Nondelegation Canons

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Reports of the death of the nondelegation doctrine have been greatly exaggerated. Rather than having been abandoned, the doctrine has merely been renamed and relocated. Its current home consists of a set of nondelegation canons, which forbid executive agencies from making certain decisions on their own. These canons forbid extraterritorial application of national law, intrusions on state sovereignty, decisions harmful to Native Americans, and absolutist approaches to health and safety. The nondelegation canons are far preferable to the old nondelegation doctrine, because they are subject to principled judicial application, and because they do not threaten to unsettled so much of modern government.

It is often said that the nondelegation doctrine is dead.1 According to the familiar refrain,2 the doctrine was once used to require Congress to legislate with some clarity, so as to ensure that law is made by the national legislature rather than by the executive. But the nondelegation doctrine—the refrain continues—is now merely a bit of rhetoric, as the United States Code has become littered with provisions asking one or another administrative agency to do whatever it thinks best.3 While this is an overstatement, it captures an important truth: Since 1935, the Supreme Court has not struck down an act of Congress on nondelegation grounds, notwithstanding the existence of a number of plausible occasions.4

But is the nondelegation doctrine really dead? On the contrary, I believe that the doctrine is alive and well. It has been relocated rather
II. HIDDEN NONDELEGATION PRINCIPLES

Let us turn now to a question that bears directly on the current status of the nondelegation doctrine: What is the authority of administrative agencies to interpret the law? When Congress has spoken clearly, everyone agrees that agencies are bound by what Congress has said. The disputed question has to do with the authority of agencies to act when Congress has not spoken clearly. Of course a very strong version of the nondelegation doctrine would suggest that agencies can, in such cases, do nothing, because the underlying grant of power is effectively void. But short of this radical conclusion, what is the allocation of authority to agencies?

A. *Chevron* as Canon: Aggravating the Delegation Problem?

The place to start is of course *Chevron USA v Natural Resources Defense Council, Inc.*, the decision that dominates modern administrative law. The Supreme Court held that unless Congress has decided the "precise question at issue," agencies are authorized to interpret ambiguous terms as they see fit, so long as the interpretation is reasonable. *Chevron* creates a familiar two-step inquiry. The first question is whether Congress has directly decided the precise question at issue. The second question is whether the agency interpretation is reasonable. Indeed, *Chevron* establishes a novel canon of construction: in the face of ambiguity, statutes mean what the relevant agency takes them to mean.

This is an emphatically prodelegation canon, indeed it is the quintessential prodelegation canon, and some critics have suggested that *Chevron* is highly objectionable precisely on nondelegation grounds. On this view, the problem is that under *Chevron*, agencies are not merely given authority that is often open-ended; they are also permitted to interpret the scope of their own authority, at least in the face of ambiguity. A regime in which agencies lacked this authority would—it might be claimed—fit better with nondelegation principles, for under such a regime, agencies would lack the power to construe statutory terms on their own. On this view, the key point, explicitly

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69 467 US at 842–43.
70 Id.
73 See id.
recognized in the case and by its most enthusiastic defenders, is that \textit{Chevron} holds that statutory ambiguities are implicit delegations of interpretive (realistically, lawmaking) authority to agencies. The opposing view—that ambiguities are not delegations at all—would fit better with the constitutional structure.

The weakness of this objection stems from the fact that when statutory terms are ambiguous, there is no escaping delegation. Neither \textit{Chevron} nor anti-\textit{Chevron} prevents delegation. By hypothesis Congress has not been clear, perhaps because it has been unable to resolve the issue, perhaps because it did not foresee it. The recipient of the delegation will be either agencies or courts. If \textit{Chevron} is rejected, ambiguous terms will be construed by judges rather than administrators, and in neither event will hard questions be decided legislatively. \textit{Chevron} does increase the discretionary authority of agencies—this is the sense in which it creates a prodelegation canon—but only in relation to courts. With respect to the nondelegation question itself, it is neither here nor there.

\textbf{B. Trumping \textit{Chevron}: Three Categories of Nondelegation Canons}

It is plain, however, that a variety of canons of construction—what I am calling nondelegation canons—trump \textit{Chevron} itself.\textsuperscript{74} In other words, the agency’s interpretation of law does not, under current doctrine, prevail if one of the nondelegation canons is at work. These canons impose important constraints on administrative authority, for agencies are not permitted to understand ambiguous provisions to give them authority to venture in certain directions; a clear congressional statement is necessary. The nondelegation canons fall in three principal categories. Some are inspired by the Constitution; others involve issues of sovereignty; still others have their foundations in public policy.

