SUPREME COURT OF THE UNITED STATES

No. 13–1080

DEPARTMENT OF TRANSPORTATION, ET AL., PETITIONERS *v.* ASSOCIATION OF AMERICAN RAILROADS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[March 9, 2015]

JUSTICE THOMAS, concurring in the judgment.

We have come to a strange place in our separation-of-powers jurisprudence. Confronted with a statute that authorizes a putatively private market participant to work hand-in-hand with an executive agency to craft rules that have the force and effect of law, our primary question—indeed, the primary question the parties ask us to answer—is whether that market participant is subject to an adequate measure of control by the Federal Government. We never even glance at the Constitution to see what it says about how this authority must be exercised and by whom.

I agree with the Court that the proper disposition in this case is to vacate the decision below and to remand for further consideration of respondent's constitutional challenge to the metrics and standards. I cannot join the majority's analysis, however, because it fails to fully correct the errors that require us to vacate the Court of Appeals' decision. I write separately to describe the framework that I believe should guide our resolution of delegation challenges and to highlight serious constitutional defects in the Passenger Rail Investment and Improvement Act of 2008 (PRIIA) that are properly presented for the lower courts' review on remand.

I

The Constitution does not vest the Federal Government with an undifferentiated "governmental power." Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. Those Clauses provide that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," Art. I, §1, "[t]he executive Power shall be vested in a President of the United States," Art. II, §1, cl. 1, and "[t]he judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish," Art. III, §1.

These grants are exclusive. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 472 (2001) (legislative power); *Free Enterprise Fund* v. *Public Company Accounting Oversight Bd.*, 561 U. S. 477, 496–497 (2010) (executive power); *Stern* v. *Marshall*, 564 U. S. ___, ___–___ (2011) (slip op., at 16–17) (judicial power). When the Government is called upon to perform a function that requires an exercise of legislative, executive, or judicial power, only the vested recipient of that power can perform it.

In addition to allocating power among the different branches, the Constitution identifies certain restrictions on the *manner* in which those powers are to be exercised. Article I requires, among other things, that "[e]very Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it . . . ." Art. I, §7, cl. 2. And although the Constitution is less specific about how the President shall exercise power, it is clear that he may carry out his duty to take care that the laws be faithfully executed with the aid of subordinates. *Myers* v. *United States*, 272 U. S. 52, 117 (1926), overruled in part on unre-

lated grounds in *Humphrey's Executor* v. *United States*, 295 U. S. 602 (1935).

When the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution. For example, Congress improperly "delegates" legislative power when it authorizes an entity other than itself to make a determination that requires an exercise of legislative power. See *Whitman, supra*, at 472. It also improperly "delegates" legislative power to itself when it authorizes itself to act without bicameralism and presentment. See, *e.g., INS* v. *Chadha*, 462 U. S. 919 (1983). And Congress improperly "delegates"—or, more precisely, authorizes the exercise of, see *Perez* v. *Mortgage Bankers Assn.*, *post*, at 22 (THOMAS, J., concurring in judgment) (noting that Congress may not "delegate" power it does not possess)—executive power when it authorizes individuals or groups outside of the President's control to perform a function that requires the exercise of that power. See, *e.g., Free Enterprise Fund*, *supra*.

In order to be able to adhere to the provisions of the Constitution that allocate and constrain the exercise of these powers, we must first understand their boundaries. Here, I do not purport to offer a comprehensive description of these powers. My purpose is to identify principles relevant to today's dispute, with an eye to offering guidance to the lower courts on remand. At issue in this case is the proper division between legislative and executive powers. An examination of the history of those powers reveals how far our modern separation-of-powers jurisprudence has departed from the original meaning of the Constitution.

II

The allocation of powers in the Constitution is absolute, *Perez*, *post,* at 5–8 (opinion of THOMAS, J.), but it does not

follow that there is no overlap between the three categories of governmental power. Certain functions may be performed by two or more branches without either exceeding its enumerated powers under the Constitution. Resolution of claims against the Government is the classic example. At least when Congress waives its sovereign immunity, such claims may be heard by an Article III court, which adjudicates such claims by an exercise of judicial power. See *Ex parte Bakelite Corp.*, 279 U. S. 438, 452 (1929). But Congress may also provide for an executive agency to adjudicate such claims by an exercise of executive power. See *ibid.* Or Congress may resolve the claims itself, legislating by special Act. See *ibid.* The question is whether the particular function requires the exercise of a certain type of power; if it does, then only the branch in which that power is vested can perform it. For example, although this Court has long recognized that it does not necessarily violate the Constitution for Congress to authorize another branch to make a determination that it could make itself, there are certain core functions that require the exercise of legislative power and that only Congress can perform. *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825) (distinguishing between those functions Congress must perform itself and those it may leave to another branch).

The function at issue here is the formulation of generally applicable rules of private conduct. Under the original understanding of the Constitution, that function requires the exercise of legislative power. By corollary, the discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct.

