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**An Internationally Intelligible Principle:
Comparing the Nondelegation Doctrine in the
United States and European Union**

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Abstract

This article analyzes the degree of convergence between the United States and the European Union regarding the structural role of administrative agencies. As will be argued, the United States and European Union have arrived at the same broad conclusion about a “nondelegation doctrine”: delegations to administrative agencies should be permitted so long as some limiting principle governs the exercise of that power and allows for sufficient judicial review. However, the Supreme Court has taken a more permissive approach than the Court of Justice in defining the limiting principle. The United States has loosened the reins for the sake of modern administration while the European Union has maintained a firmer grip to keep better control over the Europeanization project. Stated another way, the nondelegation doctrine is simply a reflection of the systems’ relative levels of integration. Thus, the nondelegation doctrine will be stretched in Europe as functional regulatory demands arise from wider and deeper integration. At the same time, the focus will be redirected from substantive limits to procedural controls; accordingly, this Note advocates for a European Administrative Procedure Act.

Key-words

Nondelegation doctrine, separation of powers, intelligible principle, administrative agencies, Meroni



1. Introduction

“[I]n our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”^I So stated the Supreme Court in *Mistretta v. United States* (1989) in upholding Congress’s delegation of authority to the United States Sentencing Commission to promulgate federal sentencing guidelines.

Mistretta follows a long history of delegations surviving the nondelegation doctrine.^{II} According to the purest form of this doctrine, Congress cannot delegate its legislative authority to another branch.^{III} While the doctrine has been cited in judicial reasoning from time to time, it has not functioned to invalidate a statutory delegation since 1936.^{IV} In fact, so long as Congress has provided an “intelligible principle” to guide agency action, a delegation will survive under the doctrine.^V

Similarly, the Court of Justice of the European Union (“Court of Justice”) has enunciated its own version of a nondelegation doctrine. As early as 1958, the Court of Justice made it clear that delegations that confer clearly defined powers governed by objective criteria allowing for appropriate judicial review will be upheld.^{VI} Though the European Union differs structurally from the United States, the similarity of the two nondelegation doctrines implies some level of congruence in how courts assess delegated powers.

This Note shall analyze, through comparative study, the degree of convergence between the two systems as regards the structural role of administrative agencies. The nondelegation doctrine will serve as the lens through which to view this role. As will be argued, the United States and European Union have arrived at the same broad conclusion about the nondelegation doctrine: delegations should be permitted so long as some limiting principle governs the exercise of that power and allows for sufficient judicial review.

However, while both systems allow delegations of power to agencies, the Supreme Court has taken a decidedly more permissive approach than the Court of Justice in defining the limiting principle. In the United States, the functional needs of the modern regulatory state have come to trump concerns for overly broad exercises of power by subsidiary bodies. Meanwhile, E.U. nondelegation doctrine has depended more heavily on the process



of European integration. The E.U. judiciary has clung to a narrower vision of delegation as a way of protecting an institutional balance within the Union. In sum, though the two systems have rejected a strict nondelegation doctrine, the United States has loosened the reins for the sake of modern administration while the European Union has maintained a firmer grip to keep better control over the Europeanization project.

Yet, stated another way, the key issue remains the same; the nondelegation doctrine is simply a reflection of the systems' relative levels of integration, with the United States composing a true federal union and the European Union blending elements of supranationalism and intergovernmentalism. Thus, if the U.S. experience can provide any foreshadowing of things to come in the E.U. context, the nondelegation doctrine will be stretched as functional regulatory demands arise from wider and deeper European integration. At the same time, the focus will be redirected from substantive limits to procedural controls; accordingly, this Note advocates for a European version of the Administrative Procedure Act (A.P.A.).

To present this argument, Part II will briefly describe the constitutional structures within which the nondelegation doctrine operates in the United States and European Union. Part III will detail the state of American nondelegation doctrine, while Part IV will present the European Union version. Part V will delve deeper into a comparative analysis of the two approaches to nondelegation. This analysis will tackle to what extent the nondelegation approaches represent a convergence or divergence. Moreover, the analysis will attempt to reconcile the difference in U.S. and E.U. constitutional structures vis-à-vis the nondelegation doctrine. This will entail a broader discussion about the “federalizing” of the European Union. Afterwards, Part VI will consider counterarguments, primarily those favoring a strong nondelegation doctrine on normative grounds. Lastly, Part VII offers policy recommendations on how to remedy the potential accountability gap created through permissive delegations.

2. Background: Constitutional Structures in the U.S. and E.U. contexts

Any comparative analysis involving the United States and European Union necessitates an overview of their divergent constitutional structures. The United States is a federal republic with powers divided between the federal and state levels.^{vii} The federal



Constitution divides powers among three branches of government: executive (formally vested in the President, but in practice exercised by administrative departments and agencies), legislative (bicameral, directly-elected representation through the Senate and House of Representatives, jointly referred to as Congress), and judicial (composed of the Supreme Court and lower federal courts).^{VIII} For the purposes of the nondelegation doctrine, the typical pattern entails a transfer of legislative authority from Congress to administrative agencies in the executive branch, with the courts supervising the legitimacy of these delegations.^{IX}

By contrast, the European Union represents a partly-supranational, partly-intergovernmental entity comprising twenty-eight Member States.^X While the European Union has been referred to as *sui generis*,^{XI} it bears certain structural similarities to the United States.^{XII} The European Commission (“Commission”) exercises the executive powers of the European Union and is tasked with proposing and implementing E.U. legislation, enforcing E.U. Treaty and secondary law, and managing the overall administration of E.U. programs.^{XIII} Like the U.S. bicameral legislature, the Council of the European Union (“Council”) and the European Parliament (“Parliament”) share E.U. legislative powers, typically deciding upon legislation through co-decision.^{XIV} The Council is composed of national ministers organized into policy-area groupings, while the Parliament is a legislature of directly elected representatives from each Member State.^{XV} The E.U. judiciary has a first-instance level of review through the General Court and a “supreme court” through the Court of Justice.^{XVI} Lastly, the European Council, composed of the heads of state or government of all E.U. Member States, plays an agenda-setting role in determining the overall direction of E.U. integration.^{XVII}

3. Nondelegation in the United States

Nondelegation has been present in American jurisprudence since the early nineteenth century. In *Wayman v. Southard* (1825), the Court addressed whether Congress could delegate the power to set rules regulating judicial proceedings to the courts themselves.^{XVIII} The Court concluded that while Congress cannot delegate “strictly and exclusively legislative [powers],” it can delegate “powers which the legislature may rightfully exercise



itself.”^{XXIX} Specifically, the Court distinguished between (but did not define) exclusive powers and delegable “details”:

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

Thus, although the Court acknowledged the intellectual foundation for a nondelegation theory, it did not resolve the precise contours of its operation.^{XXI}

The doctrine did not resurface until 1892 in *Field v. Clark*.^{XXII} In *Field*, importers challenged the Tariff Act of 1890, which in part required the President to suspend provisions of the Act permitting free trade reciprocity and levy duties upon finding that a foreign nation imposed tariffs on certain goods.^{XXIII} The importers argued that the statute impermissibly delegated legislative authority to the President.^{XXIV} The Court did not view the statutory delegation in this case as a transfer of legislative authority; rather, since the legislation premised presidential action upon a congressionally defined condition precedent, the President exercised executive power when suspending the provision.^{XXV} Yet, the Court stated that the fact that Congress “cannot delegate legislative power to the president is universally recognized as vital to the integrity and maintenance of the system of government ordained by the [C]onstitution.”^{XXVI} The Court provided a slightly more substantive outline of the doctrine than the *Wayman* court, distinguishing between “the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law.”^{XXVII} At the same time, the Court seemed to undercut its nascent doctrine by carving out an exception for foreign affairs powers whereby the President should have broad authority to conduct trade policy.^{XXVIII} The immediate exception-making premised on important policy grounds foreshadowed later developments of the doctrine resulting in permissive delegations.