An important qualification: I do not mean to endorse each of the canons here. The goal at this stage is descriptive, not normative—to see how the nondelegation canons operate as a constraint on administrative power. It does not matter if particular canons would turn out, on reflection, to be indefensible.

\textsuperscript{74} 467 US at 842–45. See also Scalia, 1989 Duke L J at 519–20 (cited in note 71).
\textsuperscript{75} See, for example, \textit{Bowen v Georgetown University Hospital}, 488 US 204, 208–09, 212–13 (1988) (noting a canon against interpreting a statute to be retroactive and denying judicial deference to an agency counsel’s interpretation of a statute when the agency itself has articulated no position on the question). This is the tendency of current law with respect to all of the nondelegation canons discussed here, but the tendency is, in some cases, little more than that, and on the conflict of the canons with \textit{Chevron}, there are some conflicts in the lower courts. See, for example, Peter S. Heinecke, Comment, \textit{Chevron and the Canon Favoring Indians}, 60 U Chi L Rev 1015 (1993). I do not discuss these conflicts here.
1. Constitutionally inspired nondelegation canons.

A number of nondelegation canons have constitutional origins. They are designed to promote some goal with a constitutional foundation. Consider, as the most familiar example, the (controversial) idea that agencies will not be permitted to construe statutes in such a way as to raise serious constitutional doubts. Notice that this principle goes well beyond the (uncontroversial) notion that agencies should not be allowed to construe statutes so as to be unconstitutional. The principle appears to say that constitutionally sensitive questions (for example, whether a statute would intrude on the right to travel, violate the right to free speech, or constitute a taking) will not be permitted to arise unless the constitutionally designated lawmaker has deliberately and expressly chosen to raise them. The only limitations on the principle are that the constitutional doubts must be serious and substantial, and that the statute must be fairly capable of an interpretation contrary to the agency's own. So long as the statute is unclear, and the constitutional question serious, Congress must decide to raise that question via explicit statement. This idea trumps *Chevron* for that very reason. Executive interpretation of a vague statute is not enough when the purpose of the canon is to require Congress to make its instructions clear.

Belonging in the same category is the idea that administrative agencies will not be allowed to interpret ambiguous provisions so as to preempt state law. The constitutional source of this principle is the evident constitutional commitment to a federal structure, a commitment that may not be compromised without a congressional decision to do so—an important requirement in light of the various safeguards against cavalier disregard of state interests created by the system of state representation in Congress. Notice that there is no constitutional obstacle to national preemption; Congress is entitled to preempt state law if it chooses. But there is a constitutional obstacle of a sort: the preemption decision must be made legislatively, not bureaucratically.

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77 See note 7.
79 See *National Association of Regulatory Utility Commissioners v FCC*, 880 F2d 422 (DC Cir 1989).
81 It is not entirely clear whether an agency might be able to decide the question if Congress expressly said that the agency is permitted to do so. This raises a general point about the nondelegation canons: What would happen if Congress attempted to bypass them by a clear statement of delegation? I take up this question in Section II.B.4 below.
As a third example, consider the notion that unless Congress has spoken with clarity, agencies are not allowed to apply statutes retroactively, even if the relevant terms are quite unclear. Because retroactivity is disfavored in the law, Congress will not be taken to have delegated to administrative agencies the authority to decide the question. The best way to understand this idea is as an institutional echo of the notion that the Due Process Clause forbids retroactive application of law.

Of course the constitutional constraints on retroactivity are now modest; while the Ex Post Facto Clause forbids retroactive application of the criminal law, the clause is narrowly construed, and Congress is generally permitted to impose civil legislation retroactively if it chooses. But there is an institutional requirement here. Congress must make that choice explicitly and take the political heat for deciding to do so. It will not be taken to have attempted the same result via delegation, and regulatory agencies will not be taken to have the authority to choose retroactivity on their own. Perhaps part of the courts' motivation here is ambivalence about judicial refusal to apply the Ex Post Facto Clause, or the Due Process Clause, so as to call into constitutional question some retroactive applications of civil law. The nondelegation canon is a more cautious way of promoting the relevant concerns.