A

The idea that the Executive may not formulate generally applicable rules of private conduct emerged even before

the theory of the separation of powers on which our Constitution was founded.

The idea has ancient roots in the concept of the "rule of law," which has been understood since Greek and Roman times to mean that a ruler must be subject to the law in exercising his power and may not govern by will alone. M. Vile, Constitutionalism and the Separation of Powers 25 (2d ed. 1998); 2 Bracton, De Legibus et Consuetudinibus Angliae 33 (G. Woodbine ed., S. Thorne transl. 1968). The principle that a ruler must govern according to law "presupposes at least two distinct operations, the making of law, and putting it into effect." Vile, *supra,* at 24. Although it was originally thought "that the rule of law was satisfied if a king made good laws and always acted according to them," it became increasingly apparent over time that the rule of law demanded that the operations of "making" law and of "putting it into effect" be kept separate. W. Gwyn, The Meaning of the Separation of Powers 35 (1965); see also *id.,* at 8–9. But when the King's power was at its height, it was still accepted that his "principal duty . . . [was], to govern *his people* according to *law*." 1 W. Blackstone, Commentaries on the Laws of England 226 (1765) (Commentaries) (emphasis added).

An early expression of this idea in England is seen in the "constitutional" law concerning crown proclamations. Even before a more formal separation of powers came about during the English Civil War, it was generally thought that the King could not use his proclamation power to alter the rights and duties of his subjects. P. Hamburger, Is Administrative Law Unlawful? 33–34 (2014) (Hamburger). This power could be exercised by the King only in conjunction with Parliament and was exercised through statutes. *Ibid.*; see also M. Hale, The Prerogatives of the King 141, 171–172 (D. Yale ed. 1976). The King might participate in "the legislative power" by giving his "assent" to laws created by the "concurrence" of "lords

and commons assembled in parliament," but he could not of his own accord "make a law or impose a charge." *Id.,* at at 141.

In 1539, King Henry VIII secured what might be called a "delegation" of the legislative power by prevailing on Parliament to pass the Act of Proclamations. Hamburger 35–36. That Act declared that the King's proclamations would have the force and effect of an Act of Parliament. *Id.,* at 37. But the Act did not permit the King to deprive his subjects of their property, privileges and franchises, or their lives, except as provided by statutory or common law. *Id.,* at 37–38. Nor did the Act permit him to invalidate "'any acts, [or] common laws standing at [that] time in strength and force.'" *Id.,* at 38 (quoting An Act that Proclamations Made by the King Shall be Obeyed, 31 Hen. VIII, ch. 8, in Eng. Stat. at Large 263 (1539)).

Even this limited delegation of lawmaking power to the King was repudiated by Parliament less than a decade later. Hamburger 38. Reflecting on this period in history, David Hume would observe that, when Parliament "gave to the king's proclamation the same force as to a statute enacted by parliament," it "made by one act a total subversion of the English constitution." 3 D. Hume, The History of England from the Invasion of Julius Ceasar to the Revolution in 1688, p. 266 (1983). By the 17th century, when English scholars and jurists began to articulate a more formal theory of the separation of powers, delegations of the type afforded to King Henry VIII were all but unheard of. Hale, *supra,* at 172–173.

This is not to say that the Crown did not endeavor to exercise the power to make rules governing private conduct. King James I made a famous attempt, see *Perez, post,* at 14 (opinion of THOMAS, J.), prompting the influential jurist Chief Justice Edward Coke to write that the King could not "change any part of the common law, nor create any offence by his proclamation, which was not an

offence before, without Parliament." *Case of Proclamations*, 12 Co. Rep. 74, 75, 77 Eng. Rep. 1352, 1353 (K. B. 1611). Coke associated this principle with Chapter 39 of the Magna Carta,[1] which he understood to guarantee that no subject would be deprived of a private right—that is, a right of life, liberty, or property—except in accordance with "the law of the land," which consisted only of statutory and common law. Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1688 (2012). When the King attempted to fashion rules of private conduct unilaterally, as he did in the *Case of Proclamations*, the resulting enforcement action could not be said to accord with "the law of the land."

John Locke echoed this view. "[F]reedom of men under government," he wrote, "is to have a standing rule to live by, common to every one of that society, and made by the *legislative power* erected in it . . . and not to be subject to the inconstant, uncertain, unknown, arbitrary will of another man." J. Locke, Second Treatise of Civil Government §22, p. 13 (J. Gough ed. 1947) (Locke) (emphasis added). It followed that this freedom required that the power to make the standing rules and the power to enforce them not lie in the same hands. See *id.,* §143, at 72. He further concluded that "[t]he legislative c[ould not] transfer the power of making laws to any other hands: for it being but a delegated power from the people, they who have it [could not] pass it over to others." *Id.,* §141, at 71.[2]

---

[1] Chapter 39 of the 1215 Magna Carta declared that "[n]o free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land." A. Howard, Magna Carta: Text and Commentary 43 (1964).