The modern nondelegation test derives from *J. W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928). As in *Field*, the Court in *Hampton* faced a constitutional challenge by importers to a presidential proclamation raising duties pursuant to the Tariff Act (this time, the 1922 Act).^{XXIX} However, *Hampton* differed from *Field* in two respects. First, the statute



added an agency layer between the President and Congress; it premised the President's authority to issue the proclamation on an investigation and report issued by the United States Tariff Commission detailing production cost differences.^{xxx} Second, the Court enunciated an "intelligible principle" test to outline the contours of the nondelegation doctrine left unaddressed by the *Wayman* decision: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized . . . is directed to conform, such legislative action is not a forbidden delegation of legislative power."^{xxxi} This delegation should be informed by "common sense and the inherent necessities of the governmental co-ordination."^{xxxii} Importantly, the Court recognized that were Congress able to regulate tariffs under its commerce powers, but unable to delegate rate-making to another body, the power would be rendered a nullity in practice.^{xxxiii} As such, the Court opened the door to a permissive nondelegation doctrine, flexible according to the evolving policy needs of government.

Less than a decade after *Hampton*, following the Great Depression and in the midst of New Deal government expansion, the Court for the first and only time held delegations invalid under the nondelegation doctrine in three cases between 1935 and 1936.^{xxxiv} In *Panama Refining Co. v. Ryan* (1935), the Court held that section 9(c) of the National Industrial Recovery Act of 1933 ("NIRA"), which authorized the President to prohibit the transportation of petroleum in excess of state quotas, represented an unconstitutional delegation of legislative power.^{xxxv} First, the Court characterized the delegation as an unqualified and unlimited grant of legislative policymaking to the President lacking any discernible criteria.^{xxxvi} Second, the Court reviewed its nondelegation jurisprudence (which had upheld the delegation in every instance) and concluded that the cases collectively stood for the proposition that "there are limits of delegation which there is no constitutional authority to transcend."^{xxxvii} In dissent, Justice Cardozo found adequate standards to guide executive action, stemming largely from a combination of the statement-of-policy section of NIRA and statutory canons of construction (constitutional avoidance and structural reading of the statute).^{xxxviii} Cardozo emphasized the need for permissive delegation given modern governance: "In the complex life of to-day, the business of government could not go on without the delegation, in greater or less degree, of the power to adapt the rule to the swiftly moving facts."^{xxxix}



In *A.L.A. Schechter Poultry Corp. v. United States* (1935), the Court invalidated another NIRA delegation to the President, which allowed him to approve industry-developed fair competition codes, impose additional conditions, or prescribe his own code.^{XLI} After rejecting the importance of exigent circumstances (i.e., the Great Depression) in constitutional analysis,^{XLI} the Court declared that NIRA did not adequately constrain the President's authority; rather, it granted him "unfettered discretion to make whatever laws he [thought] may be needed or advisable for the rehabilitation and expansion of trade or industry."^{XLII} According to the Court, the ability to make fair competition codes without controlling standards from Congress crossed the line of unconstitutional delegation.^{XLIII}

Lastly, in *Carter v. Carter Coal Co.* (1936), the Court found an unlawful delegation of legislative power under the Bituminous Coal Conservation Act of 1935 to private industry groups who were permitted to regulate wages and hours.^{XLIV} For the Court, the grant of authority to private parties represented a "legislative delegation in its most obnoxious form."^{XLV} Unlike *Panama Refining* and *Schechter*, *Carter* provides virtually no analytical support beyond its conclusory rejection of delegations to private parties.^{XLVI}

Following the trilogy of strict nondelegation applications, the Court immediately began to loosen its approach. In late 1936, the same year as the *Carter* decision, the Court decided *United States v. Curtiss-Wright Export Corp.*^{XLVII} While the case carries particular weight as a statement of presidential power in national security and foreign affairs,^{XLVIII} it also offers insight into the limits of the nondelegation doctrine. In upholding a delegation to the President to impose an arms embargo if he found that it would contribute to the peaceful resolution of the Chaco War, the Court recognized a distinction between international and internal affairs:

It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.^{XLIX}

Curtiss-Wright initiated an as-of-yet unbroken chain of judicially-affirmed delegations.^L Notably, with world war providing a context for enhanced legal realism, the Court in *Yakus*



v. United States transformed its analysis into a more permissive review for “absence of standards.”^{LI}

The *Mistretta* case exemplifies the modern trend in favor of permissive delegations. In *Mistretta*, the Court upheld a delegation to an independent agency within the judicial branch, the United States Sentencing Commission, authorizing it to formulate sentencing guidelines with a continuing obligation to periodically review and revise the standards.^{LI} Citing *Field* and *Hampton*, the Court concluded that while the nondelegation doctrine stems from separation of powers principles, the complexity of modern governance necessitates broad delegation to coordinate governmental branches.^{LI} A delegation will be “constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of this delegated authority.”^{LIV} The Court also favorably cited the “absence of standards” iteration of its nondelegation approach.^{LV} Thus, *Mistretta* confirmed the suitability of extremely broad delegation whereby Congress need only specify the agency, a policy goal, and some reviewable outer limit.

Aside from *Mistretta*, the quintessential representation of the modern U.S. approach to nondelegation is *Whitman v. American Trucking Associations* (2001).^{LVI} The Clean Air Act requires the Environmental Protection Agency (“EPA”) to promulgate rules for air pollutants and empowers the EPA Administrator to revise the standards every five years.^{LVII} American Trucking Associations challenged the EPA’s national ambient air quality standards for particulate matter and ozone.^{LVIII} Interestingly, the D.C. Circuit held that the EPA failed to articulate an intelligible principle to guide its agency action.^{LIX} On appeal, the Court disagreed.^{LX} The Court noted that nondelegation analysis applies solely to Congress’s statutory delegation, not to an agency’s interpretation of the statute.^{LXI} Moreover, in reviewing its nondelegation jurisprudence, the Court concluded that it has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”^{LXII} Ultimately, the Court reaffirmed the appropriateness of *Hampton*’s intelligible principle test and acknowledged a wide margin of discretion for delegations.^{LXIII} However, the Court harkened back to *Wayman*’s important subjects-details distinction, qualifying the intelligible principle test with degrees of requisite congressional guidance based upon the scope of the delegation.^{LXIV} This represents a subtle step backward for the permissive nondelegation doctrine, one which should not be followed going forward.



4. Nondelegation in the European Union

Nondelegation has been a concern in the European Union since its inception. In 1958, the Court of Justice decided *Meroni v. High Authority*.^{LXV} Meroni, an Italian steel company, sought annulment of a High Authority (now the Commission) decision that required the company to pay into a price stabilization system for ferrous scrap metal.^{LXVI} The High Authority delegated the regulation of this system to an independent agency established under Belgian private law, the Imported Ferrous Scrap Equalization Fund.^{LXVII} The court found that the High Authority had in fact delegated powers since the Fund fully administered the system and retained the power to collect payments; the High Authority would only intervene upon the Fund's request (which occurred in this case).^{LXVIII} As to the lawfulness of the delegation, the court held that the High Authority could not delegate power that it could not exercise itself under the Treaty because that would lead to an agency potentially holding powers more extensive than the delegating authority.^{LXIX} The court further concluded that an agency's use of its own powers had to derive from an express delegation and be "subject to precise rules" to enable judicial review.^{LXX} Yet, the court held that the High Authority, as a matter of right stemming from its Treaty powers, could delegate authority to another body so long as it found a delegation necessary and compatible with the Treaty, retained a supervisory role, and laid down conditions to govern the authority.^{LXXI} Such conditions could not, however, leave a "wide margin of discretion" to the body:

The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.^{LXXII}

Thus, according to the *Meroni* doctrine, a subordinate body can exercise only clearly



defined powers supervised by the delegating authority that do not entail actual policy decisions.