Consider, finally, the rule of lenity, which says that in the face of ambiguity, criminal statutes will be construed favorably to criminal defendants. One function of the lenity principle is to ensure against delegations. Criminal law must be a product of a clear judgment on Congress's part. Where no clear judgment has been made, the statute will not apply merely because it is plausibly interpreted, by courts or enforcement authorities, to fit the case at hand. The rule of lenity is inspired by the due process constraint on conviction pursuant to open-ended or vague statutes. While it is not itself a constitutional mandate, it is rooted in a constitutional principle, and serves as a time-honored nondelegation canon.

2. Sovereignty-inspired nondelegation canons.

The second category of nondelegation canons contains principles that lack a constitutional source but that have a foundation in wide-
spread understandings about the nature of governmental authority—more particularly, in widespread understandings about sovereignty. Consider here the fact that agencies are not permitted to apply statutes outside of the territorial borders of the United States.66 If statutes are to receive extraterritorial application, it must be as a result of a deliberate congressional judgment to this effect. The central notion here is that extraterritorial application calls for extremely sensitive judgments involving international relations; such judgments must be made via the ordinary lawmaking process (in which the President of course participates). The executive may not make this decision on its own.

For broadly related reasons, agencies cannot interpret statutes and treaties unfavorably to Native Americans.67 Where statutory provisions are ambiguous, the government will not prevail. This idea is plainly an outgrowth of the complex history of relations between the United States and Native American tribes, which have semi-sovereign status; it is an effort to ensure that any unfavorable outcome will be a product of an explicit judgment from the national legislature. The institutional checks created by congressional structure must be navigated before an adverse decision may be made. Consider, as a final if more controversial illustration, the fact that agencies are not permitted to waive the sovereign immunity of the United States, and indeed statutory ambiguity cannot be used by agencies as a basis for waiver, which must be explicit in legislation.68 Sovereign immunity is a background structural understanding, defeasible only on the basis of a judgment to that effect by the national legislature.

67 Of course the executive is permitted to make a large number of quite sensitive decisions involving foreign relations, partly because of express constitutional commitments, partly because of perceived contemporary necessities. And it would not be impossible to imagine a legal system in which the executive was permitted, in the event of ambiguity, to resolve the issue of extraterritoriality. Recall that my goal here is descriptive, not normative. The best defense of this particular nondelegation canon would be that the question whether the enacted law should be applied outside of the nation’s borders is a large and essentially legislative one, which cannot be made by the executive on its own.
68 See \textit{Ramah Navajo Chapter v Lujan}, 112 F3d 1455, 1461–62 (10th Cir 1997) (grounding a canon of statutory construction favoring Native Americans in “the unique trust relationship between the United States and the Indians”); \textit{Williams v Babbitt}, 115 F2d 657, 660 (9th Cir 1997) (noting in dicta that courts “are required to construe statutes favoring Native Americans liberally in their favor”); \textit{Tyonek Native Corp v Secretary of Interior}, 836 F2d 1237, 1239 (9th Cir 1988) (noting in dicta that “statutes benefiting Native Americans should be construed liberally in their favor”).
3. Nondelegation canons inspired by perceived public policy.

The final set of nondelegation canons is designed to implement perceived public policy, by, among other things, giving sense and rationality the benefit of the doubt—and by requiring Congress itself to speak if it wants to compromise policy that is perceived as generally held. The most sympathetic understanding of these canons rests on the view that the relevant policies are not the judges' own, but have a source in widely held social commitments.

There are many examples. Exemptions from taxation are narrowly construed; if Congress wants to exempt a group from federal income tax, it must express its will clearly. A central idea here may be that such exemptions are often the product of lobbying efforts by well organized private groups, and thus a reflection of factional influence; hence agencies may not create such exemptions on their own. At the same time, there is a general federal policy against anticompetitive practices, and agencies will not be permitted to seize on ambiguous statutory language so as to defeat that policy. If Congress wants to make an exception to the policy in favor of competition, it is certainly permitted to do so. But agencies may not do so without congressional instruction. So too, it is presumed that statutes providing veterans' benefits will be construed generously for veterans, and agencies cannot conclude otherwise. This idea is an analogue to the notion that statutes will be construed favorably to Native Americans; both require a congressional judgment if a group perceived as weak or deserving is going to be treated harshly.