[2] Locke and his contemporaries also believed that requiring laws to be made in Parliament secured the common interest. W. Gwyn, The Meaning of the Separation of Powers 75 (1965). Parliament would assemble to do the business of legislation, but then its members would disperse to live as private citizens under the laws they had created,

William Blackstone, in his Commentaries, likewise maintained that the English Constitution required that no subject be deprived of core private rights except in accordance with the law of the land. See 1 Commentaries 129, 134, 137–138. He defined a "law" as a generally applicable "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong." *Id.,* at 44 (internal quotation marks omitted). And he defined a tyrannical government as one in which "the right both of *making* and of *enforcing* the laws, is vested in one and the same man, or one and the same body of men," for "wherever these two powers are united together, there can be no public liberty." *Id.,* at 142. Thus, although Blackstone viewed Parliament as sovereign and capable of changing the constitution, *id.,* at 156, he thought a delegation of lawmaking power to be "disgrace[ful]," 4 *id.,* at 424; see also Hamburger 39, n. 17.

B

These principles about the relationship between private rights and governmental power profoundly influenced the men who crafted, debated, and ratified the Constitution. The document itself and the writings surrounding it reflect a conviction that the power to make the law and the power to enforce it must be kept separate, particularly with respect to the regulation of private conduct.

The Framers' dedication to the separation of powers has been well-documented, if only half-heartedly honored.

---

providing them an incentive to legislate in the common interest. During Parliament's absence, the King might meet certain emergencies through the exercise of prerogative power, but in order to make new, permanent laws, he would be required to call Parliament into session. Locke §§143–144, at 72–73. If the King were not dependent on Parliament to legislate, then this beneficial cycle of periodic lawmaking interspersed with representatives' living as private citizens would be broken.

See, *e.g., Mistretta* v. *United States*, 488 U. S. 361, 380–381 (1989). Most famously, in The Federalist 47, Madison wrote that "[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty than" the separation of powers. The Federalist No. 47, p. 301 (C. Rossiter ed. 1961). "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, . . . may justly be pronounced the very definition of tyranny." *Ibid.*; see also *Perez*, *post,* at 7–8 (opinion of THOMAS, J.).

This devotion to the separation of powers is, in part, what supports our enduring conviction that the Vesting Clauses are exclusive and that the branch in which a power is vested may not give it up or otherwise reallocate it. The Framers were concerned not just with the starting allocation, but with the "gradual concentration of the several powers in the same department." The Federalist No. 51, at 321 (J. Madison). It was this fear that prompted the Framers to build checks and balances into our constitutional structure, so that the branches could defend their powers on an ongoing basis. *Ibid.*; see also *Perez*, *post,* at 7 (opinion of THOMAS, J.).

In this sense, the founding generation did not subscribe to Blackstone's view of parliamentary supremacy. Parliament's violations of the law of the land had been a significant complaint of the American Revolution, Chapman & McConnell, *supra,* at 1699–1703. And experiments in legislative supremacy in the States had confirmed the idea that even the legislature must be made subject to the law. *Perez*, *post,* at 6–7 (opinion of THOMAS, J.). James Wilson explained the Constitution's break with the legislative supremacy model at the Pennsylvania ratification convention:

> "Sir William Blackstone will tell you, that in Britain . . . the Parliament may alter the form of the govern-

> ment; and that its power is absolute, without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. . . .
>
> "To control the power and conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states." 2 J. Elliot, Debates on the Federal Constitution 432 (2d ed. 1863); see also 4 *id.,* at 63 (A. Maclaine) (contrasting Congress, which "is to be guided by the Constitution" and "cannot travel beyond its bounds," with the Parliament described in Blackstone's Commentaries).

As an illustration of Blackstone's contrasting model of sovereignty, Wilson cited the Act of Proclamations, by which Parliament had delegated legislative power to King Henry VIII. 2 *id.,* at 432 (J. Wilson); see *supra,* at 6.

At the center of the Framers' dedication to the separation of powers was individual liberty. The Federalist No. 47, at 302 (J. Madison) (quoting Baron de Montesquieu for the proposition that "'[t]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates'"). This was not liberty in the sense of freedom from all constraint, but liberty as described by Locke: "to have a standing rule to live by . . . made by the *legislative power*," and to be free from "the inconstant, uncertain, unknown, arbitrary will of another man." Locke §22, at 13. At the heart of this liberty were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free. See D. Currie, The Constitution in the Supreme Court: The First One Hundred Years,

1789–1888, p. 272, and n. 268 (1985).[3]

This history confirms that the core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make "law" in the Blackstonian sense of generally applicable rules of private conduct.