The *Meroni* doctrine exists alongside a further limitation on delegated powers enunciated in the *Romano* judgment. *Romano* concerned an Italian citizen living in Belgium whose Belgian pension was reduced, pursuant to Belgian law, based upon receipt of an Italian pension.^{LXXIII} *Romano* challenged the exchange rate used to calculate the reduction, which Belgian authorities derived from a decision of the Administrative Commission on Social Security for Migrant Workers, a subordinate body of the European Commission.^{LXXIV} The Council of Ministers (now the Council) had delegated to the Administrative Commission the power to set the date determining the applicable exchange rate.^{LXXV} In a preliminary ruling,^{LXXVI} the Court of Justice held that “a body such as the Administrative Commission may not be empowered by the Council to adopt acts having the force of law.”^{LXXVII} The court premised its conclusion on both the powers of the Commission and the Community judicial system.^{LXXVIII} Therefore, as reflected in *Meroni* and *Romano*, the Court of Justice viewed the sufficiency of judicial review as an essential component of valid delegations.^{LXXIX}

Recently, the Court of Justice had the opportunity to revisit the two doctrines in *United Kingdom v. Parliament and Council*. In November 2010, following the 2007-08 financial crisis, the E.U. legislature passed Regulation 1095/2010 establishing the European Securities and Markets Authority (“E.S.M.A.”).^{LXXX} E.S.M.A. possesses distinct legal personality, meaning it is an independent E.U.-level agency constituted under E.U. public law.^{LXXXI} However, it is accountable to the Parliament and Council.^{LXXXII} In March 2012, Regulation 236/2012 granted E.S.M.A. authority to, *inter alia*, outlaw “short-selling” and related financial transactions.^{LXXXIII} The United Kingdom challenged this power on a number of grounds, including impermissible delegation.^{LXXXIV} The court first distinguished the facts of *Meroni*, noting that the body in *Meroni* was a private-law entity endowed with a wide margin of discretion; in this case, the E.U. legislature created E.S.M.A. as an E.U. entity under E.U. law with certain conditions and limiting criteria.^{LXXXV} This led the court to conclude that the delegation to E.S.M.A. fell within the permissible “clearly defined powers” category of *Meroni* which enabled sufficient judicial review.^{LXXXVI} The court proceeded to clarify that the *Romano* judgment did not add anything analytically to the *Meroni* doctrine as regards delegated powers to entities like E.S.M.A.; while E.S.M.A. must adopt generally applicable



measures, seemingly in contravention of *Romano*, the Treaty of Lisbon specifically contemplates E.U. bodies taking acts of general application.^{LXXXVII} As such, the court seemed to overrule *Romano* insofar as E.U. agencies are concerned.^{LXXXVIII} Similarly, the court rejected the argument that Articles 290 and 291 of the Treaty on the Functioning of the European Union (“TFEU”) represent a “closed system” for delegating powers to the Commission and thereby preclude delegations to other E.U. bodies.^{LXXXIX} Though the Treaty of Lisbon does not explicitly address delegations to agencies, the provisions concerning judicial review implicitly recognize the possibility.^{XC} The court placed E.S.M.A.’s power in context, stating that E.S.M.A. possessed the expertise necessary to deal with threats to the Union’s financial stability and accordingly must be able to temporarily restrict short sales.^{XCI} Lastly, the court asserted that the E.U. legislature enjoys discretion in delegating the power to implement harmonizing measures, especially “where the measures to be adopted are dependent on specific professional and technical expertise and the ability of such a body to respond swiftly and appropriately.”^{XCII}

5. Analysis

With *Whitman* and *Parliament and Council* representing the current state of the nondelegation doctrine in the United States and European Union, respectively, it is possible to identify areas of convergence and divergence. First, simply put, each system has formulated a nondelegation doctrine. The courts have taken it upon themselves, as guardians of their constitutional documents, to craft a judicially cognizable standard for adjudging the proper roles of governmental branches.^{XCIII} The very presence of a nondelegation doctrine in both systems implies a fundamental concern with upholding the structural integrity of the constitutional system. Accordingly, at its core, the nondelegation doctrine “is rooted in the principle of separation of powers”^{XCIV}

Notably, both systems have rejected the nondelegation doctrine in its strictest sense, quashing any suggestion that the legislature cannot delegate legislative powers in some form to another body. Even the *Meroni* doctrine, arguably more rigid a test than any iteration of the U.S. nondelegation doctrine, looks and acts more like a clear statement rule than a grand prohibition on delegated power: so long as the legislature expressly delegates the power and in doing so specifically outlines the content and scope of the delegation, the



court will likely uphold the delegation.^{XCv} Viewed in this light, the *Meroni* doctrine seems to fit the pattern of “nondelegation canons” described by Cass Sunstein.^{XCvI} Moreover, this rejection of a “strong” nondelegation doctrine reflects the fact that a total prohibition on delegation is “unworkable.”^{XCvII} Whether for reasons of legislative imprecision, lack of technical expertise, or acknowledging the inherent policy-setting roles imbued in executive and judicial functions, the legislature must possess enough leeway to delegate some degree of legislative power; the debate is in defining that degree.^{XCvIII}

Relatedly, courts in both systems have premised their nondelegation doctrines partly on the sufficiency on judicial review. The concern for the Community judicial system permeates the *Meroni*, *Romano*, and *Parliament and Council* judgments. In particular, the court’s central distinction in *Meroni* between “clearly defined executive powers” and “discretionary powers” rested on the delegation’s amenability to judicial review for overly broad policymaking authority.^{XCIX} In fact, the distinction drawn in *Field* between policymaking discretion and executive authority closely tracks the key language in *Meroni*.^C Moreover, the Court in *Whitman* emphasized the role of the courts in assessing the validity of delegations under the intelligible principle standard.^{CI} As such, judicial attention to the balance of powers issues in nondelegation cases shows as much concern with judicial power as with ensuring a legislative-executive separation.

Likewise, both systems’ courts have justified their nondelegation doctrine to some extent on the necessities of modern governance. In *Hampton*, *Mistretta*, and Justice Cardozo’s dissent in *Panama Refining*, the Court has explicitly grounded its permissive approach to nondelegation in the intricacies of, in the words of Justice Blackmun, “our increasingly complex society, replete with ever changing and more technical problems.”^{CI} The Court of Justice acknowledged this basis in *Parliament and Council*, stressing the need to act quickly with appropriate technical expertise in situations that could destabilize the E.U. system, such as the financial crisis.^{CI} Interestingly, this “first responder” approach to administrative law echoes Justice Cardozo’s sentiments in *Panama Refining*, in the midst of the Great Depression.^{CI} Thus, taking a permissive approach to nondelegation serves the crucial purpose of enabling a flexible governmental approach to problem-solving.

On the other hand, the United States and the European Union operate under different institutional designs. The glaring difference between the U.S. and E.U. systems in this regard relates to their constitutional documents. While U.S. courts have read the



nondelegation limitation into the text of the Constitution, the TFEU expressly lays out the terms and conditions of certain delegations. Article 290 TFEU requires that the legislative act (most likely passed through co-decision of the Council and Parliament) explicitly define the “objectives, content, scope and duration” of the delegation as well as any conditions placed upon it.^{CV} Moreover, the Article makes a distinction between “essential elements of an area,” which are reserved for the E.U. legislature and cannot be delegated, and “non-legislative acts of general application to supplement or amend certain non-essential elements,” which the Commission may pursue through delegated power.^{CVI} Like the similar language distinguishing discretionary and clearly-defined powers in *Meroni* and *Field*, the TFEU language here bears a striking resemblance to *Wayman*’s distinction between “important subjects” and “details.”^{CVII} Thus, some delegations in the E.U. system, specifically those powers given to the Commission, fall under express Treaty regulation.

