining* were the only two cases where a statute was struck down on nondelegation grounds, completely excluding *Carter Coal*); *Mistretta v. United States*, 488 U.S. 361

Nor, as the panel suggested, is the D.C. Circuit's own precedent to the contrary.⁷⁵ In *National Ass'n of Regulatory Utility Commissioners v. FCC (NARUC)*, the D.C. Circuit had indeed spoken critically of private delegations, but it was dictum (no such delegation was found in that case), and it cited *Carter Coal* without discussing whether the case was based on nondelegation or due process.⁷⁶

Moreover—in a footnote (still dictum) specifically focused on the nondelegation doctrine—the *NARUC* court stated that the harm of delegations is “doubled in degree in the context of a transfer of authority from Congress to an agency and then from an agency to private individuals.”⁷⁷ O.K., but is that because the delegation is private, or because there are two levels of delegation (as opposed to only one level of delegation in *Amtrak's* case)?

The *NARUC* court also stated that “[t]he vitality of challenges to” transfers of authority from Congress to an agency “is suspect,” but from an agency to private individuals, “unquestionable.” But again, *Amtrak's* case isn't about agency-to-private delegations but rather about Congress-to-private delegations. And saying that the vitality of a certain type of legal challenge is unquestionable isn't the same as saying that this kind of challenge always wins. Nor does it make clear why the vitality is unquestionable: is it because the legal test is different, or because delegations to private parties are more likely to lack the requisite intelligible principle?

In short, this supposed D.C. Circuit precedent doesn't carry much weight. Anything it says on the matter is (1) dictum, (2) ambiguous as to whether the nondelegation doctrine or due process is involved, (3) ambiguous as to whether there's any *per se* rule, or (4) focused on agency-to-private delegations, not Congress-to-private delegations.

(1989) (also excluding *Carter Coal* from the list of nondelegation cases); see also *INS v. Chadha*, 462 U.S. 919 (1983) (White, J., dissenting) (similarly excluding *Carter Coal* from the discussion of nondelegation cases). Even then-appellate judge Antonin Scalia noted (albeit as one-third of a *per curiam* opinion) that *Carter Coal* spoke of the nondelegation doctrine but rested its holding primarily upon denial of substantive due process. *Synar v. United States*, 626 F. Supp. 1374, 1383 n.8 (D.D.C. 1986) (three-judge panel) (*per curiam*), *aff'd sub nom. Bowsheer v. Synar*, 478 U.S. 714 (1986).

⁷⁵ AAR I, 721 F.3d at 671 n.3.

⁷⁶ 737 F.2d 1095, 1143 (D.C. Cir. 1984).

⁷⁷ *Id.* at 1143 n.41.

2. What Difference Does It Make?

In a footnote, the D.C. Circuit acknowledged the argument that *Carter Coal* should be interpreted as a due process case instead of a nondelegation case, but decided that this didn't make much difference. The difference, the panel wrote, was only of "scholarly interest" and "neither court nor scholar has suggested a change in the label would effect a change in the inquiry."⁷⁸ Oh, but (speaking as a scholar) it does.

First, would the doctrine of this case apply to federal delegations only, or also to state delegations? The nondelegation doctrine derives from the Vesting Clause of Article I and therefore applies only to delegations by Congress. The Due Process Clause applies to both the federal government and state governments through the Fifth and Fourteenth Amendments.⁷⁹ Sure, this wouldn't make a difference in this case, but getting the theory correct is important because the greatest value of cases is as precedent.

It doesn't help to treat private delegation as a hybrid nondelegation and due process problem, as some courts and commentators have done.⁸⁰ The Due Process Clause has one line of doctrine, and the nondelegation doctrine has another.⁸¹ If we're talking about a federal delegation, how do these two lines of doctrine mix? And if we're talking about a state delegation, how does such a due-process-only analysis proceed differently from a federal case where both doctrines apply?

Second, are damages available? In federal delegation cases, plaintiffs prefer to win on due process grounds rather than nondelegation grounds, because due process cases can be litigated under *Bivens v.*

⁷⁸ AAR I, 721 F.3d at 671 n.3.

⁷⁹ U.S. Const. amend. V; U.S. Const. amend. XIV, § 1; see Note, The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation, 127 Harv. L. Rev. 751, 764 (2013); David N. Wecht, Note, Breaking the Code of Difference: Judicial Review of Private Persons, 96 Yale L.J. 815, 825 n.57 (1987).

⁸⁰ See, e.g., *McGautha v. California*, 402 U.S. 183, 272 n.21 (1971) (Brennan, J., dissenting); A. Michael Froomkin, Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution, 50 Duke L.J. 17, 151, 153 (2000); Paul R. Verkuil, Public Law Limitations on Privatization of Government Functions, 84 N.C. L. Rev. 397, 422 (2006).

⁸¹ The due process line of cases involves *Mathews v. Eldridge*, 424 U.S. 319 (1976), *Roth*, and *Roberge*. The nondelegation line of cases includes *Schechter Poultry* and *J.W. Hampton*.