III

Even with these sound historical principles in mind, classifying governmental power is an elusive venture. *Wayman*, 10 Wheat., at 43; The Federalist No. 37, at 228 (J. Madison). But it is no less important for its difficulty. The "check" the judiciary provides to maintain our separation of powers is enforcement of the rule of law through judicial review. *Perez*, *post,* at 14 (opinion of THOMAS, J.). We may not—without imperiling the delicate balance of our constitutional system—forgo our judicial duty to ascertain the meaning of the Vesting Clauses and to adhere to that meaning as the law. *Perez*, *post,* at 14–16.

We have been willing to check the improper allocation of executive power, see, *e.g., Free Enterprise Fund*, 561 U. S. 477; *Metropolitan Washington Airports Authority* v. *Citizens for Abatement of Aircraft Noise, Inc.*, 501 U. S. 252 (1991), although probably not as often as we should, see, *e.g., Morrison* v. *Olson*, 487 U. S. 654 (1988). Our record with regard to legislative power has been far worse.

We have held that the Constitution categorically forbids Congress to delegate its legislative power to any other body, *Whitman,* 531 U. S., at 472, but it has become in-

---

[3] I do not mean to suggest here that the Framers believed an Act of the Legislature was *sufficient* to deprive a person of private rights; only that it was necessary. See generally Chapman & McConnell, Due Process as Separation of Powers, 121 Yale L. J. 1672, 1715, 1721–1726 (2012) (discussing historical evidence that the Framers believed the Due Process Clause limited Congress' power to provide by law for the deprivation of private rights without judicial process).

creasingly clear to me that the test we have applied to distinguish legislative from executive power largely abdicates our duty to enforce that prohibition. Implicitly recognizing that the power to fashion legally binding rules is legislative, we have nevertheless classified rulemaking as executive (or judicial) power when the authorizing statute sets out "an intelligible principle" to guide the rulemaker's discretion. *Ibid.* Although the Court may never have intended the boundless standard the "intelligible principle" test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.

A

The Court first announced the intelligible principle test in *J. W. Hampton, Jr., & Co.* v. *United States*, 276 U. S. 394 (1928). That case involved a challenge to a tariff assessed on a shipment of barium dioxide. *Id.,* at 400. The rate of the tariff had been set by proclamation of the President, pursuant to the so-called flexible tariff provision of the Tariff Act of 1922. *Ibid.* That provision authorized the President to increase or decrease a duty set by the statute if he determined that the duty did not "'equalize . . . differences in costs of production [of the item to which the duty applied] in the United States and the principal competing country.'" *Id.,* at 401 (quoting 19 U. S. C. §154 (1925 ed.)). The importer of the barium dioxide challenged the provision as an unconstitutional delegation of legislative power to the President. 276 U. S., at 404. Agreeing that Congress could not delegate legislative power, the Court nevertheless upheld the Act as constitutional, setting forth the now-famous formulation: "If Congress shall

lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409.

Though worded broadly, the test rested on a narrow foundation. At the time *J. W. Hampton* was decided, most "delegations" by Congress to the Executive, including the delegation at issue in that case, had taken the form of conditional legislation. See *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 683–689 (1892). That form of legislation "makes the suspension of certain provisions and the going into operation of other provisions of an Act of Congress depend upon the action of the President based upon the occurrence of subsequent events, or the ascertainment by him of certain facts, to be made known by his proclamation." *Id.*, at 683.

The practice of conditional legislation dates back at least to the Third Congress in 1794. *Id.*, at 683–689 (collecting statutes). It first came before the Court in *Cargo of Brig Aurora* v. *United States*, 7 Cranch 382 (1813). There, the Court considered whether a Presidential proclamation could, by declaring that France had ceased to violate the neutral commerce of the United States, reinstate a legislative Act embargoing British goods. *Id.,* at 384, 388. The Court concluded that the proclamation was effective, seeing "no sufficient reaso[n] why the legislature should not exercise its discretion . . . either expressly or conditionally, as their judgment should direct." *Id.,* at 388.

At least as defined by the Court in *Field*, the practice of conditional legislation does not seem to call on the President to exercise a core function that demands an exercise of legislative power. Congress creates the rule of private conduct, and the President makes the *factual* determination that causes that rule to go into effect. That type of factual determination seems similar to the type of factual determination on which an enforcement action is condi-

tioned: Neither involves an exercise of policy discretion, and both are subject to review by a court. See *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386 (1907) (explaining that, when the Secretary of War determined whether bridges unreasonably obstruct navigation, he "could not be said to exercise strictly legislative . . . power any more, for instance, than it could be said that Executive officers exercise such power when, upon investigation, they ascertain whether a particular applicant for a pension belongs to a class of persons who, under general rules prescribed by Congress, are entitled to pensions").