After the Court of Justice’s holding in *Parliament and Council*, that Articles 290 and 291 do not define the full range of allowable delegations,^{CVIII} E.U. agencies can be the beneficiaries of a delegation from the Council and Parliament. This sort of judicial gloss on the E.U.’s constitutional document echoes the Supreme Court’s structural reading of legislative powers in U.S. nondelegation cases.^{CIX} In practical terms, Article 290 and *Meroni* impose similar requirements on delegations: explicit statements of delegated authority subject to certain conditions and limiting criteria.^{CX} Considered alongside the broad “intelligible principle” standard in U.S. courts, the E.U. standard for delegations certainly seems more stringent.^{CXI}

However, this stringency may be explained with reference to institutional dynamics. In Congress, both the House of Representatives and the Senate are directly elected, and the executive branch acts as the hub for implementing law.^{CXII} The European Union has not reached the same high level of integrated federalism. While the Parliament derives from Europe-wide democratic elections,^{CXIII} the Member State ministers who compose the Council represent state interests pursuant to their national ministerial appointment.^{CXIV} Moreover, the Commission does not mirror the U.S. executive branch in form or substance. Because of the E.U.’s federal nature,^{CXV} embodying dual competencies with dual governance structures, implementation of E.U. legislative acts primarily occurs at the Member State level; granting delegated authority to E.U. agencies thus “Europeanizes” a power the relevant national authorities currently exercise.^{CXVI} Additionally, the Commission



drafts and proposes laws,^{CXVII} functions carried out by Congress in the U.S. context.^{CXVIII} In the aggregate, these different designs create different perceived needs for a stricter or looser nondelegation doctrine.

However, because the constitutional documents in both systems do not provide a framework for agency creation or authority, agencies are creatures of statute.^{CXIX} The statutory nature of agencies results in another intriguing divergence: while in the United States Congress proposes and passes legislation subject only to presidential veto, in the European Union the Treaties split those functions between the Commission as initiator and the Council and Parliament as co-legislators.^{CXX} Thus, the executive suggests the formation of new E.U. public agencies, an exercise of power reserved to the legislature in the United States. This gives the Commission greater control over the ultimate regulatory direction of the European Union.

Like their constitutionally enumerated counterparts, agencies in the two systems share other structural convergences and divergences. In the United States, agencies exist almost exclusively as a constitutional matter within the executive branch.^{CXXI} Yet, “independent” agencies in the U.S. context, while composing a *de facto* fourth branch of government,^{CXXII} exhibit various traits that functionally separate them from the executive, such as limits on presidential authority to remove agency heads.^{CXXIII} In the European Union, aside from a handful of bodies providing direct support to Commission-managed programs, agencies maintain total institutional separation from the Commission; the vast majority exists as structurally-independent “decentralized agencies.”^{CXXIV} To illustrate, while the EPA (the agency in *Whitman*) is an “independent” agency whose administrator serves at the pleasure of the President,^{CXXV} E.S.M.A. (the agency in *Parliament and Council*) resides completely outside of the Commission and is led by an independent Board of Supervisors.^{CXXVI} However, when E.U. legislation delegates implementation powers to the Commission, delegations operate within the institutional quirk of the committee procedure, also known as comitology.^{CXXVII} Through this procedure, representatives from the Member States directly assist the Commission in implementing E.U. law.^{CXXVIII} Recently, pursuant to Article 291 TFEU, Regulation 182/2011 set down rules governing this procedure, including guidelines for when a committee seeks to adopt “acts of general scope.”^{CXXIX} Moreover, Article 11 of the Regulation allows the Parliament and Council to intervene when they feel that a draft implementing act exceeds the implementing power in the



legislation.^{CXXX} This synergistic relationship between the E.U.'s supranational and intergovernmental elements permits a type of quasi-legislative functionalism that could not occur in the U.S. executive branch. The presence of this institutional structure also helps explain why the European Union has not generally resorted to creating independent agencies for regulatory purposes.

Whether independence carries a connotation of neutrality versus structural separateness impacts other considerations in the nondelegation analysis, such as accountability and democratic legitimacy. In the U.S. context, each governmental branch serves as a potential check on agency power. Congress enables (or later amends or revokes) the delegation, defines its scope, and subsequently exercises budgetary and oversight roles; the President can veto the delegation, exert the inherent political capital of the presidency to informally influence agency action, and may remove the agency head where the agency organization allows (as is the case with the EPA); the courts review the delegation itself as well as the agency's exercise of that power under the Constitution, enabling statute, regulations, and the federal A.P.A.^{CXXXI} Since agency enabling statutes presuppose an act of Congress, the democratic legitimacy of agencies stems from the legislature. Likewise, independent E.U. agencies derive democratic legitimacy from the legislative participation of the European Parliament. Moreover, the Court of Justice has authority under the TFEU to review the legality of agency acts.^{CXXXII} As such, while agencies in both systems possess characteristics of functional independence, this institutional separation does not equal unaccountability.

These considerations beg the question: Who is the court protecting by enforcing a nondelegation doctrine? The legislature has made a policy choice, and sometimes that choice is to grant a large degree of discretion to technical experts. As Thomas Merrill has argued, “[g]iven the realities of modern government, Congress is better suited to answer questions about which institution should make policy than it is to make policy itself.”^{CXXXIII} Agencies in this sense do not usurp a power; the legislature serves as a willing donor, with agencies embodying able receivers. As such, if separation of powers drives the doctrine, the court can only be trying to protect the legislature from itself—which unnecessarily interferes with the legislature's policymaking prerogative. If the anxiety revolves around the elected legislature legislating itself out of existence and handing it over to unelected bureaucrats, then the abovementioned points of accountability negate such concerns. Since directly elected representatives, whether the President or Congress, exercise a number of



oversight roles (including the ability to disenable the agency), the People ultimately control the agency.

Perhaps this is why, aside from the “local aberration” of invalidations between 1935 and 1936, the Court has consistently reaffirmed delegations of legislative power.^{CXXXIV} The United States has instead taken a pragmatic approach to delegation, informed by the complications arising out of modern governance.^{CXXXV} A flexible doctrine accommodating such modern governance challenges derives in part from a basic insight of the law of agency: the principal often grants authority to the agent in terms of broad goals rather than enumerated commands.^{CXXXVI} In addition, after the “local aberration” period, “[t]he New Deal had become so well-established that comporting with ‘the requirements of the administrative process’ had itself become a justification for legislative delegations.”^{CXXXVII} With courts recognizing that agencies should be able to possess broad authority to regulate the substance of congressional policy, the legislative role has shifted to procedural and institutional specification.^{CXXXVIII} The key point is that under this arrangement Congress decides how best to achieve its policy objectives.

While the Court of Justice applied the *Meroni* criteria to E.S.M.A., an E.U. agency,^{CXXXIX} it broadly paved the way for agency delegation, premised on the notion that delegations to agencies must be placed in their proper legal, institutional, and social context.^{CXL} Consequently, some commentators argue that the *Meroni* doctrine has become increasingly weakened in practice.^{CXLI} In fact, whereas there were no E.U.-level agencies at the time of *Meroni*, there are now forty.^{CXLII} These agencies have emerged in waves at key points in the E.U. integration process.^{CXLIII} With the significantly increased workload and variety of new tasks resulting from enlargement in particular, there was an obvious need for the creation of new European administrative bodies, particularly to unburden the European Commission.^{CXLIV} Therefore, with the Court of Justice recognizing the modern administrative need for agency delegation, one should expect that the strict *Meroni* doctrine will loosen as the European Union faces growing regulatory challenges. While the Court of Justice in *Parliament and Council* missed an opportunity to eject the formal *Meroni* language, the fact that it still upheld E.S.M.A.’s power to heavily interfere in financial markets shows how little practical significance the *Meroni* approach retains.