Six Unknown Named Agents of the Federal Bureau of Narcotics, which allows for damages against federal actors responsible for the due process violation.⁸² *Bivens* hasn't been extended to cases under the nondelegation doctrine and is unlikely to be.⁸³

Third, how do we determine who's a state actor? If the case involves due process, we rely on *Lebron* and find that Amtrak is a state actor. If the case involves the nondelegation doctrine, we rely on the D.C. Circuit's new, ad hoc theory related to the underlying goals of the nondelegation doctrine. (Well, not anymore, since, as we'll see, that part of the holding was reversed by the Supreme Court.) Perhaps we shouldn't have a multiplicity of state-action doctrines for different constitutional contexts, or perhaps the different contexts make different tests appropriate. What's clear, though, is that nondelegation and due process are not at all interchangeable in this respect.

Finally, and most important, the Due Process Clause just makes more sense here, because of the internal logic of the doctrines themselves. The nondelegation doctrine—true to its roots in the Vesting Clause—ensures that legislative authority stays with Congress.⁸⁴ Due process, though, is about fairness.

What's the difference between nondelegation and fairness? Consider *Whitman v. American Trucking Ass'n's*, which involved a nondelegation challenge to the Clean Air Act.⁸⁵ Before *American Trucking* reached the Supreme Court, the D.C. Circuit held that the Clean Air Act lacked an intelligible principle for Congress to properly delegate regulatory authority to the EPA.⁸⁶ But, said the D.C. Circuit, all would be fine if the EPA adopted a limiting construction of the overly broad delegation⁸⁷—a theory advanced by administrative law scholar Kenneth Culp Davis, who wrote that such limiting constructions would

⁸² 403 U.S. 388 (1971) (recognizing the availability of damages for federal officials' violation of the Fourth Amendment); see also *Davis v. Passman*, 442 U.S. 228 (1979) (extending *Bivens* to the Due Process Clause).

⁸³ See Alexander Volokh, *The Modest Effect of Minneci v. Pollard on Inmate Litigants*, 46 Akron L. Rev. 287 (2013).

⁸⁴ See text accompanying note 65, *supra*.

⁸⁵ 531 U.S. 457.

⁸⁶ *Id.* at 463 (citing *Am. Trucking Ass'ns, Inc. v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999) (*Am. Trucking I*), *rev'd*, *Am. Trucking II*, 531 U.S. 457).

⁸⁷ *Id.* (citing *Am. Trucking I*, 175 F.3d at 1038).

adequately serve the nondelegation doctrine's concern with limiting "arbitrariness" and "uncontrolled discretionary power."⁸⁸

The Supreme Court rejected all of that. First, it held that the delegation wasn't too broad. Second, it held that even if the delegation were too broad, it would make no sense to say that the EPA could cure that deficiency by adopting a limiting construction: the EPA's voluntarily limiting its own authority would itself be an exercise of the forbidden legislative power.⁸⁹ But note that, while an appropriate limiting construction couldn't cure a nondelegation problem, it would provide notice and could even provide other elements of due process if these were lacking in the statute. Thus, *American Trucking* shows that a nondelegation doctrine violation need not violate due process as well.

Similarly, a violation of due process need not violate the nondelegation doctrine. Congress could pass a statute allowing officials to withdraw certain beneficiaries' welfare payments without any process; such a statute would presumably violate due process,⁹⁰ but it would be perfectly consistent with the nondelegation doctrine if the officials' discretion were sufficiently circumscribed.

The two theories are related in various ways—for instance, the presence of procedures can satisfy due process and can also help to alleviate nondelegation concerns⁹¹—but they don't necessarily go together. So, despite the D.C. Circuit's footnote suggesting otherwise, keeping the two doctrines separate is important for both academic and very practical reasons.

In sum, here the D.C. Circuit got the doctrine wrong: delegation to a private, self-interested party is a due process problem, not a nondelegation problem. That said, the panel's bottom line was sound. I think there is enough of an intelligible principle—the command

⁸⁸ Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 713 (1969). The D.C. Circuit had already used this approach in *Amalgamated Meat Cutters & Butcher Workmen AFL-CIO v. Connally*, 337 F. Supp. 737, 758–59 (D.D.C. 1971) (three-judge panel).

⁸⁹ *Am. Trucking II*, 531 U.S. at 472–73.

⁹⁰ See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

⁹¹ See, e.g., *Fahey v. Mallonee*, 332 U.S. 245, 253 (1947); *Yakus*, 321 U.S. at 426; *Schechter Poultry*, 295 U.S. at 539–40.

that Amtrak be run as a profit-making enterprise.⁹² But the same principle that saves the delegation under the nondelegation doctrine should be enough to doom it under the Due Process Clause. As a (quasi-?) for-profit enterprise, Amtrak has a fiduciary duty to undermine other railroads by any legal means if this would maximize its own profits. Amtrak could exercise its ability to create metrics and standards, as well as its veto power, self-interestedly. This conflict of interest violates due process.

IV. A Narrow Overruling

The Supreme Court overruled the D.C. Circuit but didn't disapprove of the private nondelegation doctrine. Rather, it sidestepped the issue entirely, merely holding that Amtrak is a governmental actor for purposes of the nondelegation doctrine. This limited holding makes it unimportant (for this case) whether a special private doctrine even exists. (Of course, if there's no special private doctrine, it doesn't matter whether Amtrak is public. So the Supreme Court's opinion might be completely irrelevant.)