As it happens, however, conditional statutes sometimes did call for the President to make at least an implicit policy determination. For example, a 1794 provision entitled "An Act to authorize the President of the United States to lay, regulate and revoke Embargoes," ch. 41, 1 Stat. 372, called on the President to impose an embargo on shipping "whenever, in his opinion, the public safety shall so require . . . ." *Ibid.* The statutes at issue in *Field* and *J. W. Hampton* could similarly be viewed as calling for built-in policy judgments. See Schoenbrod, The Delegation Doctrine: Could The Court Give It Substance? 83 Mich. L. Rev. 1223, 1263–1264 (1985).[4] Such delegations

---

[4] The statute at issue in *Field* authorized the President to reimpose statutory duties on exports from a particular country if he found that the country had imposed "reciprocally unequal and unreasonable" duties on U. S. exports. 143 U. S., at 692. At least insofar as the terms "unequal" and "unreasonable" did not have settled common-law definitions that could be applied mechanically to the facts, they could be said to call for the President to exercise policy judgment about which duties qualified. See *id.,* at 699 (Lamar, J., dissenting but concurring in judgment) (The statute "does not, as was provided in the statutes of 1809 and 1810, entrust the President with the ascertainment of a fact therein defined upon which the law is to go into operation. It goes farther than that, and deputes to the President the power to suspend another section in the same act whenever 'he may deem' the action of any foreign nation . . . to be 'reciprocally unequal and unreasona-

of policy determinations pose a constitutional problem because they effectively permit the President to define some or all of the content of that rule of conduct. He may do so expressly—by setting out regulations specifying what conduct jeopardizes "the public safety," for example—or implicitly—by drawing distinctions on an ad hoc basis. In either event, he does so based on a policy judgment that is not reviewable by the courts, at least to the extent that the judgment falls within the range of discretion permitted him by the law. See *id.,* at 1255–1260.

The existence of these statutes should not be taken to suggest that the Constitution, as originally understood, would permit such delegations. The 1794 embargo statute involved the external relations of the United States, so the determination it authorized the President to make arguably did not involve an exercise of core legislative power. See *id.,* at 1260–1263 (distinguishing the tariff statute at issue in *Field* and *J. W. Hampton* on these grounds).[5]

---

ble. . . '"). Similarly, the statute at issue in *J. W. Hampton* called on the President, with the aid of a commission, to determine the "'costs of production'" for various goods—a calculation that could entail an exercise of policy judgment about the appropriate wage and profit rates in the relevant industries. 276 U. S., at 401.

[5] The definition of "law" in England at the time of the ratification did not necessarily include rules—even rules of private conduct—dealing with external relations. For example, while "every Englishman [could] claim a right to abide in his own country so long as he pleases; and not to be driven from it unless by the sentence of the law," the King "by his royal prerogative, [could] issue out his writ *ne exeat regnum*, and prohibit any of his subjects from going into foreign parts without licence." 1 Commentaries 133. It is thus likely the Constitution grants the President a greater measure of discretion in the realm of foreign relations, and the conditional tariff Acts must be understood accordingly. See *Clinton* v. *City of New York*, 524 U. S. 417, 445 (1998) (distinguishing *Field* on the ground that the statute at issue in *Field* regulated foreign trade); see also *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 324 (1936) ("Practically every volume of the United States Statutes contains one or more acts or joint resolutions of Congress authorizing action by the President in respect of subjects affecting

Moreover, the statute was never subjected to constitutional scrutiny. And when a statute of its kind—that is, a tariff statute calling for an exercise of policy judgment—finally came before this Court for consideration in *Field*, the Court appeared to understand the statute as calling for no more than a *factual* determination. 143 U. S., at 693. The Court thus did not in that case endorse the principle that the Executive may fashion generally applicable rules of private conduct and appears not to have done so until the 20th century.

More to the point, *J. W. Hampton* can be read to adhere to the "factual determination" rationale from *Field*. The Court concluded its delegation analysis in *J. W. Hampton not* with the "intelligible principle" language, but by citing to *Field* for the proposition that the "Act did not in any real sense invest the President with the power of legislation, *because nothing involving the expediency or just operation* of such legislation was left to the determination of the President." 276 U. S., at 410 (emphasis added); *Field*, 143 U. S., at 692 (explaining that an Act did not "in any real sense, invest the President with the power of legislation"). Congress had created a "named contingency," and the President "was the mere agent of the lawmaking department to ascertain and declare the event upon which its expressed will was to take effect." *J. W. Hampton*, *supra,* at 410–411.[6]

---

foreign relations, which either leave the exercise of the power to his unrestricted judgment, or provide a standard far more general than that which has always been considered requisite with regard to domestic affairs"). This Court has at least once expressly relied on this rationale to sanction a delegation of power to make rules governing private conduct in the area of foreign trade. See *Buttfield* v. *Stranahan*, 192 U. S. 470, 496 (1904).

[6] Contemporary perceptions of the statute were less sanguine. One editorial deemed it "the most dangerous advance in bureaucratic government ever attempted in America." D. Schoenbrod, Power Without Responsibility 36 (1993) (quoting Letter from J. Cotton (Feb. 7,

The analysis in *Field* and *J. W. Hampton* may have been premised on an incorrect assessment of the statutes before the Court, see n. 4, *supra*, but neither purported to define executive power as including the discretion to make generally applicable rules governing private conduct. To the extent that our modern jurisprudence treats them as sanctioning the "delegation" of such power, it misunderstands their historical foundations and expands the Court's holdings.