In sum, while the United States and European Union have come to allow for varying degrees of delegation in spite of a stated nondelegation doctrine, the form of their



nondelegation doctrines reflect their respective levels of integration at a given moment in time. Supposing that E.U. federalism continues to look more and more like U.S. federalism, one should similarly expect E.U. administrative law to mirror the state of American administrative law. This leads to one probable outcome in particular: decreasing judicial interference in the *substance* of delegation, increasing judicial interference in *processes* governing agency action. A process-oriented oversight structure acknowledges the legislative prerogative to solve problems in whatever way the legislature feels appropriate while subjecting agency action to some form of accountability. The United States shifted toward process-oriented control through the A.P.A. in 1946, intending to structure judicial review of agency action and provide individuals with procedural rights and means of redress in their interactions with the administrative state.^{CXLV} A European corollary to the A.P.A. would harmonize the currently fragmented system of procedural protections set out in E.U. secondary law, thereby creating a standardized and easily comprehensible check on arbitrary agency action.^{CXLVI} Earlier commentary expressing hesitation about an E.U. A.P.A. due to a lack of hierarchical control^{CXLVII} is increasingly unpersuasive with the ascent of the Parliament's powers as a co-legislator. As E.U. agencies gain greater regulatory powers (like those possessed by E.S.M.A.), an E.U. A.P.A. would help ameliorate a perceived 'democratic deficit' and make agencies more accountable.^{CXLVIII}

6. Counterarguments

This Note has presented a comparative analysis of the nondelegation doctrine in the United States and European Union, broadly concluding that while both systems apply it with varying degrees of permissiveness, the doctrine must be placed into its historical and structural context to fully understand its contours. Before offering recommendations on the best way forward, it is necessary to address two likely retorts to this analysis. First, some commentators argue in favor of a strict nondelegation doctrine on formalistic, normative grounds.^{CXLIX} Typically, proponents of this view point to the text of the Constitution, specifically Article I, Section I,^{CL} for the proposition that "legislative power" cannot be delegated.^{CLI} They see the nondelegation doctrine as a guardian of constitutional sanctity, preventing violations of the separation of powers enshrined in the Constitution's text.^{CLII} While a debate about the pros and cons of formal versus functional approaches to



legal analysis is beyond the scope of this Note, the argument proposed herein adopts an unambiguously functional approach. Functionalism accords with this Note's core conclusion that the nondelegation doctrine is contextual, with each version rooted in the pragmatic needs of the particular governance system (for the United States, a modern administrative state; for the European Union, the appropriate level of integration).

Second, as with any comparative study, one could assail the comparison as an apples-to-oranges problem. However, as laid out in Part II, the two systems share an increasingly similar federal structure.^{CLIII} This constitutional convergence facilitates an interesting comparative perspective on the ways in which the nondelegation doctrines in the two systems meet and depart. The similarities and dissimilarities of each version of the doctrine encapsulate the very context this Note has sought to draw out.

7. Conclusions and Policy Recommendations

As it stands, the E.U. delegation framework looks a lot like the early days of American nondelegation jurisprudence. Despite the Court of Justice opening the door to agency delegation and essentially overruling the *Romano* doctrine in *Parliament and Council*, the court's application of *Meroni* (to a Union agency no less) illustrates that the nondelegation doctrine still formally operates. However, it is only a matter of time before the Court of Justice will have to loosen its nondelegation language.^{CLIV} Judicial review does not hold the same weight anymore as a suitable justification for the strictness of *Meroni* given that the TFEU unambiguously allows the Court of Justice to hear cases dealing with E.U.-level agency acts.^{CLV} Furthermore, strict application of the *Meroni* doctrine could stifle the functional development of the European Union. In a system where the lines between executive, legislative, and judicial powers are blurred by design, requiring such a strict adherence to delegation criteria seems like overkill.

A more permissive nondelegation doctrine should be established in the United States and European Union. In the U.S. context, maximization of the functional benefits of delegation necessitates the broadest possible standard.^{CLVI} While the intelligible principle test represents a marked improvement over earlier nondelegation standards, as well as the strict *Meroni* doctrine, the Court should return to the *Yakus* approach: so long as the enabling statute does not have an "absence of standards," judicial review is possible and



the delegation should therefore be upheld. Even the *Yakus* standard may not be as permissive as modern government can accommodate; the A.P.A. itself recognizes the possibility of completely standardless delegations, and not only upholds them but bars any form of judicial review.^{CLVII} Likewise, the Court of Justice should loosen the *Meroni* doctrine. E.U. integration has advanced significantly in the fifty-plus years since *Meroni*, and the court should have done more to recognize the major development of institutional structures and democratic legitimacy than it did in *Parliament and Council*. Going forward, the Court of Justice should embrace the significant changes since *Meroni* and adopt a more permissive standard. The court in *Parliament and Council* implied a willingness to look at the context within which a delegation occurs as a way of validating the transfer of authority.^{CLVIII} Both systems can benefit from adopting a permissive nondelegation standard—the United States gets a more productive administrative state and the European Union gets an increasingly Europeanized system of administration.

Yet, to balance out a permissive delegation standard, steps can be taken to ensure adequate accountability. One suggested route, which the Parliament has investigated, is the creation of a Law of Administrative Procedure of the European Union, essentially an E.U. A.P.A.^{CLIX} Such a development could help guide agency action, allowing permissive delegation while simultaneously framing and limiting the operation of those powers. Another option would entail a formal treaty amendment explicitly stipulating the permissible level of delegation to agencies. However, this option should be considered less desirable in view of the treaty's rather strict treatment of delegations to the Commission in Article 290 TFEU. Moreover, constitutionalizing a nondelegation doctrine, however loose, would lock in an inflexible standard that could hold back the functional evolution of the E.U. system. In addition, more effective legislative drafting would allow for more precise judicial review and could help avoid the application of nondelegation principles altogether. Lastly, ensuring sufficient input legitimacy represents the key to giving broad delegations a democratic backbone. The increasing powers and participation of Parliament^{CLX} and the new European Citizens' Initiative procedure^{CLXI} give E.U. citizens a greater voice in the scope of integration. In both the United States and the European Union, broad delegations to agencies that result in tangible public gains will help secure continued support for a modern administrative system.



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^I *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

^{II} See *infra* Part III.

^{III} See Locke 1690-1988: 363 (“The power of the Legislative being derived from the People by a positive voluntary Grant and Institution, can be no other, than what the positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making laws, and place it in other hands.”).

^{IV} The Supreme Court has cited the nondelegation doctrine on only three occasions to strike down a statute: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935); *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); and *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

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

^{VI} Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 152.

^{VII} See generally Onuf 1983: xiii-xvii (describing the United States as a federal republic).

^{VIII} U.S. CONST. arts. I-III.

^{IX} See Posner & Vermeule 2002: 1721 (defining the doctrine).

^X For an introduction to the European Union, see generally Dinan 2010.

^{XI} See, e.g., Phelan 2012: 367 (“It is widely agreed that the EU is a *sui generis* international organization . . .”).

^{XII} See generally Fabbrini 2007 (arguing that the two systems are converging).

^{XIII} Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community art. 17, Dec. 13, 2007, 2007 O.J. (C 306) 1 [hereinafter Treaty of Lisbon].

^{XIV} *Id.* at arts. 14 & 16.

^{XV} *Id.*

^{XVI} *Id.* at art. 19.

^{XVII} *Id.* at art. 15.

^{XVIII} *Wayman v. Southard*, 23 U.S. 1, 3 (1825).

^{XIX} *Id.* at 42-43.

^{XX} *Id.* at 43; see also *id.* at 46 (“The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”).

^{XXI} *Ziaja* 2008: 931.

^{XXII} *Marshall Field & Co. v. Clark*, 143 U.S. 649 (1892).

^{XXIII} *Id.* at 680.

^{XXIV} *Id.* at 681.

^{XXV} *Id.* at 692-93.

^{XXVI} *Id.* at 692.

^{XXVII} *Id.* at 693-94 (citing *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs*, 1 Ohio St. 77, 88 (1852)).

^{XXVIII} *Id.* at 691 (“[I]n the judgment of the legislative branch of the government, it is often desirable, if not essential, for the protection of the interests of our people against the unfriendly or discriminating regulations established by foreign governments, in the interest of their people, to invest the president with large discretion in matters arising out of the execution of statutes relating to trade and commerce with other nations.”); see also *Ziaja* 2008: 932 (“The effect of adopting the nondelegation doctrine, creating an exception to it, and then applying it to the Tariff Act effectively rendered the Court’s first formal recognition of the doctrine dictum, if not also incomprehensible.”).