The Supreme Court's opinion is awfully reminiscent of *Lebron*—which is indeed cited repeatedly as an opinion that “provides necessary instruction.”⁹³ As in *Lebron*, the labeling of Amtrak as not-an-agency and the requirement that it operate as a profit-making entity aren't dispositive of the constitutional question.⁹⁴ As in *Lebron*, it's relevant that the government holds the majority of Amtrak's stock and that virtually all the board members are government officials. The statute has changed a bit since *Lebron*; now, eight of nine board members are government officials, including the secretary of transportation and seven others who are appointed by the president and confirmed by the Senate. Their salaries are limited by Congress and, according to the attorney general, they're removable by the president without cause.⁹⁵

The government has a lot of supervisory authority over Amtrak: Amtrak has to submit certain annual reports to Congress and the

⁹² See 49 U.S.C. § 24301(a) (2012) (“Amtrak . . . shall be operated and managed as a for-profit corporation.”).

⁹³ AAR II, 135 S. Ct. at 1233.

⁹⁴ *Id.* at 1231.

⁹⁵ *Id.* (citing 49 U.S.C. §§ 24302(a)(1), 24303(b) (2012); 27 Op. Atty. Gen. 163 (2003)).

president, receives large subsidies, is subject to the Freedom of Information Act, and must maintain an inspector general similar to other governmental agencies.⁹⁶ Congress frequently conducts oversight hearings to determine Amtrak's budget, routes, and prices.⁹⁷ And while it's required to maximize profits, it also has to pursue various other statutory goals, including "provid[ing] efficient and effective intercity passenger rail mobility," "provid[ing] reduced fares to the disabled and elderly," and "ensur[ing] mobility in times of national disaster."⁹⁸

As a result, "[g]iven the combination of these unique features and its significant ties to the Government, Amtrak is not an autonomous private enterprise."⁹⁹ (Unique indeed: this laundry list of factors is awfully Amtrak-specific, and—even if public or private status is relevant for the nondelegation doctrine—may not be very helpful next time a similar case comes up involving a different organization.) "[T]he practical reality of federal control and supervision" suffice to make *Lebron's* holding (in a rights context) applicable in this separation-of-powers context too; after all, "[t]he structural principles secured by the separation of powers protect the individual as well."¹⁰⁰

Having decided this, the Court remanded to the D.C. Circuit for further litigation.¹⁰¹ There remain several constitutional issues in the case: whether the Amtrak board's selection of its president, who isn't appointed by the president or confirmed by the Senate, violates the Appointments Clause; whether the arbitrator provision, which allows Amtrak or the FRA to appoint a (possibly private) binding arbitrator if neither party can agree on metrics and standards, violates the nondelegation doctrine or the Appointments Clause; and (the real *Carter Coal* issue) whether Congress violated the Due Process Clause by granting Amtrak regulatory authority over the industry.

⁹⁶ *Id.* at 1232 (citing 49 U.S.C. § 24315 (2012)).

⁹⁷ *Id.*

⁹⁸ *Id.* (quoting 49 U.S.C. §§ 24101, 24307 (2012)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 1233 (quoting *Bond v. United States*, 131 S. Ct. 2355, 2365 (2011)).

¹⁰¹ *Id.* at 1234.

V. The More Interesting Concurrences

The concurrences are more interesting than the majority opinion—not surprisingly, since just about anything is more interesting than the majority opinion. Justice Alito wrote a strong concurrence opining on the remaining separation of powers issues (and, unfortunately, endorsing the private nondelegation theory). Justice Thomas used the opportunity to present his complete originalist theory of the nondelegation doctrine (which is likewise somewhat confused on private nondelegation).

A. Justice Alito's Structural Concurrence

Justice Alito, stressing that “[l]iberty requires accountability,”¹⁰² addressed a number of structural issues that might arise on remand. (Justice Alito apparently likes to address issues that he feels might become significant in the case down the road but that aren't addressed in the narrower majority opinion.¹⁰³)

First, Amtrak board members don't swear an oath or (apparently) receive a commission from the president, both of which are required of officers of the United States.¹⁰⁴ These requirements are important if Amtrak board members are “officers,” an issue that Justice Alito returns to shortly.

Second, the statute is indisputably regulatory—and yet, this regulatory power can be wielded, in case of disagreement between Amtrak and the FRA, by an arbitrator. But the statute “says nothing . . . about who the arbitrator should be.”¹⁰⁵ Clearly, the arbitration provision can be challenged here even though no arbitration has occurred—what actually happens occurs in the shadow of what could happen. And the arbitration provision, Justice Alito writes, is unconstitutional:¹⁰⁶ First, if the arbitrator is private, he's unconstitutional because of the private delegation doctrine. The government suggested that the arbitrator should be interpreted to be public, for

¹⁰² *Id.* at 1234 (Alito, J., concurring).

¹⁰³ See, e.g., *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2035 (2015) (Alito, J., concurring in the judgment); *T-Mobile S. LLC v. City of Roswell*, 135 S. Ct. 808, 819 (2015); *Volkman v. United States*, 135 S. Ct. 13 (2014).

¹⁰⁴ AAR II, 135 S. Ct. at 1234 (Alito, J., concurring).

¹⁰⁵ *Id.* at 1236.

¹⁰⁶ *Id.* at 1237–39.

exactly these constitutional avoidance reasons—though the plain meaning of “arbitrator” usually refers to a private arbitrator. But second, it doesn’t matter because, even if he’s public, he’s unconstitutional. As someone who wields significant federal authority without a superior, he’s a principal officer, and because he’s not nominated by the president with Senate confirmation, his appointment violates the Appointments Clause. Justice Alito thus endorses the D.C. Circuit’s private nondelegation analysis.

Finally, the appointment of Amtrak’s president raises structural issues. He’s just appointed by the other eight board members (who themselves are presidential appointees). Since he has no superior and can cast the deciding vote, he also seems to be a principal officer, and therefore also requires presidential nomination and Senate confirmation. But even if he’s an inferior officer, his appointment may likewise be unconstitutional because the rest of the Amtrak board, which appoints him, might not be properly considered a “Head” of a “Department” within the meaning of the Appointments Clause.¹⁰⁷

Justice Alito’s arguments are bound to shape the parties’ arguments on remand—at least the separation-of-powers arguments, since Justice Alito didn’t address any due process arguments.

B. Justice Thomas’s Originalist Concurrence

1. The Promised Theory of Nondelegation

On February 27, 2001, the Supreme Court issued *Whitman v. American Trucking Ass’ns*, easily upholding the Clean Air Act’s delegation to the EPA of the authority to set National Ambient Air Quality Standards.¹⁰⁸ Everyone accepted the “intelligible principle” doctrine as a way of distinguishing between valid and invalid delegations¹⁰⁹—except for Justice Thomas, who wrote:

¹⁰⁷ AAR II, 135 S. Ct. at 1239–40 (citing *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 511 (2010)).

¹⁰⁸ 531 U.S. 457.

¹⁰⁹ The *American Trucking* majority, in line with prevailing doctrine, would use the principle to distinguish between delegations of *legislative* power and delegations of authority that fall short of being legislative delegations. *Am. Trucking II*, 531 U.S. at 472–73. Justice Stevens’s concurrence would use the principle to distinguish between valid and invalid delegations of legislative power. *Id.* at 489–90 (Stevens, J., concurring in part and concurring in the judgment).

The parties to these cases who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the “intelligible principle” requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of “intelligible principles.” Rather, it speaks in much simpler terms: “All legislative Powers herein granted shall be vested in a Congress.” I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than “legislative.”

As it is, none of the parties to these cases has examined the text of the Constitution or asked us to reconsider our precedents on cessions of legislative power. On a future day, however, I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.¹¹⁰

March 9, 2015, was that future day. Justice Thomas has now given us his complete originalist theory of delegation.¹¹¹

First, Justice Thomas engages in an extended historical overview—notably focusing on the controversial use of the proclamation power by Henry VIII and James I, which deeply influenced the Framers—to establish that only the legislative branch can “make ‘law’ in the Blackstonian sense of generally applicable rules of private conduct.”¹¹²

¹¹⁰ *Id.* at 487 (Thomas, J., concurring) (citations omitted).

¹¹¹ Justice Thomas’s concurrence in the judgment here goes together with his concurrence in the judgment in *Perez v. Mortgage Bankers Ass’n*, 135 S. Ct. 1199, 1213 (2015), handed down the same day, as well as his concurrence in *Michigan v. EPA*. In *Perez*, Justice Thomas discusses administrative deference under *Auer v. Robbins*, 519 U.S. 452 (1997), and *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); and in *Michigan v. EPA*, he discusses administrative deference under *Chevron*. See *Michigan v. EPA*, 135 S. Ct. at 2712–14 (Thomas, J., concurring) (questioning *Chevron* deference on nondelegation grounds but merely calling it “potentially unconstitutional” and granting that “[p]erhaps there is some unique historical justification for deferring to federal agencies” (citing *Mead*, 533 U.S. at 243 (Scalia, J., dissenting))). Deference to agencies has always been rooted in concepts of implicit delegation—*Chevron* deference explicitly so. See *Chevron*, 467 U.S. at 843–44.

¹¹² AAR II, 135 S. Ct. at 1242–45 (Thomas, J., concurring in the judgment).

Next, he goes through the history of American delegation cases, showing that early delegations to the executive branch were generally in the form of conditional legislation, by which a fully formed congressional regime sprang in or out of being when the president or another executive official found a particular fact.¹¹³ (One early example is Congress's enactment of an embargo, conditional on the president's determination as to whether or not France was violating the neutral commerce of the United States.)¹¹⁴ To be sure, some of this fact-finding involved implicit policy determinations, and to that extent was problematic (except if the determinations involved core executive areas like foreign affairs).¹¹⁵ But even when such delegations came before the Court at the turn of the 20th century, the Court upheld them, not because it endorsed the view that the president could make generally applicable rules of private conduct, but because it (perhaps wrongly) denied that any such implicit policymaking was going on.¹¹⁶

Only in the 20th century did courts truly start endorsing delegates' power to make binding rules of conduct. These cases purported to rely on Chief Justice Marshall's early opinion in *Wayman v. Southard*,¹¹⁷ but that case—which upheld congressional delegation to the judiciary of power to make procedural rules—was about rules for governmental bodies to enforce their own judgments, not about rules of private conduct.¹¹⁸ And today, “the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power,” so that the executive branch is now allowed to “craft significant rules of private conduct” and even “decide which policy goals it wants to pursue.”¹¹⁹

In Justice Thomas's view, “[w]e should return to the original meaning of the Constitution: The Government may create generally

¹¹³ *Id.* at 1247.

¹¹⁴ *Cargo of Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813).

¹¹⁵ AAR II, 135 S. Ct. at 1247–48.

¹¹⁶ *Id.* at 1248–49 (citing *J.W. Hampton*, 276 U.S. at 410–11; *Field v. Clark*, 143 U.S. 649, 692–93 (1892)).

¹¹⁷ 23 U.S. (10 Wheat.) 1.

¹¹⁸ AAR II, 135 S. Ct. at 1249–50 (Thomas, J., concurring in the judgment).

¹¹⁹ *Id.* at 1250–51.

applicable rules of private conduct only through the proper exercise of legislative power.”¹²⁰

Moving on to the current case, Justice Thomas endorses the D.C. Circuit’s view that, if Amtrak were private, a delegation to it would be unconstitutional based on *Carter Coal*.¹²¹ But because here he agrees with the majority that Amtrak is governmental, the above theory applies. Amtrak’s joint development of metrics and standards “alter[s] the railroads’ common-carrier obligations,” so Amtrak is making binding rules of private conduct, which is a legislative function. Therefore, the delegation to Amtrak is invalid.¹²² *Currin v. Wallace*, the case discussed above involving industry veto of agency regulations,¹²³ and its companion case, *United States v. Rock-Royal Cooperative, Inc.*,¹²⁴ “have been discredited and lack any force as precedents,” since they conflict with the more recent decision in *INS v. Chadha*¹²⁵ that a one-house legislative veto is an exercise of legislative power. (Under Justice Thomas’s theory, *Currin* is of course incorrect, as is most of the rest of nondelegation case law. But here, Justice Thomas is making a narrower point about the consistency of *Currin* with *Chadha*, and this point is certainly incorrect: Of course, the decision to deport Chadha was a legislative act, but only because it was performed by the House of Representatives. Everyone agrees that it would have been unambiguously an executive, not a legislative, act if the executive branch had made the same decision. So *Chadha* has no bearing on whether the industry members’ veto in *Currin* is an exercise of legislative power.)

Of course, the D.C. Circuit is required to apply current doctrine on remand, so the delegation to Amtrak is likely to survive under the “intelligible principle” doctrine. Thus, the next step is to “determine whether Amtrak is constitutionally eligible to exercise executive power”—which involves applying constitutional doctrines related

¹²⁰ *Id.* at 1252.

¹²¹ *Id.*

¹²² *Id.* at 1253.

¹²³ See text accompanying notes 51–53, 63–65, *supra*.

¹²⁴ 307 U.S. 533 (1939).

¹²⁵ 462 U.S. 919.

to appointment and removal.¹²⁶ On this point, Justice Thomas refers back to Justice Alito’s concurrence.

2. Evaluating Justice Thomas’s Theory

Does Justice Thomas’s theory have originalist support? Eric Posner and Adrian Vermeule have argued for a drastically different non-delegation doctrine—they call their view the “naïve”¹²⁷ view—that would merely prevent legislators from delegating their formal “authority to vote on federal statutes or to exercise other de jure powers of federal legislators.”¹²⁸ A Congress that allows an agency to make rules isn’t *delegating* its legislative power; it’s *exercising* its legislative power. And an agency that uses this power to make rules isn’t exercising *legislative* power; it’s doing what Congress told it to do, that is, executing the federal statute, that is, exercising *executive* power.¹²⁹

The originalist argument against this naïve view is that the term “legislative power” was understood—for instance, by Locke, Montesquieu, and Blackstone—as meaning “the power to make laws/rules for the governance of society,” not “the power to vote on legislation.”¹³⁰ Thus, when Congress passes such a statute, it’s *both exercising and delegating* legislative power, and when an agency uses the delegated power, it’s exercising *both legislative and executive* power.¹³¹

But why should the Vesting Clause prevent transfers of legislative power, rather than just announcing where the legislative power lies initially?¹³² Justice Thomas doesn’t address this question—he simply assumes that the three Vesting Clauses announce where particular powers should lie forever—but Gary Lawson, one of the leading

¹²⁶ AAR II, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment).

¹²⁷ Posner & Vermeule, *supra* note 5, at 1725–26.

¹²⁸ *Id.* at 1723.

¹²⁹ *Id.* at 1725–26.

¹³⁰ Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1310 (2003); see also AAR II, 135 S. Ct. at 1244 (Thomas, J., concurring in the judgment) (quoting William Blackstone, 1 Commentaries 44).

¹³¹ Alexander & Prakash, *supra* note 130, at 1319.

¹³² See text accompanying notes 3–4, *supra*.

academic defenders of the nondelegation doctrine from an originalist perspective, does.¹³³

Lawson poses the following hypothetical: Suppose Congress passes a Goodness and Niceness Act, where section 1 outlaws any transaction in interstate or foreign commerce not promoting goodness and niceness, and section 2 gives the president the power to define the content of the statute by promulgating regulations.¹³⁴ Section 1 is justified by the Commerce Clause, but section 2 has no support in any congressional power. Section 2 doesn't itself regulate commerce; nor is it justified under the Necessary and Proper Clause unless the delegation is both "necessary" and "proper." Many delegations will prove to be not "necessary"¹³⁵—though for this to have bite, one will have to reconsider the modern scope of necessity, possibly going all the way back to *McCulloch v. Maryland*.¹³⁶ And most delegations will prove to be "improper," where the standard of propriety includes background constitutional principles of limited government (as illustrated by the precise list of congressional functions in Article I) and divided government (in light of the division of functions between Congress and the president).¹³⁷

Lawson thus places the nondelegation doctrine not in the Article I Vesting Clause but rather in the Necessary and Proper Clause as informed by background principles derived from the overall structure of the document; but his analysis supports the basic structure of the doctrine, even if not its precise doctrinal location.¹³⁸

But if a nondelegation doctrine, limiting anyone but Congress's ability to make binding rules of private conduct, can be traced back

¹³³ See Gary Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327 (2002); Gary Lawson, Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine, 73 Geo. Wash. L. Rev. 235 (2005); see also Michael B. Rappaport, The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for *Clinton v. City of New York*, 76 Tul. L. Rev. 265 (2001).

¹³⁴ Lawson, Discretion as Delegation, *supra* note 133, at 238.

¹³⁵ *Id.* at 242–48.

¹³⁶ 17 U.S. (4 Wheat.) 316 (1819); Lawson, Discretion as Delegation, *supra* note 133, at 248 & n.78 (questioning whether *McCulloch* itself is really as broad as later generations have made it out to be).

¹³⁷ Lawson, Discretion as Delegation, *supra* note 133, at 255–67.

¹³⁸ *Id.* at 243–44.

to original meaning, does that mean that the limitation is as extreme as Justice Thomas makes it out to be?

Justice Thomas would allow delegations of power to determine the organization of governmental functions, like the grant to the judiciary to determine its rules of procedure upheld in *Wayman v. Southard*.¹³⁹ He would apparently also allow delegations, even of the power to make binding rules of private conduct, where the power granted by Congress relates closely enough to core executive functions—as, perhaps, in *United States v. Curtiss-Wright Export Corp.*,¹⁴⁰ where the president was given the power to ban arms sales in connection with the Chaco War between Bolivia and Paraguay if he found that it “may contribute to the reestablishment of peace between” the warring countries.¹⁴¹

Justice Thomas would allow delegations of a fact-finding power, like whether France had ceased to violate the neutral commerce of the United States.¹⁴² But even in this category, he holds out the possibility that “fact-finding power” cases like *Field v. Clark* or *J.W. Hampton* were incorrectly decided because they wrongly held that the president was given no discretion.¹⁴³

And in fact, the president certainly held substantial discretionary power in those cases. Modern scholars would be inclined to—correctly—detect discretion and implicit policymaking in most (or all?) fact-finding. Review of formal agency findings of fact under the Administrative Procedure Act,¹⁴⁴ which (roughly speaking) upholds such findings if they could have been made by any reasonable fact finder,¹⁴⁵ has taught us as much, since it recognizes that a broad range of fact-finding can be nonarbitrary. So even most fact-finding delegation should be considered suspect under Justice Thomas’s theory. (Conversely, if we try to get around this by just exempting any fact-finding from the nondelegation doctrine—which Justice

¹³⁹ 23 U.S. (10 Wheat.) 1.

¹⁴⁰ 299 U.S. 304 (1936).

¹⁴¹ *Id.* at 330–31; see also Rappaport, *supra* note 133, at 353–54.

¹⁴² See text accompanying note 114 *supra*.

¹⁴³ AAR II, 135 S. Ct. at 1249 (Thomas, J., concurring in the judgment).

¹⁴⁴ See 5 U.S.C. § 706(2)(A), (E) (2012) (laying out the standard of review for formal agency findings).

¹⁴⁵ See, e.g., *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951); Gary Lawson, *Federal Administrative Law* 473–75 (6th ed. 2013).

Thomas wouldn't do—one can probably recreate a lot of the status quo in more complicated form: Congress will just reenact a lot of statutes in the form of complex conditional legislation.)

It's not just most or all of the administrative state that becomes suspect: What about the executive branch's authority to prosecute someone who violates a statute? Presumably they're just executing the statute, and the prosecutor's authority is to find the fact that a suspect may have violated the various elements of the statute. But this is precisely the sort of discretion-laden fact-finding power that is suspect. The inconsistency of Justice Thomas's theory with basic functions that would have been accepted at the Founding suggests that his theory is too strict.

But this doesn't mean that a slightly less strict theory isn't viable. In Gary Lawson's view, the nondelegation doctrine "permits Congress to grant discretion with respect to matters ancillary to a statutory scheme but forbids grants of discretion on fundamental matters."¹⁴⁶ This sort of ancillary-fundamental distinction is admittedly hard to apply, but it would accommodate reasonable structural concerns about delegation while at the same time giving Congress realistic flexibility and not requiring it to legislate impossibly precisely.

3. Unpacking the Theory of Private Delegation

Justice Thomas grounds the *per se* rule against private delegations not just in *Carter Coal*, but in more fundamental considerations of constitutional structure. It's worth unpacking his structural argument, which turns out to be (only) partially right and broader than just the nondelegation doctrine. He writes:

Although no provision of the Constitution expressly forbids the exercise of governmental power by a private entity, our so-called "private nondelegation doctrine" flows logically from the three Vesting Clauses. Because a private entity is neither Congress, nor the President or one of his agents, nor the Supreme Court or an inferior court established by Congress, the Vesting Clauses would categorically preclude it from exercising the legislative, executive, or judicial powers of the Federal Government. In short, the "private nondelegation doctrine" is merely one application of the provisions of the

¹⁴⁶ Lawson, *Discretion as Delegation*, *supra* note 133, at 266.

Constitution that forbid Congress to allocate power to an ineligible entity, whether governmental or private.

For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power.¹⁴⁷

It's not clear that Justice Thomas's view that Congress may allocate no power outside of the three branches is correct. For instance, federal law incorporates state law quite a lot, from state definitions of spouses and children (for purposes of income taxes or Social Security) to state tort law (for purposes of tort suits against the federal government). By changing their family law or tort law, states can alter one's tax liability and eligibility for federal benefits or expand the scope of the federal government's waiver of its sovereign immunity. Congress has indisputably allocated power to non-federal entities, but it seems inconceivable that dynamically incorporating state law for these sorts of purposes is unconstitutional.

But—ignoring that problem for now—consider the difference between conventional nondelegation doctrine and Justice Thomas's view.

Conventional doctrine agrees that legislative power can never be delegated (though it disagrees with Justice Thomas on what makes a delegation legislative), but the conventional doctrine is based on Article I's Vesting Clause alone—on the principle that Congress can't give up its legislative power.

Here, Justice Thomas is briefly setting forth a complete view of governmental power: each of the three branches is limited to exercising its own distinctive type of power, and no entity outside those branches may exercise any governmental power. A mere Article I-based view would be insufficient to establish that there's a separate doctrine for private delegates. If no one but Congress may establish binding rules of private conduct, what difference should it make whether the maker of such rules is Barack Obama or Bill Gates? Either way, it's a forbidden exercise of legislative power; there's nothing distinctive about the private party.

¹⁴⁷ AAR II, 135 S. Ct. at 1252–53 (Thomas, J., concurring in the judgment).

What's doing the work in ruling out private parties is not Article I, but rather Article II (or, in private adjudicator cases, Article III).¹⁴⁸ Private parties can't exercise any delegated power—even if it's non-legislative, like the power to find facts or make internal governmental rules—because they're not “the President or one of his agents”; that is, they're not part of the executive branch.

In that sense, this discussion resembles Justice Alito's discussion. Recall that Justice Alito (wrongly, in my view) endorsed the private nondelegation doctrine as to the private arbitrator—but then argued that a public arbitrator was likewise invalid because he would exercise significant governmental power without oversight and was thus a principal officer of the United States who must be presidentially appointed with Senate confirmation.¹⁴⁹ It's not an Article I-based theory of how much power Congress can delegate, but an Article II-based theory of who can exercise the delegated power.

But Justice Alito gets the better of this resemblance. Justice Alito was clear: if you're within the executive branch and you exercise significant federal governmental authority, you're an officer, and therefore you need to be properly appointed. Justice Thomas even says so later:

[T]he Court of Appeals must then determine whether Amtrak is constitutionally eligible to exercise executive power. . . .

As noted, Article II of the Constitution vests the executive power in a “President of the United States of America.” Amtrak, of course, is not the President of the United States, but this fact does not immediately disqualify it from the exercise of executive power. Congress may authorize subordinates of the President to exercise such power, so long as they remain subject to Presidential control.

The critical question, then, is whether Amtrak is adequately subject to Presidential control. Our precedents treat appointment and removal powers as the primary devices of executive control, and that should be the starting point of the Court of Appeals' analysis. As Justice Alito's concurrence demonstrates, however, there are other constitutional requirements that the Court of Appeals should also scrutinize

¹⁴⁸ Cf. *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568 (1985) (involving whether a private arbitrator was granted the Article III judicial power).

¹⁴⁹ See text accompanying note 106, *supra*.

in deciding whether Amtrak is constitutionally eligible to exercise the power [the statute] confers on it.¹⁵⁰

But note the possible contrast with what he had written in the previous block quotation: “Because a private entity is . . . [not] the President or one of his agents . . . , the [Article II] Vesting Clause[] would categorically preclude it from exercising the . . . executive . . . power[] of the Federal Government. . . . For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise . . . governmental power.”¹⁵¹

As a matter of first principles, can a private party *never* be part of the executive branch? Can it *never* be an “agent” or “subordinate” of the president? What if a private party goes through the proper appointment process?¹⁵² Would it be categorically impossible for an entity to be appointed, and does it matter whether it’s a Senate confirmation appointment or a vested appointment? Does this have something to do with whether it’s possible for an entity to take an oath? (If an entity can’t take an oath, what if all the employees of the entity took the oath for as long as the entity exercises the power?)

These are interesting questions¹⁵³—I’m inclined to think that there’s nothing wrong in principle with anyone, public or private, being part of the executive branch as long as they’re properly appointed—but Justice Thomas doesn’t address them, so we end up

¹⁵⁰ AAR II, 135 S. Ct. at 1254 (Thomas, J., concurring in the judgment) (citations omitted).

¹⁵¹ *Id.* at 1252–53. See also text accompanying note 148, *supra*.

¹⁵² Under current doctrine, one isn’t an “officer of the United States” subject to the Appointments Clause unless one has a position of “continuing and permanent” employment within the federal government. See *United States v. Hartwell*, 73 U.S. (6 Wall.) 385, 393 (1868); *United States v. Germaine*, 99 U.S. 508, 512 (1879); *Auffmordt v. Hedden*, 137 U.S. 310, 327 (1890). But here we are talking about first principles.

¹⁵³ The status of military contracting, prison privatization, and *qui tam* suits is unclear under some super-strong separation-of-powers views. For discussions of possible Appointments Clause issues surrounding privatization, see, e.g., Paul R. Verkuil, *Outsourcing Sovereignty: Why Privatization of Government Functions Threatens Democracy and What We Can Do About It* 106–13 (2007); Evan Caminker, *The Constitutionality of Qui Tam Actions*, 99 *Yale L.J.* 341, 374–80 (1989); Neil Kinkopf, *Of Devolution, Privatization, and Globalization: Separation of Powers Limits on Congressional Authority to Assign Federal Power to Non-Federal Actors*, 50 *Rutgers L. Rev.* 331 (1998); Jon D. Michaels, *Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War*, 82 *Wash. U. L.Q.* 1001, 1070–73 (2004).

with two theories in tension: (1) private parties can never exercise governmental power because they're not part of the government, and (2) a subordinate of the president can exercise executive power if (among other things) he's properly appointed.

The tension could be easily resolved by *defining* "private" as "not properly appointed"; that works when talking about individuals (if you're properly appointed, you're an officer, otherwise you're just a private person), but this isn't how we typically use the word "private" when talking about entities. A profit-making entity whose shares are traded on the stock market and that isn't a "state actor" for constitutional purposes definitely falls within the generally accepted meaning of "private," so it would be strange to have a *per se* rule against private delegations that *allows* delegations to such an entity if that entity is properly appointed. Certainly defining "private" as "not properly appointed" is not identical to the majority's (and the *Lebron* Court's) list of public-vs.-private factors; one would want to use a word different than "private" to refer to this concept.

Likewise, the tension could be easily resolved by asserting that such a profit-making entity could never be properly appointed under the Appointments Clause, but it's not clear to me that this is correct, and Justice Thomas doesn't engage that question. Indeed, it would seem hard to take this position without begging the question of what it *means* to be private—an issue I've discussed at length elsewhere.¹⁵⁴

The proper answer to Justice Thomas's endorsement of a *per se* rule against private delegations is thus: (1) as discussed earlier, *Carter Coal* doesn't establish such a rule, (2) the private prohibition doesn't follow from Justice Thomas's rule against congressional delegation of the power to make binding rules of private conduct, (3) Justice Thomas's view that Congress may not allocate power outside of the three branches is probably incorrect, and (4) any prohibition against private exercise of executive power flows not from a theory of congressional delegation but from a theory of how the executive branch must be constituted—a theory that need not categorically exclude private actors.

¹⁵⁴ See Alexander Volokh, *Privatization and the Elusive Employee-Contractor Distinction*, 46 U.C. Davis L. Rev. 133 (2012).

VI. Conclusion

In the end, *DOT v. Ass'n of American Railroads* is unlikely to have much direct effect. Its decision is the narrowest, most fact-based, most Amtrak-specific decision one could imagine. Its significance lies in what one can divine of the Court's thinking by reading between the lines.

As to Justices Alito and Thomas, not much divining is necessary, since they were considerate enough to tell us their thinking. Unlike Justices Alito and Thomas, the majority neither endorsed nor rejected the D.C. Circuit's *Carter Coal*-based private nondelegation theory. But some language from Chief Justice Roberts's dissent in *Wellness International Network, Ltd. v. Sharif*, a separation-of-powers opinion issued two months later, might give us a clue as to the thinking of some of the other justices. This part of his opinion was joined only by Justice Scalia:

It is a fundamental principle that no branch of government can delegate its constitutional functions to an actor who lacks authority to exercise those functions. See *Whitman v. American Trucking Ass'ns*; *Carter v. Carter Coal Co.* Such delegations threaten liberty and thwart accountability by empowering entities that lack the structural protections the Framers carefully devised. See *DOT v. Ass'n of American Railroads* (Alito, J., concurring); *id.* (Thomas, J., concurring in the judgment); *Mistretta v. United States* (Scalia, J., dissenting).¹⁵⁵

So perhaps there is at least a substantial minority that accepts the D.C. Circuit's theory. The reference to Justice Scalia's dissent in *Mistretta*¹⁵⁶ suggests even another possible (though related) theory: that "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action," and that lawmaking is thus "ancillary to" the executive and judicial branch's exercise of their powers.¹⁵⁷ Delegation should thus, in Justice Scalia's view, be considered per se invalid when the recipient of the delegation has no proper executive or judicial powers—as the Sentencing Commission in *Mistretta*. Here, it would be Amtrak, though perhaps one might say that

¹⁵⁵ *Wellness Int'l Network, Ltd. v. Sharif*, 135 S. Ct. 1932, 1957–58 (2015) (Roberts, C.J., dissenting) (citations altered or omitted).

¹⁵⁶ 488 U.S. at 417–22 (Scalia, J., dissenting).

¹⁵⁷ *Id.* at 417.

Amtrak is exercising the executive function of helping to enforce the statutory requirement that private trains yield to Amtrak trains. Whether that executive power is properly exercised now becomes a question for other constitutional provisions like the Appointments Clause—which could make this theory, in the end, much like Justice Alito’s.

Even as to the Amtrak case, the resolution is quite limited: the Court has reversed the D.C. Circuit’s finding as to Amtrak’s public-private nature, while keeping its private nondelegation theory alive for possible use in re-invalidating the scheme based on the arbitrator provision. As Justice Alito points out, the scheme may yet be invalidated on a host of separation-of-powers grounds. And there remains my own favorite, the due process theory: the fundamental unfairness of putting the regulation of an industry in the hands of an entity that has a profit-making interest in the outcome of the regulation.