B

It is nevertheless true that, at the time *J. W. Hampton* was decided, there was a growing trend of cases upholding statutes pursuant to which the Executive exercised the power of "making . . . subordinate rules within prescribed limits." *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 421 (1935); see also *id.,* at 429 (collecting cases). These cases involved executive power to make "binding rules of conduct," and they were found valid "as subordinate rules . . . [when] within the framework of the policy which the legislature ha[d] sufficiently defined." *Id.,* at 428–429. To the extent that these cases endorsed authorizing the Executive to craft generally applicable rules of private conduct, they departed from the precedents on which they purported to rely.

The key decision to which these cases purport to trace their origin is *Wayman*, 10 Wheat. 1, but that decision does not stand for the proposition those cases suggest. Although it upheld a statute authorizing courts to set

---

1929), in With Our Readers, 13 Constitutional Review 98, 101 (1929)). President-elect Hoover stirred the public with promises of a repeal: "There is only one commission to which delegation of [the] authority [to set tariffs] can be made. That is the great commission of [the people's] own choosing, the Congress of the United States and the President." Public Papers of the Presidents, Herbert Hoover, 1929, p. 565 (1974); see also Schoenbrod, *supra,* at 36.

rules governing the execution of their own judgments, *id.,* at 50, its reasoning strongly suggests that rules of private conduct were not the proper subject of rulemaking by the courts. Writing for the Court, Chief Justice Marshall surveyed a number of choices that could be left to rulemaking by the courts, explaining that they concerned only "the regulation of the conduct of the officer of the Court in giving effect to its judgments." *Id.,* at 45. When it came to specifying "the mode of obeying the mandate of a writ," however, he lamented that "so much of that which may be done by the judiciary, under the authority of the legislature, seems to be blended with that for which the legislature must expressly and directly provide." *Id.,* at 46.

This important passage reflects two premises that Chief Justice Marshall took for granted, but which are disregarded in later decisions relying on this precedent: First, reflected in his discussion of "blending" permissible with impermissible discretion, is the premise that it is not the *quantity*, but the *quality*, of the discretion that determines whether an authorization is constitutional. Second, reflected in the contrast Chief Justice Marshall draws between the two types of rules, is the premise that the rules "for which the legislature must expressly and directly provide" are those regulating private conduct rather than those regulating the conduct of court officers.

Thus, when Chief Justice Marshall spoke about the "difficulty in discerning the exact limits within which the legislature may avail itself of the agency of its Courts," *ibid.*, he did not refer to the difficulty in discerning whether the Legislature's policy guidance is "sufficiently defined," see *Panama Refining*, *supra,* at 429, but instead the difficulty in discerning which rules affected substantive private rights and duties and which did not. We continue to wrestle with this same distinction today in our decisions distinguishing between substantive and procedural rules both in diversity cases and under the Rules

Enabling Act. See, *e.g., Shady Grove Orthopedic Associates, P. A.* v. *Allstate Ins. Co.*, 559 U. S. 393, 406–407 (2010) ("In the Rules Enabling Act, Congress authorized this Court to promulgate rules of procedure subject to its review, 28 U. S. C. §2072(a), but with the limitation that those rules 'shall not abridge, enlarge or modify any substantive right,' §2072(b)").[7]

C

Today, the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power. To the extent that the "intelligible principle" test was ever an adequate means of enforcing that distinction, it has been decoupled from the historical understanding of the legislative and executive powers and thus does not keep executive "lawmaking" within the bounds of inherent executive discretion. See *Whitman*, 531 U. S., at 487 (THOMAS, J., concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power"). Perhaps we were led astray by the optical illusion caused by different branches carrying out the same functions, believing that the separation of powers would be substantially honored so long as the encroachment were not too great. See, *e.g., Loving* v. *United States*, 517 U. S. 748, 773 (1996) ("Separation-of-powers principles are vindicated, not disserved, by measured

---

[7] Another early precedent on which the errant "subordinate rulemaking" line of cases relies involves rules governing mining claims on public land. *Jackson* v. *Roby*, 109 U. S. 440, 441 (1883); see also *United States* v. *Grimaud*, 220 U. S. 506 (1911) (sustaining an Act authorizing the Secretary of Agriculture to make rules and regulations governing the use and occupancy of public forest reservations). Although perhaps questionable on its own terms, *Jackson* is distinguishable because it did not involve the Government's reaching out to regulate private conduct, but instead involved the Government's setting rules by which individuals might enter onto public land to avail themselves of resources belonging to the Government.

cooperation between two political branches of the Government, each contributing to a lawful objective through its own processes"). Or perhaps we deliberately departed from the separation, bowing to the exigencies of modern Government that were so often cited in cases upholding challenged delegations of rulemaking authority.[8] See, *e.g., Mistretta*, 488 U. S., at 372 ("[O]ur jurisprudence has been driven by a practical understanding that in 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").