^{XXIX} *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 404 (1928).

^{XXX} *Id.* at 402.



XXXI *Id.* at 409.

XXXII *Id.* at 406.

XXXIII *Id.* at 407 (“If Congress were to be required to fix every rate, it would be impossible to exercise the power at all.”); *see also* Wertkin 2002: 1065 (“Because the Court granted Congress the power to regulate intrastate commerce by tariffs, the Court necessarily had to grant to Congress the flexibility to implement those regulations by allowing broad delegation.”).

XXXIV *See supra* note IV.

XXXV *Panama Refining Co. v. Ryan*, 293 U.S. 388, 433 (1935). Section 9(c) of NIRA read:

The President is authorized to prohibit the transportation in interstate and foreign commerce of petroleum and the products thereof produced or withdrawn from storage in excess of the amount permitted to be produced or withdrawn from storage by any State law or valid regulation or order prescribed thereunder, by any board, commission, officer, or other duly authorized agency of a State. Any violation of any order of the President issued under the provisions of this subsection shall be punishable by fine of not to exceed \$1,000, or imprisonment for not to exceed six months, or both.

XXXVI *Id.* at 415.

XXXVII *Id.* at 430. This legal reasoning has rightly been referred to as “judicial slight of hand” and “the old switcheroo.” *See* Ziaja 2008: 945.

XXXVIII *Panama Refining*, 293 U.S. at 439-40 (Cardozo, J., dissenting).

XXXIX *Id.* at 441.

XL *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521-23, 551 (1935).

XLI *Id.* at 528.

XLII *Id.* at 537-38.

XLIII *Id.* at 541-42.

XLIV *Carter v. Carter Coal Co.*, 298 U.S. 238, 311-12 (1936).

XLV *Id.* at 311. Interestingly, the D.C. Circuit recently cited *Carter’s* conclusory prohibition on delegations to private parties in striking down a delegation allowing Amtrak and the Federal Railroad Administration to jointly develop certain regulations for rail services. *Ass’n of Am. Railroads v. U.S. Dep’t of Transp.*, 721 F.3d 666, 670 (D.C. Cir. 2013) (quoting *Carter*, 298 U.S. at 311) (“Federal lawmakers cannot delegate regulatory authority to a private entity. To do so would be ‘legislative delegation in its most obnoxious form.’”); *see also id.* at 671 (“Even an intelligible principle cannot rescue a statute empowering private parties to wield regulatory authority.”).

XLVI *See* Bergin 2001: 371 (arguing that the Court “treated the outcome as a foregone conclusion”).

XLVII *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

XLVIII *See* Landau 2012: 1943 (discussing the importance of *Curtiss-Wright* for that reason).

XLIX *Curtiss-Wright*, 299 U.S. at 320.

L *See* Posner & Vermeule 2002: 1722 (describing the short string of invalidated delegations as a “local aberration”); Sunstein 2000: 322 (referring to them as an “anomaly”).

LI *See* *Yakus v. United States*, 321 U.S. 414, 426 (1944) (“Only if we could say that there is an absence of standards for the guidance of the . . . action, so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means.”).

LII *Mistretta v. United States*, 488 U.S. 361, 368-69 (1989).

LIII *Id.* at 372.

LIV *Id.* at 372-373 (quoting *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946)).

LV *Id.* at 379 (quoting *Yakus*, 321 U.S. at 426).

LVI *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001).

LVII 42 U.S.C. §§ 7408, 7409(d)(1) (2006).

LVIII *Whitman*, 531 U.S. at 463.

LIX *Am. Trucking Ass’ns v. EPA*, 175 F.3d 1027, 1034 (D.C. Cir. 1999).

LX *Whitman*, 531 U.S. at 472.

LXI *Id.*

LXII *Id.* at 474-75 (quoting *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

LXIII *See id.* at 475-76 (“Section 109(b)(1) of the CAA . . . fits comfortably within the scope of discretion permitted by our precedent.”).



LXIV *See id.* at 475 (“[T]he degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred. . . . While Congress need not provide any direction to the EPA regarding the manner in which it is to define “country elevators,” . . . it must provide substantial guidance on setting air standards that affect the entire national economy.”).

LXV Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133. Though the court decided the case the same year as the coming-into-force of the Treaty of Rome, the case was filed on December 12, 1956, and thus arose under the Treaty of Paris.

LXVI *Id.* at 135.

LXVII *Id.* at 135-36.

LXVIII *Id.* at 147-49.

LXIX *Id.* at 150.

LXX *Id.* at 151.

LXXI *Id.* at 152.

LXXII *Id.*

LXXIII Case 98/80, *Giuseppe Romano v. Institut National d’Assurance Maladie-Invalidité*, 1981 E.C.R. 1242, 1243.

LXXIV *Id.* at 1243-44.

LXXV *Id.* at 1244.

LXXVI Under the Article 267 TFEU preliminary reference procedure, any national court or tribunal can (and sometimes must) request the Court of Justice to rule on questions of E.U. law. Consolidated Version of the Treaty on the Functioning of the European Union art. 267, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

LXXVII *Romano*, 1981 E.C.R. at 1256.

LXXVIII *Id.*

LXXIX Compare text accompanying notes LXXI-LXXIII, and Chamon 2010: 298 (“[I]t was . . . the concern for the Treaty’s system of judicial protection that was central to the Court’s reasoning in *Meroni* and if the *Meroni* ruling is to be a guide in the process of *agencification*, this general concern should be honoured.”), with Geradin 2004: 10, n. 54 (“[*Romano*] can be distinguished from [*Meroni*] since the Court did not explicitly rely on the ‘institutional balance’ principle but on Article 155 (now 211) of the EC Treaty, which states the missions of the Commission.”).

LXXX Regulation 1095/2010, Establishing a European Supervisory Authority (European Securities and Markets Authority), 2010 O.J. (L 331) 84 (EU).

LXXXI *Id.* at arts. 1, 5.

LXXXII *Id.* at art. 3.

LXXXIII Regulation 236/2012, art. 28, 2012 O.J. (L 86) 1, 19 (EU).

LXXXIV Case C-270/12, *United Kingdom of Great Britain and N. Ireland v. Parliament & Council* ¶¶ 28-34 (Jan. 22, 2014), <http://curia.europa.eu/juris/liste.jsf?num=C-270/12>.

LXXXV *Id.* ¶¶ 43, 45.

LXXXVI *Id.* ¶¶ 53-54.

LXXXVII *Id.* ¶¶ 64-66. The court referred to Articles 263 and 277, which govern various types of judicial review. This provides further evidence that one of the court’s chief concerns in reviewing delegations is the sufficiency of judicial review.

LXXXVIII *Repasi* 2014: 3.

LXXXIX Case C-270/12, *supra* note LXXXIV, ¶¶ 78, 86; *see also* Ankersmit 2014 (using the “closed system” terminology and explaining the court’s reasoning).

XC Case C-270/12, *supra* note LXXXIV, ¶¶ 79-81.

XCI *Id.* ¶ 85.

XCVI *Id.* ¶ 105.

XCVII Similarly, parallels have been drawn between the principles of judicial review enunciated in *Marbury v. Madison* and the E.U.’s *Van Gend & Loos*. *See* Halberstam 2010 (making the comparison); *cf.* Bermann 2004 (discussing the particular challenges for “vertical” constitutional review in the E.U. system when compared to “horizontal” constitutional review in the United States).

XCVIII *Mistretta v. United States*, 488 U.S. 361, 371 (1989); *accord* Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 152 (arguing that to allow discretionary powers would undercut the “guarantee” of a “balance of powers which is characteristic of



the institutional structure of the Community”).

^{XCv} See *Meroni*, 1958 E.C.R. at 151-52 (delegation must be expressly made and encompass clearly defined executive powers).

^{XCvi} See Sunstein 2000: 315-16 (“[The nondelegation doctrine] has been relocated rather than abandoned. Federal courts commonly vindicate not a general nondelegation doctrine, but a series of more specific and smaller, though quite important, nondelegation doctrines. Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so.”).