In decisions of particular importance for the modern regulatory state, agencies are sometimes forbidden to require very large expenditures for trivial or de minimis gains. If Congress wants to be "abso-

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91 Michigan Citizens for an Independent Press v Thornburgh, 868 F2d 1285, 1299 (DC Cir 1989) (Ginsburg dissenting) (noting the "accepted rule" that antitrust exemptions must be narrowly construed); Group Life & Health Insurance v Royal Drug Co, 440 US 205, 231 (1979) (noting the "well settled" rule that antitrust exceptions "are to be narrowly construed").
93 See Industrial Union Department, AFL-CIO v American Petroleum Institute, 448 US 607, 644 (1980) (plurality) (holding that in promulgating OSHA, Congress "intended, at a bare minimum, that the Secretary [of Labor] find a significant risk of harm and therefore a probability of significant benefits before establishing a new standard"); Corrosion Proof Fittings v EPA, 947 F2d 1201, 1222-23 (5th Cir 1991) (vacating the EPA's proposed rulemaking under the Toxic Substances Control Act and its ban on asbestos, partially on the grounds that the agency's own figures suggested that enforcing the regulation might cost as much as $74 million per life saved); Alabama Power Co v Costle, 636 F2d 323, 360-61 (DC Cir 1979) (stating that "unless Congress has been extraordinarily rigid, there is likely a basis for an implication of de minimis authority to provide exemption when the burdens of regulation yield a gain of trivial or no value"); Monsanto Co v Kennedy, 613 F2d 947, 954-55 (DC Cir 1979) (allowing the Commissioner of Food and Drugs not to apply the strictly literal terms of the statute and to make de minimis exceptions).
lutionist” about safety, it is permitted to do so by explicit statement. But agencies will not be allowed to take ambiguous language in this direction. This is a genuinely novel nondelegation principle, a creation of the late twentieth century. It is an evident response to perceived problems in modern regulatory policy.

4. Barriers, catalysts, and minimalism.

How intrusive are the nondelegation canons? What kind of judicial role do they contemplate? Consider the view that these canons are best understood not as barriers but as catalysts, allowing government to act so long as it does so through certain channels. The effort is to trigger democratic (in the sense of legislative) processes and to ensure the forms of deliberation, and bargaining, that are likely to occur in the proper arenas.

In a sense this understanding—of nondelegation canons as catalysts—is correct. So long as government is permitted to act when Congress has spoken clearly, no judicial barrier is in place. In this way, the nondelegation canons are properly understood as a species of judicial minimalism, indeed democracy-forcing minimalism, designed to ensure that judgments are made by the democratically preferable institution. As compared with more rigid barriers to government action, the conventional nondelegation doctrine itself is a form of minimalism insofar as it requires Congress to speak with clarity and does not disable the government entirely. And because the nondelegation canons are narrower and more specifically targeted—requiring particular rather than general legislative clarity—they are more minimalist still.

But this understanding misses an important point. Nondelegation canons are barriers, and not merely catalysts, with respect to purely administrative (or executive) judgment on the matters in question.

94 See Public Citizen v Young, 831 F2d 1108, 1122 (DC Cir 1987) (finding no de minimis exception under the Delaney Clause, which barred the use of carcinogens in food additives). In a famous essay, Karl Llewellyn contended that the canons of construction were indeterminate and unhelpful. See Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes Are To Be Construed, 3 Vand L Rev 395 (1950). There has been a vigorous debate over whether Llewellyn was right. See, for example, Antonin Scalia, A Matter of Interpretation 26-27 (Princeton 1997) (Amy Gutman, ed) (rejecting Llewellyn’s claim). Even if Llewellyn is right, his argument does not undermine the nondelegation canons, which go in a single direction: against agency discretion. Of course it will be possible that other canons, for example those involving syntax, will support the agency’s view of the statute.

95 See Stephen Breyer, Breaking the Vicious Circle 10-17 (Harvard 1993) (discussing the problem of “the last 10%”).

96 Consider Hampton v Mow Sun Wong, 426 US 88, 114–17 (1976) (holding that the Civil Service Commission could not decide to exclude aliens from the civil service, but leaving open the question whether Congress or the President could do so).

97 On minimalism generally, see Sunstein, One Case At A Time (cited in note 10).
They erect a decisive barrier to certain discretionary decisions by the executive. In this respect, at least, the relevant institutions are blocked.

This point raises a final issue, involving the status of the nondelegation canons: Suppose that Congress expressly delegates to administrative agencies the authority to decide (for example) whether a statute may be applied outside the territory of the United States, or whether a statute should be construed favorably to Native Americans, or whether a statute ought to be understood to raise a serious constitutional question. Would such a delegation be unconstitutional? No clear authority answers this question, for Congress has never attempted to do anything of this sort. But at first glance, a delegation of this kind would not seem by itself to violate the conventional non-delegation doctrine, as currently understood, so long as Congress has not given the agency a general “blank check,” which courts are loathe to find. Thus the answer appears to be that the nondelegation canons are merely tools of construction, and that they should not be taken to forbid Congress from delegating expressly if it chooses.

On the other hand, the Court suggested otherwise in the only decision that at all bears on this question. In *Hampton v Mow Sun Wong*, the Supreme Court invoked the Due Process Clause to strike down a Civil Service Commission regulation banning aliens from working for the United States Civil Service. The Court emphasized that any such ban must be defended by reference to serious national interests, and it acknowledged that the rule might be valid if issued by the President or Congress. And some relevant interests—such as encouraging naturalization or giving the President a bargaining chip in negotiations with foreign countries—might be sufficient if invoked by the President or Congress. Here, however, neither Congress nor the President required the ban; they had merely acquiesced in it. The Court refused to interpret the apparently open-ended statute—allowing the President and his delegate the Commission to “prescribe such regulations . . . as will best promote the efficiency of” the civil service—to permit the Civil Service Commission to take account of the goal of encouraging naturalization or granting a bargaining chip to the President. Those interests were beyond the Commission’s domain (even though they might be invoked by the President under the

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98 See note 16 and accompanying text.
100 Id at 114–17.
101 Id at 116.
102 Id at 105.
103 Id.
104 5 USC § 3301(1) (1994).
same statutory provision). The Commission could invoke the interest in having "one simple rule," but that interest was too "hypothetical" to justify "the wholesale deprivation" here.\footnote{Id. at 115–16.}

To say the least, \textit{Mow Sun Wong} is an opaque opinion. It is clear that, in the Court's view, a decision to ban noncitizens from the civil service must be made by Congress or the President; it cannot be made by agencies alone. The narrowest reading of the opinion is that the Court will not interpret an ambiguous statutory provision to allow an agency to reach a constitutionally questionable decision on a subject outside its expertise. But \textit{Mow Sun Wong} is a due process holding, not a mere matter of statutory interpretation, and it is plausible to take the case to stand for the proposition that under the Due Process Clause, and as a matter of constitutionally required "procedures,"\footnote{Id at 103.} Congress or the President, not agencies alone, are required to make decisions affecting certain constitutionally sensitive rights and interests.

The \textit{Mow Sun Wong} decision has had no progeny,\footnote{An important qualification is that Justice Powell relied on the case in his extremely important opinion announcing the judgment of the Court in \textit{Regents of the University of California v Bakke}, 438 US 265, 309 (1978); Justice Powell emphasized that the affirmative action program at issue there had not been adopted by the California legislature, and was the product of a decision of university administration, a body with far less of a democratic pedigree. Justice Powell thus announced a kind of nondelegation canon with respect to certain affirmative action programs.} and outside of very unusual circumstances,\footnote{\textit{Mow Sun Wong} itself involved such circumstances: a wholesale exclusion of noncitizens from a huge class of jobs. See 426 US at 92–93.} the Court would be most unlikely to say that Congress cannot delegate to agencies the power of decision, even in sensitive areas, if it chooses to do so expressly. But notice that Congress must take the political heat that would undoubtedly be generated by any such explicit delegation, a point that helps account for Congress's failure to delegate authority of that kind. And notice too that in cases in which a constitutional right is plausibly at stake, the Court might invoke \textit{Mow Sun Wong} and strike down the delegation on due process grounds.

\section*{III. CANONS RECONCEIVED AND REDEEMED}
\subsection*{A. Judicial Administrability and Congressional Lawmaking}

Canons of the sort I have outlined here are highly controversial. Judge Posner, for example, fears that some of them create a "penumbral Constitution," authorizing judges to bend statutes in particular directions even though there may in fact be no constitutional viola-