For whatever reason, the intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law. And because the Court 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,'" *Whitman*, *supra*, at 474–475 (majority opinion) (quoting *Mistretta*, *supra,* at 416 (SCALIA, J., dissenting)), the level of specificity it has required has been very minimal indeed, see 531 U. S., at 474 (collecting cases upholding delegations to regulate in the "public interest"). Under the guise of the intelligible-principle test, the Court has allowed the Executive to go beyond the safe realm of factual investigation to make political judgments about what is "unfair" or "unnecessary." See, *e.g., American Power & Light Co.* v. *SEC*, 329 U. S. 90, 104–105 (1946). It has permitted the Executive to make trade-offs between competing policy goals. See,

---

[8] Much of the upheaval in our delegation jurisprudence occurred during the Progressive Era, a time marked by an increased faith in the technical expertise of agencies and a commensurate cynicism about principles of popular sovereignty. See *Perez* v. *Mortgage Bankers Assn.*, *post,* at 19–20, n. 6 (THOMAS, J., concurring in judgment).

e.g., Yakus v. *United States*, 321 U. S. 414, 420, 423–426 (1944) (approving authorization for agency to set prices of commodities at levels that "will effectuate the [sometimes conflicting] purposes of th[e] Act"); see also *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 686–687 (1980) (Rehnquist, J., concurring in judgment) ("It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge"). It has even permitted the Executive to decide which policy goals it wants to pursue. *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U. S. 208, 218–223 (2009) (concluding that Congress gave the Environmental Protection Agency (EPA) discretion to decide whether it should consider costs in making certain rules). And it has given sanction to the Executive to craft significant rules of private conduct. See, *e.g., Whitman*, 531 U. S., at 472–476 (approving delegation to EPA to set national standards for air quality); see also *id.,* at 488–489 (Stevens, J., concurring in part and concurring in judgment) (arguing that the Clean Air Act effects a delegation of legislative power because it authorizes EPA to make prospective, generally applicable rules of conduct).

Our reluctance to second-guess Congress on the *degree* of policy judgment is understandable; our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct. To understand the "intelligible principle" test as permitting Congress to delegate policy judgment in this context is to divorce that test from its history. It may never be possible perfectly to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not

enacted by Congress pursuant to Article I.

We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable. In anticipating that result and accepting it, I am in good company. John Locke, for example, acknowledged that a legislative body "is usually too numerous, and so too slow for the dispatch requisite to execution." Locke §160, at 80. But he saw that as a benefit for legislation, for he believed that the creation of rules of private conduct should be an irregular and infrequent occurrence. See *id.,* §143, at 72. The Framers, it appears, were inclined to agree. As Alexander Hamilton explained in another context, "It may perhaps be said that the power of preventing bad laws includes that of preventing good ones . . . . But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws, which form the greatest blemish in the character and genius of our governments." The Federalist No. 73, at 443–444. I am comfortable joining his conclusion that "[t]he injury which may possibly be done by defeating a few good laws will be amply compensated by the advantage of preventing a number of bad ones." *Id.*, at 444.

IV

Although the majority corrects an undoubted error in the framing of the delegation dispute below, it does so without placing that error in the context of the constitutional provisions that govern respondent's challenge to §207 of the PRIIA.

A

Until the case arrived in this Court, the parties pro-

ceeded on the assumption that Amtrak is a private entity, albeit one subject to an unusual degree of governmental control.[9] The Court of Appeals agreed. 721 F. 3d 666, 674–677 (CADC 2013). Because it also concluded that Congress delegated regulatory power to Amtrak, *id.,* at 670–674, and because this Court has held that delegations of regulatory power to private parties are impermissible, *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 311 (1936), it held the delegation to be unconstitutional, 721 F. 3d, at 677.

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

For this reason, a conclusion that Amtrak is private—that is, not part of the Government at all—would necessarily mean that it cannot exercise these three categories of governmental power. But the converse is not true: A determination that Amtrak acts as a governmental entity in crafting the metrics and standards says nothing about whether it properly exercises governmental power when it does so. An entity that "was created by the Government,

---

[9] See Brief for Appellees in No. 12–5204 (DC), pp. 23–29 (defending §207 under cases upholding statutes "assign[ing] an important role to a private party"); *id.,* at 29 ("Amtrak . . . is not a private entity comparable to the [private parties in a relevant precedent]. Although the government does not control Amtrak's day-to-day operations, the government exercises significant structural control").

is controlled by the Government, and operates for the Government's benefit," *ante,* at 10 (majority opinion), but that is not properly constituted to exercise a power under one of the Vesting Clauses, is no better qualified to be a delegatee of that power than is a purely private one. To its credit, the majority does not hold otherwise. It merely refutes the Court of Appeals' premise that Amtrak is private. But this answer could be read to suggest, wrongly, that our conclusion about Amtrak's status has some constitutional significance for "delegation" purposes.