^{XCvii} Clark 2000: 627.

^{XCviii} See *Mistretta*, 488 U.S. at 415 (Scalia, J., dissenting) (“Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree.”)

^{XCix} See *Meroni*, 1958 E.C.R. at 152 (stating that delegations are valid when they can be “subject to strict review in the light of objective criteria determined by the delegating authority”).

^c Compare *id.* (“The consequences resulting from a delegation of powers are very different depending on whether it involves clearly defined executive powers the exercise of which can, therefore, be subject to strict review in the light of objective criteria determined by the delegating authority, or whether it involves a discretionary power, implying a wide margin of discretion which may, according to the use which is made of it, make possible the execution of actual economic policy. A delegation of the first kind cannot appreciably alter the consequences involved in the exercise of the powers concerned, whereas a delegation of the second kind, since it replaces the choices of the delegator by the choices of the delegate, brings about an actual transfer of responsibility.”), with *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693-94 (1892) (citing *Cincinnati, Wilmington & Zanesville R.R. Co. v. Comm’rs*, 1 Ohio St. 77, 88 (1852)) (“The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”).

^{ci} See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473 (2001) (“Whether the statute delegates legislative power is a question for the courts . . .”); see also *Mistretta* 488 U.S. at 416-17 (Scalia, J., dissenting) (“Precisely because the scope of delegation is largely uncontrollable by the courts, we must be particularly rigorous in preserving the Constitution’s structural restrictions that deter excessive delegation.”).

^{cii} *Mistretta*, 488 U.S. at 372.

^{ciii} Case C-270/12, *supra* note LXXXIV, ¶ 105.

^{civ} *Panama Refining Co. v. Ryan*, 293 U.S. 388, 441 (1935) (Cardozo, J., dissenting) (arguing that government would not function properly if it could not rapidly respond to “swiftly moving facts”); accord *Seidenfeld & Rossi* 2000: 5 (“[T]he demands of the modern state call for a more flexible government structure that can gather necessary information about, and respond more readily to, problems that may call for technical solutions and quick action.”).

^{cv} TFEU, *supra* note LXXVI, at art. 290(1)-(2).

^{cvi} *Id.*

^{cvi} Compare TFEU, *supra* note LXXVI, at art. 290(1) (“A legislative act may delegate to the Commission the power to adopt non-legislative acts of general application to supplement or amend certain non-essential elements of the legislative act. . . . The essential elements of an area shall be reserved for the legislative act and accordingly shall not be the subject of a delegation of power.”), with *Wayman v. Southard*, 23 U.S. 1, 43 (1825) (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.”).

^{cvi} See Case C-270/10, *supra* note LXXXIV, ¶¶ 78-85 (arguing that the delegation to E.S.M.A., while not falling under article 290 or 291, nonetheless was permissible as a component of the rules regulating the E.U. financial system).

^{cix} Justice Thomas criticized the Court’s nondelegation jurisprudence for not being textually grounded, stating that “the Constitution does not speak of ‘intelligible principles.’” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

^{cx} Compare TFEU, *supra* note LXXVI, at art. 290(1)-(2) (“The objectives, content, scope and duration of the delegation of power shall be explicitly defined in the legislative acts. . . . Legislative acts shall explicitly lay



down the conditions to which the delegation is subject . . .”), *with* Case 9/56, *Meroni & Co, Industrie Metallurgiche S.p.A. v High Auth. of the European Coal & Steel Cmty.*, 1958 E.C.R. 133, 151 (“A delegation of powers cannot be presumed and even when empowered to delegate its powers the delegating authority must take an express decision transferring them. . . . [T]he power of the High Authority to authorize or itself to make the financial arrangements mentioned in Article 53 of the Treaty gives it the right to entrust certain powers to such bodies subject to conditions to be determined by it and subject to its supervision.”)

CXI *See* Geradin 2004: 14 (suggesting that the E.U. loosen its nondelegation doctrine).

CXII *See supra* note VIII and accompanying text.

CXIII Treaty of Lisbon, *supra* note XIII, at art. 14(3) (“The members of the European Parliament shall be elected for a term of five years by direct universal suffrage in a free and secret ballot.”).

CXIV *Id.* at art. 16(2) (“The Council shall consist of a representative of each Member State at ministerial level, who may commit the government of the Member State in question and cast its vote.”)

CXV Some have called for a federal structure more closely akin to the United States. For that perspective, see José Manuel Durão Barroso, President of the European Comm’n, State of the Union 2012 Address to the Plenary Session of the European Parliament, SPEECH (2012) 596 (Sept. 12, 2012), *available at* http://europa.eu/rapid/press-release_SPEECH-12-596_en.htm (“[W]e will need to move towards a federation of nation states.”).

CXVI *See* Geradin 2004: 10 (“In the EU context, . . . implementation powers lie with national administrations.”).

CXVII Treaty of Lisbon, *supra* note XIII, at art. 17(2) (“Union legislative acts may only be adopted on the basis of a Commission proposal, except where the Treaties provide otherwise.”).

CXVIII U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

CXIX Geradin 2004: 9.

CXX *See supra* Part II.

CXXI One notable exception is the United States Sentencing Commission (the agency at issue in *Mistretta*), which resides within the judicial branch. A few agencies are considered “legislative,” such as the Congressional Budget Office and the Library of Congress.

CXXII *See, e.g.*, *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 525-26 (2009) (referring to independent agencies as the “Headless Fourth Branch”).

CXXIII Independent agencies officially reside within the executive branch but do not fall within a federal department, which are led by Cabinet secretaries. *See* Meazell 2012: 1777 (“Whereas executive agencies are typically headed by individuals who serve at the will of the president, independent agencies are headed by multimember groups of people who are removable only for cause.”). *But see* Datla & Revesz 2013: 772 (“[T]here is no single feature—not even a for-cause removal provision—that every agency commonly thought of as independent shares. Moreover, many agencies generally considered to be executive agencies exhibit at least some structural attributes of independence.”).

CXXIV There are currently over forty E.U. agencies, divided into four categories: decentralized agencies, executive agencies, EURATOM agencies, and the European Institute of Innovation and Technology (E.I.T.). For a complete list, see AGENCIES AND OTHER EU BODIES, http://europa.eu/about-eu/agencies/index_en.htm (last visited Oct. 10, 2015).

CXXV 42 U.S.C.A. § 4321 (West 2014).

CXXVI Regulation 1095/2010, *supra* note LXXX, at arts. 40 & 42. The Board of Supervisors is composed of an independent Chairperson as well as representatives from the Member States, Commission, and other E.U. bodies, though only the Member State representatives have voting power.

CXXVII For a detailed description of comitology, see *Comitology in Brief*, EUROPA, <http://ec.europa.eu/transparency/regcomitology/index.cfm?do=implementing.home> (last visited Oct. 10, 2015).

CXXVIII *Id.*

CXXIX Regulation 182/2011, Laying Down the Rules and General Principles Concerning Mechanisms for Control by Member States of the Commission’s Exercise of Implementing Powers, art. 2(2)(a), 2011 O.J. (L 55) 13, 14 (EU).

CXXX *Id.* at art. 11.

CXXXI *See supra* note VIII.

CXXXII TFEU, *supra* note LXXVI, at arts. 263, 277.

CXXXIII Merrill 2004: 2097.



- CXXXIV Posner & Vermeule 2002: 1722.
- CXXXV See *supra* note CII and accompanying text.
- CXXXVI See Posner & Vermeule 2004: 1744-45 (applying principal-agent principles to congressional delegation).
- CXXXVII Ziaja 2008: 961 (quoting *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940)).
- CXXXVIII See Weaver 2014: 279 (“Each delegation specifies the various institutional designs and mechanisms through which Congress can check agency action in each unique context. Sometimes Congress delegates broadly. Sometimes Congress cabins agency authority. Sometimes Congress requires agencies to adhere to procedural requirements that go beyond those required in the Administrative Procedure Act (“APA”). . . . Carefully making these institutional design choices helps ensure that agencies stay within the bounds of their delegated authority.”); see also Merrill 2004 and accompanying text.
- CXXXIX See Chamon 2010: 297-98 (“The assertion that *Meroni* applies to Union Administration . . . does not sit well with a modern view on administration and, rather, amounts to conflation, since *Meroni* only dealt with delegation of powers to bodies established under private law.”).
- CXL Case C-270/12, *supra* note LXXXIV, ¶ 85 (“Article 28 of Regulation No 236/2012 cannot be considered in isolation. On the contrary, that provision must be perceived as forming part of a series of rules designed to endow the competent national authorities and ESMA with powers of intervention to cope with adverse developments which threaten financial stability within the Union and market confidence. To that end, those authorities must be in a position to impose temporary restrictions on the short selling of certain stocks, credit default swaps or other transactions in order to prevent an uncontrolled fall in the price of those instruments. Those bodies have a high degree of professional expertise and work closely together in the pursuit of the objective of financial stability within the Union.”)
- CXLI See, e.g., Kelemen & Majone 2012: 228 (“Over time, . . . we can observe a gradual decrease in the constraints imposed by the *Meroni* doctrine and a gradual increase in the authority delegated to EU agencies.”).
- CXLII See *supra* note CXXIV.
- CXLIII See Geradin 2004: 8-9 (placing these ‘agencification’ waves in the mid-1970s, 1990s, and early 2000s, coinciding with, *inter alia*, the first wave of enlargement, development of the single market/Euro, and the Eastern enlargement, respectively).
- CXLIV Saurer 2009: 444.
- CXLV See Bressman 2003: 472-73 (discussing the A.P.A.’s primary purposes).
- CXLVI See Geradin 2004: 5.
- CXLVII See, e.g., Lindseth 1999: 693-95 (expressing skepticism about an E.U. administrative code because, unlike presidential oversight in the United States, the European Union does not have the requisite structures in place to keep agencies ‘under control’).
- CXLVIII See Majone 1994: 95 (“The adoption of something like an Administrative Procedures Act [sic] for the European Union could do more to make public accountability possible than the wholesale transfer of traditional party politics to Brussels.”).
- CXLIX See Sarvis 2006: 317 (“[T]he nondelegation doctrine—that legislative power cannot be delegated to the executive consistently with the Constitution—should be viewed as an important protector of constitutional values whose judicial enforcement is both desirable and practicable.”); Lawson 2002: 332 (“[T]o abandon openly the nondelegation doctrine is to abandon openly a substantial portion of the foundation of American representative government.”); Schoenbrod 1985: 1226 (“The delegation doctrine is ritualistically invoked, but fails to check agency discretion or to ensure electoral accountability for the rules promulgated.”).
- CL “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.” U.S. CONST. art. I, § 1.
- CLI See, e.g., *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasizing that the Vesting Clause grants “all” legislative power to Congress). Though Justice Scalia penned the 9-0 opinion in *Whitman*, his approach in earlier cases indicated greater hostility to delegated powers. See *Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 280 (1996) (Scalia, J., concurring in part and concurring in the judgment) (referencing the Vesting Clause and Lockean nondelegation, though discussing the doctrine in the context of legislative history as a form of delegation); see also Manning 1997: 698 (“If Congress effectively relies on its components to speak for the institution—to express Congress’s detailed intent—the practice offends the Lockean injunction against the delegation of legislative authority.”).
- CLII See, e.g., McCarthy & Roberts 2001: 139 (arguing for a strong nondelegation doctrine on separation of



powers grounds).

^{CLIII} See Fabbrini 2007: 2 (“[A] process of *institutional convergence* is taking place between the EU and the USA.”). See generally Menon & Schain 2006 (presenting multiple comparative analyses of U.S. and E.U. federalism).

^{CLIV} See Pelkmans & Simoncini 2014: 6 (arguing that the *Meroni* doctrine should be ‘mellowed’ “where a compelling case has been made for the sake of the establishment and proper functioning of the single market”); Griller & Orator 2007: 2 (“[T]he very strict limits to the delegation of powers to agencies as established by the ECJ’s jurisprudence might be loosened to a certain extent without giving up their legal fundamentals.”).

^{CLV} Ankersmit, *supra* note LXXXIX.

^{CLVI} Recently, the Court had a rare but significant opportunity to clarify the scope of the nondelegation doctrine as applies to private entities carrying out semi-public functions in a challenge to Amtrak’s standard-setting role for railroad services. *Ass’n of Am. R.R.s v. U.S. Dep’t of Transp.*, 721 F.3d 666 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). In *Association of American Railroads*, the D.C. Circuit invalidated a statute (on nondelegation grounds and with reference to *Carter Coal*) that empowered Amtrak (a federally chartered corporation) and the Federal Railroad Administration (a federal agency) to jointly develop certain performance measures for passenger rail service. *Id.* at 673 (“Section 207 [of the Passenger Railroad Investment and Improvement Act of 2008] is as close to the blatantly unconstitutional scheme in *Carter Coal* as we have seen.”). However, as the district court noted, promulgation of the standards requires the approval of the Federal Railroad Administration, and the Surface Transportation Board (a federal agency) retains ultimate enforcement authority over the statutory scheme. See *Ass’n of Am. R.R.s v. Dep’t of Transp.*, 865 F. Supp. 2d 22, 32-35 (D.D.C. 2012), *rev’d* 721 F.3d 666 (D.C. Cir. 2013), *cert. granted* 134 S. Ct. 2865 (June 23, 2014) (No. 13-1080). As such, the facts are distinguishable from the statutory scheme in *Carter Coal*, which did not involve such governmental checks on the private party’s delegated authority. See *supra* note XLV and accompanying text. In March 2015, the Court vacated and remanded the D.C. Circuit decision, holding that Amtrak is a governmental entity for separation of powers purposes. *Dep’t of Transp. v. Ass’n of Am. Railroads*, 135 S. Ct. 1225, 1233 (2015). Therefore, for now, the nondelegation doctrine’s boundaries remain untouched.

^{CLVII} A.P.A. § 701(a)(2) prevents judicial review where “agency action is committed to agency discretion by law.” The Court has interpreted this language to cover instances where a delegation’s extremely broad language provides “no law to apply” and “no judicially manageable standards.” *Heckler v. Chaney*, 470 U.S. 821, 830 (1985). Amee Bergin has argued that this “no judicially manageable standards” interpretation of A.P.A. § 701(a)(2) is not reconcilable with the nondelegation doctrine’s “intelligible principle” test, leading Bergin to argue that the A.P.A. provision is unconstitutional. Bergin 2001: 396. As evident in *Chaney*, the Court has not agreed with Bergin’s analysis, and it has applied the exception numerous times. See, e.g., *Dalton v. Specter*, 512 U.S. 1247 (1994); *Lincoln v. Vigil*, 508 U.S. 182 (1993); *Webster v. Doe*, 486 U.S. 592 (1988). The existence and use of the “committed to agency discretion” exception accentuates the nondelegation doctrine’s demise as a meaningful substantive control.

^{CLVIII} See *supra* notes XCI, CVIII and accompanying text.

^{CLIX} European Parliament Resolution of 15 January 2013 with Recommendations to the Commission on a Law of Administrative Procedure of the European Union, EUR. PARL. DOC. 2024(INI) (2012); see also Chamon 2010: 49 (arguing in favor of a European A.P.A.). A similar solution has been suggested in the realm of international delegations, such as to treaty bodies. See Zaring 2013: 109-12 (calling for an International A.P.A. regulating congressional delegations to international bodies).

^{CLX} See Hosli et al. 2013: 1122-23 (“The European Parliament (EP) is frequently seen as the ‘big winner’ of the Lisbon Treaty, given the fact that several changes (e.g. extension of co-decision as the ordinary legislative procedure, introduction of the assent procedure to international agreements) have significantly extended its powers.”).

^{CLXI} Treaty of Lisbon, *supra* note XIII, at art. 11.



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