B

The first step in the Court of Appeals' analysis on remand should be to classify the power that §207 purports to authorize Amtrak to exercise. The second step should be to determine whether the Constitution's requirements for the exercise of that power have been satisfied.

1

Under the original understanding of the legislative and executive power, Amtrak's role in the creation of metrics and standards requires an exercise of legislative power because it allows Amtrak to decide the applicability of standards that provide content to generally applicable rules of private conduct.

Specifically, the metrics and standards alter the railroads' common-carrier obligations under 49 U. S. C. §11101. Host railroads may enter into contracts with Amtrak under §§10908 and 24308 to fulfill their common-carrier obligations. The metrics and standards shape the types of contracts that satisfy the common-carrier obligations because §207 provides that "Amtrak and its host rail carriers *shall*" include the metrics and standards in their contracts "[t]o the extent practicable." PRIIA §207(c), 49 U.S.C. §24101 (note) (emphasis added). As JUSTICE ALITO explains, it matters little that the railroads may avoid

incorporating the metrics and standards by arguing that incorporation is impracticable; the point is that they have a legal duty to try—a duty the substance of which is defined by the metrics and standards. See *ante*, at 3–4 (concurring opinion). And that duty is backed up by the Surface Transportation Board's coercive power to impose "reasonable terms" on host railroads when they fail to come to an agreement with Amtrak. §24308(a)(2)(A)(ii). Presumably, when it is "practicable" to incorporate the metrics and standards, the Board is better positioned to deem such terms "reasonable" and to force them upon the railroads.

Although the Government's argument to the contrary will presumably change now that the Court has held that Amtrak is a governmental entity, it argued before this Court that Amtrak did not exercise meaningful power because other "governmental entities had sufficient control over the development and adoption of the metrics and standards." Brief for Petitioners 19–26. For support, the Government relied on two questionable precedents in which this Court held that Congress may grant private actors the power to determine whether a government regulation will go into effect: *Currin* v. *Wallace*, 306 U. S. 1 (1939), and *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (1939). Those precedents reason that it does not require an exercise of legislative power to decide whether and when legally binding rules of private conduct will go into effect. *Currin*, *supra,* at 16–18; *Rock Royal*, *supra,* at 574–577. But as I have explained above, to the extent that this decision involves an exercise of policy discretion, it requires an exercise of legislative power. *Supra,* at 21–22. In any event, these precedents are directly contrary to our more recent holding that a discretionary "veto" necessarily involves an exercise of legislative power. See *INS* v. *Chadha*, 462 U. S., at 952–953; see also *id.,* at 987 (White, J., dissenting) (noting that the

power Congress reserved to itself was virtually identical to the power it conferred on private parties in *Currin* and *Rock Royal*). As such, *Currin* and *Rock Royal* have been discredited and lack any force as precedents.

Section 207 therefore violates the Constitution. Article I, §1, vests the legislative power in Congress, and Amtrak is not Congress. The procedures that §207 sets forth for enacting the metrics and standards also do not comply with bicameralism and presentment. Art. I, §7. For these reasons, the metrics and standards promulgated under this provision are invalid.

2

I recognize, of course, that the courts below will be bound to apply our "intelligible principle" test. I recognize, too, that that test means so little that the courts are likely to conclude that §207 calls for nothing more than the exercise of executive power. Having made that determination, the Court of Appeals must then determine whether Amtrak is constitutionally eligible to exercise executive power.

As noted, Article II of the Constitution vests the executive power in a "President of the United States of America." Art. II, §1. Amtrak, of course, is not the President of the United States, but this fact does not immediately disqualify it from the exercise of executive power. Congress may authorize subordinates of the President to exercise such power, so long as they remain subject to Presidential control.

The critical question, then, is whether Amtrak is adequately subject to Presidential control. See *Myers*, 272 U. S., at 117. Our precedents treat appointment and removal powers as the primary devices of executive control, *Free Enterprise Fund*, 561 U. S., at 492, and that should be the starting point of the Court of Appeals' analysis. As JUSTICE ALITO's concurrence demonstrates,

however, there are other constitutional requirements that the Court of Appeals should also scrutinize in deciding whether Amtrak is constitutionally eligible to exercise the power §207 confers on it.

* * *

In this case, Congress has permitted a corporation subject only to limited control by the President to create legally binding rules. These rules give content to private railroads' statutory duty to share their private infrastructure with Amtrak. This arrangement raises serious constitutional questions to which the majority's holding that Amtrak is a governmental entity is all but a non sequitur. These concerns merit close consideration by the courts below and by this Court if the case reaches us again. We have too long abrogated our duty to enforce the separation of powers required by our Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure. The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects.