Note

Who Are They to Judge?: The Constitutionality of Delegations by Courts to Probation Officers

Mark Thomson∗

In 2009, the United States District Court for the Southern District of Texas sentenced Maurice Turpin to fifty-seven months in prison and three years of supervised release for transporting an unlawful alien.[1] As a condition of supervised release, the District Court ordered Turpin to participate in mental health and anger management programs "as deemed necessary and approved by the probation officer."[2]

Orders delegating discretionary authority to probation officers are not uncommon. Oftentimes, the delegation implicates liberty interests arguably even more substantial than that at issue for Turpin. In one case, for example, a district court delegated to a probation officer the power to determine a probationer's right to visit with his son and grandson unsupervised.[3] In another, a judge delegated to a probation officer the power to decide whether a defendant could possess a computer.[4]

Like a growing number of defendants, Turpin appealed the order in his case on grounds that the district court had impermissibly delegated its judicial authority to a non-judicial officer.[5] His argument, essentially, was that the Constitution requires that certain decisions be made exclusively by Article III judicial officers, meaning courts may not delegate those decisions to non-Article III officials.[6]

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1. *See* United States v. Turpin, 393 F. App'x 172, 173 (5th Cir. 2010).
2. *Id.*
3. United States v. Bowman, 175 F. App'x 834, 838 (9th Cir. 2006).
4. United States v. Fields, 324 F.3d 1025, 1027–28 (8th Cir. 2003).
5. *Turpin*, 393 F. App'x at 173.
6. *Id.*

Turpin's appeal posed a problem for the Fifth Circuit, however, since there is no judicial consensus as to when courts may constitutionally delegate their authority to probation officers.[7] Though a majority of the federal courts of appeal have considered the constitutionality of delegations of probationary authority by the judiciary, their decisions have resulted in a pronounced and ongoing circuit split.[8]

This Note considers the different approaches taken by the circuit courts in evaluating judicial delegations of power to probation officers. Part I lays out the various standards that the circuit courts have applied to determine whether a delegation by a court to a probation officer is constitutional. Part II analyzes those standards and identifies a number of flaws in each. Part III argues that courts would improve jurisprudence in this area of the law by abandoning the current, multi-test framework in favor of the standard used by the Supreme Court to evaluate delegations of Article I power. Doing so would engender greater doctrinal consistency and coherence, promote judicial economy, and, ultimately, improve fairness to parties.

I. CURRENT LAW ON JUDICIAL DELEGATIONS TO PROBATION OFFICERS

The judicial system is at a crossroads in its growing dependence on probation officers. Increasingly, courts delegate authority to probation officers in order to manage the growing number and variety of sentences imposed in criminal cases,[9] but probationers often challenge such delegations as violative of Article III's Vesting Clause.[10] Although reviewing courts have devised a number of judicial tests to balance these conflicting imperatives, the tests are inconsistent and the results, accordingly, uneven and difficult to reconcile. The current state

7. *Id.* at 173–74 (recognizing there is currently a circuit split on the issue).

8. *Compare Bowman*, 175 F. App'x at 838 (upholding delegation of authority to a probation officer against an Article III challenge), *and* United States v. Mickelson, 433 F.3d 1050, 1057 (8th Cir. 2006) (same), *and* Weinberger v. United States, 268 F.3d 346, 359–61 (6th Cir. 2001) (same), *with* United States v. Pruden, 398 F.3d 241, 251 (3d Cir. 2005) (overturning delegation of authority to probation officer as a violation of Article III), *and* United States v. Heath, 419 F.3d 1312, 1315–16 (11th Cir. 2005) (same), *and* United States v. Johnson, 48 F.3d 806, 808 (4th Cir. 1995) (same).

9. *See* United States v. Burnette, 980 F. Supp. 1429, 1432–33 (M.D. Ala. 1997) (asserting that the probation officer functions as the "supervisory 'arm of the court'").

10. *See, e.g.*, United States v. Mike, 632 F.3d 686, 695, 698, 700 (10th Cir. 2011); *see also* U.S. CONST. art. III, § 1.

of the law regarding judicial delegations stands in marked contrast to the situation surrounding constitutional challenges to delegations of legislative authority, with respect to which courts today have the benefit of a nearly universally accepted standard for review.

A. PROBATION OFFICERS AS EXECUTIVE OFFICIALS

Federal probation officers operate under the supervision of the federal judiciary and serve the courts.[11] They are not, however, part of the Article III judiciary, for the simple reason that they do not actually decide—or help to decide—cases or controversies.[12] Instead, probation officers perform a quintessentially executive function: enforcing court orders and judgments.[13] Unlike Article III judges, whose jobs require neutrality, probation officers are generally adversarial to defendants, in the same way that police officers, prosecutors, and other executive branch officials are adversarial to defendants.[14] Probation officers might be an "arm of the federal judiciary,"[15] but they are fundamentally executive—not judicial—officials.[16]

B. DELEGATION TO PROBATION OFFICERS AS THE MODERN NORM

The criminal justice system relies heavily on probation officers.[17] As the Fourth Circuit recognized, "to remain efficient, [district courts] must be able to rely as extensively as possible on the support services of probation officers."[18] Courts routinely

11. *See Probation and Pretrial Services - Mission*, U.S. COURTS, http://www.uscourts.gov/FederalCourts/ProbationPretrialServices/Mission.aspx (last visited Oct. 21, 2011).

12. *See* Vermont v. New York, 417 U.S. 270, 277 (1974) (explaining that the Constitution's reference to "'judicial power' embraces application of principles of law or equity to facts, distilled by hearings or by stipulations").

13. *See* BLACK'S LAW DICTIONARY 651 (9th ed. 2011) (defining "executive power" as "the power to see that laws are duly executed and enforced").

14. Ricardo J. Bascuas, *The American Inquisition: Sentencing After the Federal Guidelines*, 45 WAKE FOREST L. REV. 1, 58–59 (2010).

15. *See* U.S. COURTS, *supra* note 11.

16. Bascuas, *supra* note 14, at 59 (contending that although a probation officer "formally or technically works for the Judicial Branch," the officer "serves as nothing less than the court's inquisitor").

17. *See, e.g.*, United States v. Herrera-Figueroa, 918 F.2d 1430, 1435 (9th Cir. 1990) ("[P]robation officers therefore 'are virtually indispensable.'"); *see also* Williams v. New York, 337 U.S. 241, 249–50 (1949).

18. United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995).

delegate a wide range of functions to probation officers.[19] Sometimes, the delegated function is relatively simple and entails the exercise of only minimal discretion by the probation officer, as where a district court orders a probation officer to collect DNA samples from a probationer.[20] In other instances, the court delegates much greater authority or discretion to the probation officer. For example, district courts have granted probation officers broad discretion in determining whether and where to allow a probationer to travel,[21] whether to require a probationer to notify third parties of his criminal background,[22] and whether, when, and where to administer random drug tests.[23]

Allowing courts to delegate these functions is essential to the smooth functioning of the judicial system,[24] especially given the high number of probationers and parolees—over 119,000[25]—in the federal system today. Requiring courts to oversee the particularities of every probation would impose a significant strain on judicial resources.[26] Thus, Congress has given courts broad authority to delegate powers and responsibilities to probation officers.[27]

C. ARTICLE III'S VESTING CLAUSE AND LIMITS ON DELEGATION OF JUDICIAL POWER

Though the judiciary routinely delegates authority to probation officers, defendants continue to assert that the practice

19. *See* HILDA L. SOLIS, U.S. DEP'T OF LABOR & KEITH HALL, U.S. BUREAU OF LABOR STATISTICS, OCCUPATIONAL OUTLOOK HANDBOOK 242 (2010), *available at* http://www.bls.gov/oco/reprints/ooh003.pdf.

20. *See, e.g.*, United States v. Sczubelek, 402 F.3d 175, 189 (3d Cir. 2005).

21. United States v. Stanphill, 146 F.3d 1221, 1223–24 (10th Cir. 1998).

22. United States v. Peterson, 248 F.3d 79, 85–86 (2d Cir. 2001).

23. United States v. Bonanno, 146 F.3d 502, 511 (7th Cir. 1998).

24. *See, e.g.*, United States v. Zinn, 321 F.3d 1084, 1092 (11th Cir. 2003); United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001).

25. *See* LAUREN E. GLAZE ET AL., BUREAU OF JUSTICE STATISTICS, PROBATION AND PAROLE IN THE UNITED STATES, 2009, at 23, 33 (2010).

26. United States v. York, 357 F.3d 14, 22 n.6 (1st Cir. 2004) ("As a practical matter, moreover, many district courts must rely on probation services to ensure the efficient administration of justice in criminal cases."); United States v. Kent, 209 F.3d 1073, 1079 (8th Cir. 2000) ("[F]ederal district courts cannot be expected to police every defendant to the extent that a probation officer is capable of doing.").

27. *See, e.g.*, 18 U.S.C. § 3603(10) (2006) ("A probation officer shall . . . perform any other duty that the court may designate.").

violates Article III, § 1 of the Constitution.[28] Article III, § 1, also known as Article III's Vesting Clause, states that, "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."[29] As interpreted by the Supreme Court, the Vesting Clause bars delegations of the judicial power to non-judicial officers.[30] This interpretation is known as the Article III nondelegation principle.[31]

The nondelegation principle serves two purposes.[32] First, it is a corollary to the Constitution's separation of powers, rooted in the concern that delegation by one branch of its powers to another branch threatens the balance of powers.[33] To keep the branches separate and co-equal, and thus functioning effectively as checks on each other, courts and scholars—echoing the Founding Fathers—have posited that certain responsibilities should be exercised only by specific branches (i.e. should not be delegable).[34] Consistent with Article III's Vesting Clause, the Supreme Court has said that separation of powers prohibits courts from delegating "essential attributes of the judicial power."[35]

In the context of Article III, the nondelegation principle also "preserves to litigants their interest in an impartial and independent federal adjudication of claims within the judicial power of the United States."[36] The impartiality and indepen-

28. United States v. Mike, 632 F.3d 686, 695 (10th Cir. 2011) (challenging the constitutionality of a court's grant of authority to a probation officer); United States v. Torres-Pindan, 400 F. App'x 839, 841 (5th Cir. 2010) (same), *cert. denied*, 131 S. Ct. 2960 (2011); United States v. Scalise, 398 F. App'x 736, 742 (3d Cir. 2010) (same), *cert. denied*, 131 S. Ct. 1585 (2011).

29. U.S. CONST. art. III, § 1.

30. *See, e.g.*, N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58–59 (1982) ("The inexorable command of [Article III, § 1] is clear and definite: The judicial power of the United States must be exercised by courts having the attributes prescribed in Art. III.").

31. *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 352 (2002).

32. *See* Austin v. Healey, 5 F.3d 598, 602 (2d Cir. 1993).

33. *See, e.g.*, Darren Summerville, *The Nondelegation Doctrine After* Whitman v. American Trucking Associations*: Constitutional Precedent Breathes a Sigh of Relief*, 18 GA. ST. U. L. REV. 627, 662 (2001) ("[T]he nondelegation doctrine is cemented by separation of powers concerns . . . .").

34. *See* Chadha v. I.N.S., 634 F.2d 408, 420–26 (9th Cir. 1981), *aff'd*, I.N.S. v. Chadha, 462 U.S. 919 (1983).

35. *See* Crowell v. Benson, 285 U.S. 22, 51 (1932).

36. Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 850 (1986).

dence of the judiciary are secured through Article III's protections of judicial salary and tenure—protections unique, at the federal level, to the judiciary.[37] Furthermore, because Article III judges are appointed from a national pool after careful consideration by the President and Senate, they are arguably, as a group, more competent than non-Article III judges to determine defendants' rights.[38]

D. TESTS USED BY COURTS TO EVALUATE THE CONSTITUTIONALITY OF DELEGATIONS TO PROBATION OFFICERS

The Supreme Court has held that sentencing is fundamentally a judicial power.[39] As a judicial power, it falls within Article III's nondelegation principle. Because setting terms of probation is one manner of sentencing,[40] the power to set terms of probation is also nondelegable, meaning only Article III judges may exercise it.[41]

But this seemingly clear analysis has given rise to a very unclear jurisprudence. Considerable uncertainty exists about what sorts of decisions fall within the ambit of "sentencing" and what sorts of grants of power constitute delegations. When resolving claims of unconstitutional delegations, courts typically

37. U.S. CONST. art. III, § 1; THE FEDERALIST NO. 78, at 467, 472–75 (Alexander Hamilton) (Bernard Bailyn ed., 1993) (arguing that life tenure for Article III judges is essential to ensure their fairness and impartiality); Lloyd N. Cutler, *The Limits of Advice and Consent*, 84 NW. U. L. REV. 876, 877 (1990) (noting that the prohibition against diminishing judicial salary is one means of assuring "the appearance of judicial independence and impartiality").

38. *See* Akhil Amar, *The Two-Tiered Structure of the Judiciary Act of 1789*, 138 U. PA. L. REV. 1499, 1509 (1990); David Pimentel, *Reframing the Independence v. Accountability Debate: Defining Judicial Structure in Light of Judges' Courage and Integrity*, 57 CLEV. ST. L. REV. 1, 16 n.56 (2009); *see also* Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105 (1977) (opposing the notion that "federal and state trial courts are equally competent forums for the enforcement of federal constitutional rights").

39. *Ex parte* United States, 242 U.S. 27, 41 (1916) ("Indisputably under our constitutional system the right to try offences against the criminal laws and upon conviction to impose the punishment provided by law is judicial . . . .").

40. 18 U.S.C. § 3551(b)(1) (2008) (identifying "a term of probation" as a type of sentence).

41. *See, e.g.*, Whitehead v. United States, 155 F.2d 460, 462 (6th Cir. 1946) ("Fixing the terms and conditions of probation is a judicial act which may not be delegated.").

look to either of two judicial tests: the "core judicial functions" test [42] or the "ultimate authority" test.[43]

1. The Core Judicial Functions Test

Courts applying the core judicial functions test distinguish between powers that are essential to or inherent in the adjudicative function and powers that are essentially "ministerial" or "administrative."[44] The test reflects a functionalist approach to the Constitution which posits that the separation of powers bolstered by the non-delegation principle is preserved as long as "core functions" of the branches aren't transferred from one branch to another.[45] "Core functions," in turn, are those functions that must be retained by a branch in order to ensure that it is able to function as a separate, co-equal branch of government within the Constitution's system of checks and balances.[46] Courts applying this test variously characterize Article III's Vesting Clause and the non-delegation principle, as applying only to functions that are "strictly judicial" or "core judicial functions."[47] Since delegating "ministerial" or "administrative" functions assertedly does not threaten the judiciary's exercise of "the judicial Power," as that phrase is used in Article III's Vesting Clause, Article III's nondelegation principle does not limit delegations of these functions.[48]

42. *See, e.g.*, United States v. Prouty, 303 F.3d 1249, 1254–55 (11th Cir. 2002) (holding that setting a schedule for restitution payments "is a core judicial function . . . that the district court may not delegate").

43. *See, e.g.*, United States v. Wynn, 553 F.3d 1114, 1120 (8th Cir. 2009) ("[W]e have upheld a district court's limited delegation of authority to a probation officer where the court gives no affirmative indication that it would not retain ultimate authority over all of the conditions of supervised release.").

44. *See, e.g.*, United States v. Allen, 312 F.3d 512, 516 (1st Cir. 2002) ("[D]elegating the administrative details to the probation officer [constitutes] a permissible delegation."); United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001) ("We find no improper delegation of judicial authority in this case because by ordering the issuance of a summons, the court directed the probation officer to perform a ministerial act or support service.").

45. Eric R. Claeys, *Progressive Political Theory and Separation of Powers on the Burger and Rehnquist Courts*, 21 CONST. COMMENT. 405, 427–28 (2004).

46. Edward Susolik, Note, *Separation of Powers and Liberty: The Appointments Clause,* Morrison v. Olson*, and Rule of Law*, 63 S. CAL. L. REV. 1515, 1531 n.58 (1990).

47. *See, e.g.*, United States v. Turpin, 393 F. App'x 172, 173 (5th Cir. 2010).

48. *See, e.g.*, *Allen*, 312 F.3d at 516; *Bernardine*, 237 F.3d at 1283.

Courts and commentators have struggled to distinguish core functions from non-core, ministerial, or administrative functions.[49] Some have tried to formulate and apply a general definition of "core judicial function."[50] Others have adopted a case-by-case approach, limiting application of the core judicial function test to particular sets of facts.[51]

a. The Definitional Model

The Supreme Court has never defined "core judicial functions," except to say that it involves the authority to decide Article III "cases and controversies."[52] That, of course, leaves the question of what it means to "decide" such actions, to say nothing of the debate about the meaning of "cases and controversies."[53] Possibly for those reasons, no circuit court has invoked the Court's explanation in applying the core judicial functions test.

The Eleventh and First Circuits have offered alternative ways of defining core judicial functions. In *United States v. Nash*, the Eleventh Circuit defined core judicial functions as determinations about *whether* a particular condition would attach to a sentence.[54] Under the *Nash* Court's approach, then, courts may delegate determinations as to when, where, and how a sentence should be meted out, but not what the sentence itself should be.[55] That line is similar to one drawn by the Third

49. *See* Louis L. Jaffe, *Suits Against Governments and Officers: Damage Actions*, 77 HARV. L. REV. 209, 218 (1963) ("The dichotomy between 'ministerial' and 'discretionary' [is] at the least unclear, and one may suspect that it is a way of stating rather than arriving at the result."); M. Elizabeth Magill, *The Real Separation in Separation of Powers Law*, 86 VA. L. REV. 1127, 1136–47 (2000) (discussing the difficulties in formulating a definition of "core functions" in the judicial, legislative, and executive contexts).

50. *See, e.g.*, United States v. Stephens, 424 F.3d 876, 880 (9th Cir. 2005) (suggesting that a court delegates a core judicial function when it delegates a decision as to "*whether* a defendant must abide by a condition").

51. *See, e.g.*, Weinberger v. United States, 268 F.3d 346, 359–61 (6th Cir. 2001) (holding that a court's delegating to a probation officer the schedule of restitution payments is constitutionally permissible).

52. Miller v. French, 530 U.S. 327, 349 (2000).

53. *See* Thomas H. Lee, *The Supreme Court of the United States as Quasi-International Tribunal: Reclaiming the Court's Original and Exclusive Jurisdiction over Treaty-Based Suits by Foreign States Against States*, 104 COLUM. L. REV. 1765, 1811 (2004) (acknowledging the continued vitality of "an important debate about the meaning of the words 'Cases' and 'Controversies' in Article III, Section 2, Clause 1").

54. 438 F.3d 1302, 1304–06 (11th Cir. 2006).

55. *Id.* at 1306.

Circuit, which distinguished between nondelegable decisions involving the "nature or extent of the punishment imposed" and other, delegable determinations.[56]

The First Circuit, by contrast, has sometimes defined core judicial functions in terms of the significance of the function being delegated.[57] Under a test announced in *United States v. York*, a decision is nondelegable (i.e. a core judicial function) if it is a "significant penological decision," such as deciding if a probationer must undergo specific types of treatment.[58] As the Tenth Circuit discovered when attempting to employ the *York* test, however, determining exactly how significant a decision must be under the *York* test is oftentimes an exercise in comparative analysis, rather than a simple or straightforward application of a judicial standard.[59]

b. The Case-by-Case model

Other circuit courts have employed an incremental, case-by-case approach to marking out some sort of line to determine whether a function is a core judicial function.[60] Courts using this approach have said, for example, that determining the number of drug tests a probationer must undergo[61] and determining whether a probationer must participate in a mental health treatment program[62] are both nondelegable core judicial functions, whereas determining the details of a probationer's participation in a mental health treatment program[63] and determining certain details of a probationer's visitation privileges

56. *See* United States v. Pruden, 398 F.3d 241, 250 (3d Cir. 2005).

57. *See, e.g.*, United States v. York, 357 F.3d 14, 21 (1st Cir. 2004).

58. *Id.* As this example makes clear, in practice, the First Circuit's test is frequently indistinguishable from the "whether" test.

59. *See* United States v. Huffman, 146 F. App'x 939, 945 (10th Cir. 2005) ("The delegation of authority in Huffman's case falls somewhere between the forbidden delegation of a 'significant penological decision' . . . and [a] permitted delegation of authority . . . .").

60. *See, e.g.*, United States v. Peterson, 248 F.3d 79, 85 (2d Cir. 2001) ("If [the defendant] is required to participate in a mental health intervention only if directed to do so by his probation officer, then this special condition constitutes an impermissible delegation of judicial authority to the probation officer. On the other hand, if the District Court [intends] nothing more than to delegate to the probation officer details with respect to the selection and schedule of the program, such delegation was proper." (citations omitted)).

61. United States v. Stephens, 424 F.3d 876, 883 (9th Cir. 2005).

62. United States v. Pruden, 398 F.3d 241, 251 (3d Cir. 2005).

63. United States v. Heckman, 592 F.3d 400, 409–11 (3d Cir. 2010).

with his son and grandson[64] are delegable non-core judicial functions.

The incremental approach has the virtue of clearly demarcating the legality of certain types of delegations within a given circuit.[65] However, different circuits applying this approach often reach divergent conclusions on essentially the same facts.[66]

2. The Ultimate Authority Test

Courts also regularly evaluate challenges to the constitutionality of delegations to probation officers by distinguishing between supervised and unsupervised delegations of judicial authority.[67] Depending on the extent to which an Article III court retains ultimate power over a probation officer's use of judicially delegated authority, courts may decide that the judicial branch has not delegated anything—at least not in a meaningful way.[68]

Courts applying the ultimate authority test generally agree that the nondelegation principle is not violated where,

> the district court does not disclaim ultimate responsibility for deciding the appropriateness of a sentence . . . [making it] likely that the probation officer will consult with the court about the matter or, at a minimum, [that] the court will entertain a motion from the defendant for reconsideration of the probation officer's initial decision.[69]

In other words, so long as appeal is not foreclosed—by the court either expressly disclaiming responsibility for deciding the appropriateness of a sentence or refusing to entertain a motion for reconsideration of the probation officer's initial decision—Article III courts retain ultimate authority over judicial power and there has been no unconstitutional delegation.[70] The

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64. United States v. Bowman, 175 F. App'x 834, 838 (6th Cir. 2006).

65. *See, e.g.*, United States v. Figuereo, 404 F.3d 537, 542–43 (1st Cir. 2005) (resolving petitioner's constitutional claim in three sentences by reference to a prior decision).

66. *Compare* Montano-Figueroa v. Crabtree, 162 F.3d 548, 550 (9th Cir. 1998) (holding that courts may delegate to probation officers the power to set the amount and timing of restitution payments), *with* United States v. Miller, 77 F.3d 71, 77–78 (4th Cir. 1996) (holding that courts may not delegate to probation officers the power to set the amount and timing of restitution payments).

67. *See, e.g.*, United States v. Johnson, 48 F.3d 806, 808–09 (4th Cir. 1995) (finding that a grant of authority was not an unconstitutional delegation because the district court "retain[ed] the right to review findings and to exercise ultimate authority for resolving the case or controversy").

68. *See, e.g.*, United States v. Roberts, 229 F. App'x 172, 178 (3d Cir. 2007); United States v. Mickelson, 433 F.3d 1050, 1056 (8th Cir. 2006).

69. United States v. Wynn, 553 F.3d 1114, 1120 (8th Cir. 2009).

70. *See, e.g.*, United States v. Bowman, 175 F. App'x 834, 838 (9th Cir.

courts' ability to exercise that authority, however, may depend on a probationer's decision to appeal.[71]

Courts applying the ultimate authority test look at orders or conditions imposed by probation officers made pursuant to judicial delegation as essentially advisory in the sense that they are not final.[72] After all, according such orders or conditions the weight of final authority would potentially run afoul of both the individual's right to have certain claims heard by an Article III court and the principle of separation of powers (insofar as that principle requires any final and binding action to be taken by an Article III court).[73]

E. THE SUPREME COURT'S WELL-SETTLED ARTICLE I DELEGATION JURISPRUDENCE

Article III's Vesting Clause is not the only vesting clause in the Constitution. Articles I and II each have a Vesting Clause, and each clause bears a strong similarity in form and function to Article III's Vesting Clause.[74] Comparing Article III's Vesting Clause to its Article I counterpart is particularly instructive, since there is a relatively large, jurisprudentially consistent body of case law surrounding the Article I Vesting Clause.[75]

Just as grants of judicial authority must conform to Article III's nondelegation principle, grants of legislative power must conform to Article I's nondelegation principle.[76] Article I's nondelegation principle is based in the text of Article I's Vesting

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2006) (finding that the nondelegation principle was not offended where, upon issuance of an unfavorable recommendation by his probation officer, Bowman was "free to seek relief from the district court").

71. *See, e.g.*, *Wynn*, 553 F.3d at 1120.

72. *See Bowman*, 175 F. App'x at 838.

73. *See* Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 849–51, 857 (1986) (holding a delegation of judicial power constitutional because the "essential attributes of judicial power" were retained by an Article III court and because the petitioner had waived his individual right to an Article III determination of the legal question at issue).

74. *Compare* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . ."), *with* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."), *and* U.S. CONST. art. II, § 1 ("The executive Power shall be vested in a President of the United States of America.").

75. *See* Lawson, *supra* note 31, at 355–72 (exploring the history of the nondelegation doctrine from 1825 to 2002).

76. *See* United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("That the legislative power of Congress cannot be delegated is, of course, clear.").

Clause, which provides that "All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."[77]

Despite the similarities in the language of the Vesting Clauses of Articles I and III, the standard governing courts' application of Article I's nondelegation principle is simpler and more straightforward than its Article III counterpart. Since the early twentieth century, the Court's Article I nondelegation jurisprudence has been governed exclusively by the intelligible principle standard,[78] in contrast to the multiplicity of approaches applied to Article III nondelegation jurisprudence.[79] Under the intelligible principle standard, if a statutory delegation of rulemaking authority provides an intelligible principle to limit the discretion of the person or entity exercising the delegated power, then the delegation itself is non-legislative and, thus, constitutional.[80]

As a number of justices have pointed out, many of the "intelligible principles" recognized by a court do little, if anything, to actually constrain discretion.[81] In practice, the intelligible principle standard has proven to be a blank check for Congress to delegate its powers.[82] Only twice has the Court held delega-

77. U.S. CONST. art. I, § 1.

78. *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472 (2001); J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928).

79. *Compare* Bryan Clark, *Refining the Nondelegation Doctrine in Light of Real ID Act Section 102(c): Time to Stop Bulldozing Constitutional Barriers for a Border Fence*, 58 CATH. U. L. REV. 851, 859 n.64 (2009) (noting the Supreme Court's "rote recitation, at least in modern cases, of the intelligible principle requirement . . . while ultimately reaching what has become a foregone conclusion—'that the delegation meets the standard'" (quoting Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 IND. L.J. 239, 261–65 (2005))), *with* Richard H. Fallon, Jr., *Of Legislative Courts, Administrative Agencies, and Article III*, 101 HARV. L. REV. 915, 933 (1988) ("[T]he Court's [Article III nondelegation] methodology is underdeveloped, its standards obscure. Judges, legislators, and lawyers would profit from increased clarity and coherence.").

80. *See* Loving v. United States, 517 U.S. 748, 776–77 (1996) (Scalia, J., concurring); Touby v. United States, 500 U.S. 160, 165 (1991); Mistretta v. United States, 488 U.S. 361, 372–73 (1989).

81. *See, e.g.*, *Whitman*, 531 U.S. at 487–88 (Stevens, J., concurring); *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

82. 1 RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE 87 (4th ed. 2002) ("The Court has become increasingly candid in recognizing its inability to enforce any meaningful limitation on Congress's power to delegate its legislative power to an appropriate institution.").

tions of legislative power unconstitutional,[83] and it has routinely upheld delegations under statutory standards that are extremely broad[84] or contradictory.[85] The intelligible principle test is so permissive that, today, the Article I nondelegation doctrine is widely considered a dead letter.[86]

Courts and commentators criticize the permissiveness of the intelligible principle test as having the potential to undermine representative democracy by allowing unelected bureaucrats to exercise a vast array of government powers.[87] But they also acknowledge that the intelligible principle test enhances efficiency by allowing Congress to delegate policy decisions to experts in the relevant fields and avoid many of the problems inherent in collective action.[88]

Given the similarities in language and structure between Article I's Vesting Clause and Article III's Vesting Clause, courts might have been expected to draw on the established Article I nondelegation jurisprudence in developing Article III nondelegation jurisprudence.[89] Instead, lower courts have gone a different direction, bypassing the intelligible principle test in favor of variations of the core judicial function test and the ul-

83. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 549–51 (1935); Pan. Ref. Co. v. Ryan, 293 U.S. 388, 432–33 (1935).

84. *See* PIERCE, *supra* note 82, at 93, 96.

85. *See, e.g.*, *id.* at 89–90 (citing the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651–78 (1982), as a "fertile source" for "inherently inconsistent" standards).

86. *See, e.g.*, Sanford Levinson & Jack M. Balkin, *Constitutional Dictatorship: Its Dangers and Its Design*, 94 MINN. L. REV. 1789, 1821 (2010) ("[T]he nondelegation doctrine died an unceremonious death, and the modern conservative Court has been unwilling to disinter it." (footnote omitted)). *But see* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298 (2003) (expressing doubt that the nondelegation doctrine is a thing of the past).

87. *See, e.g.*, Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst., 448 U.S. 607, 686 (1980) (Rehnquist, J., concurring) ("[T]his Court should once more take up its burden of ensuring that Congress does not unnecessarily delegate important choices of social policy to politically unresponsive administrators.").

88. *See* PIERCE, *supra* note 82, at 98–99.

89. *See, e.g.*, Steven G. Calabresi & Kevin H. Rhodes, *The Structural Constitution: Unitary Executive, Plural Judiciary*, 105 HARV. L. REV. 1153, 1158 n.12 (1992) (noting the similarities in the three Vesting Clauses but declining to "address the implications of the Article II and Article III [nondelegation] debates for Article I").

timate authority test.[90] These tests too, however, have proved to be difficult to apply consistently and are plagued by problems of interpretation.

II. CRITICIZING THE CURRENT FRAMEWORK FOR EVALUATING THE CONSTITUTIONALITY OF JUDICIAL DELEGATIONS TO PROBATION OFFICERS

Despite the widespread use of the core judicial function test and the ultimate authority test, both tests have significant shortcomings. The core judicial function test is fatally imprecise. The ultimate authority test is problematic because it does not specify a point beyond which delegated authority is too far removed from its judicial source. Given these flaws, it is not surprising that courts have struggled to apply the two tests consistently.

A. FLAWS IN THE CORE JUDICIAL FUNCTIONS TEST

The problem with the core judicial functions test is that there is no truly helpful, generally accepted definition of a "core" judicial function.[91] Article III speaks only of "the judicial Power" and offers no guidance as to what a "core" function might be.[92] As noted above, the Supreme Court has gone only slightly further, saying that the judiciary's "core function" is "to decide 'cases and controversies properly before [it].'"[93] The Court has offered no guidance as to what specific powers or determinations are essential or integral to deciding cases and controversies.

Scholars' attempts to identify those functions at the "core" of "the judicial Power" are of similarly little help. Formalists—who view the Constitution as strictly compartmentalizing spe-

90. *See* Harold I. Abramson, *A Fifth Branch of Government: The Private Regulators and Their Constitutionality*, 16 HASTINGS CONST. L.Q. 165, 187–99 (1989).

91. *See, e.g.*, Leslie M. Kelleher, *Separation of Powers and Delegations of Authority to Cancel Statutes in the Line Item Veto Act and the Rules Enabling Act*, 68 GEO. WASH. L. REV. 395, 419 (2000) (recognizing that the "'core functions' of each branch" are "ill defined"); Letter from Edmund Randolph, Governor of Va., to Speaker of Va. House of Delegates (Oct. 10, 1787), *in* 3 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 123, 127 (Max Farrand, ed., rev. ed. 1966) (listing the Constitution's deficiencies "[i]n limiting and defining the judicial power").

92. U.S. CONST. art. III, § 1.

93. Miller v. French, 530 U.S. 327, 349–50 (2000) (quoting United States v. Raines, 362 U.S. 17, 20 (1960)).

cific powers[94]—often find themselves, when pressed, at a loss to say exactly what those powers are.[95] Even Justice Antonin Scalia, "the leading judicial formalist of our day,"[96] has observed,

> [W]hile the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts. Once it is conceded, as it must be, . . . 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.[97]

Functionalists—who emphasize that the three branches of government commonly exercise "shared and overlapping powers, as well as separate powers"[98]—are more candid in acknowledging the difficulty of defining exactly what constitutes a "core" function of a particular branch.[99] Nevertheless, some functionalists insist that "core" functions exist.[100] The most common functionalist definition of "core" functions is that they are those functions that are vital to preserving the system of checks and balances and to ensuring that each branch of government is independent of, and co-equal with, its counterparts.[101] But, as applied in the judicial context, this definition

94. *See* MARTIN H. REDISH, THE CONSTITUTION AS POLITICAL STRUCTURE 101 (1995) ("[T]he Court's role in separation-of-powers cases is to be limited to determining whether the challenged branch action falls within the definition of that branch's constitutionally derived powers . . . .").

95. *See, e.g.*, Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1390 n.47 (1994) ("I do not think I can attempt to address here the very difficult question of whether to seek the original meaning of [the terms executive, legislative, or judicial], their present day meaning, or their original meaning as 'translated' into the present day world.").

96. Daniel Farber, *The Ages of American Formalism*, 90 NW. U. L. REV. 89, 91 (1995).

97. Mistretta v. United States, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting).

98. M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 608–09 (2001).

99. *Id.* at 613 ("Functionalist commentators, for their part, leave the three categories of governmental power undefined, including the identification of the 'core' functions of each of the departments.").

100. *E.g.*, Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 642–43 (1984).

101. *See, e.g.*, United States v. Nixon, 418 U.S. 683, 707 (1974) (reflecting the functionalist view that, in resolving separation of powers disputes, the Court must "preserve the essential functions" of the judiciary); John Devlin, *Toward a State Constitutional Analysis of Allocation of Powers: Legislators and Legislative Appointees Performing Administrative Functions*, 66 TEMP. L. REV. 1205, 1213 (1993); Letter from William French Smith, Att'y Gen. of the U.S., to Strom Thurmond, Chairman, S. Comm. on the Judiciary (May 6,

is susceptible of multiple interpretations. What one court finds to be a function essential to the preservation of the judiciary as a co-equal branch of government, another court might not deem essential.[102]

The problems inherent in defining a "core" function are illustrated by the Eleventh and First Circuits' attempts to do so. As applied by the Eleventh Circuit in *United States v. Nash,* the core function test distinguishes between "whether" a criminal defendant will have to do something—which is deemed a determination involving a "core judicial function"—and "when, where, or how" a sentence will be performed—which determinations are not "core judicial functions."[103] But the "whether" distinction is problematic for at least two reasons. First, the "whether" test is exceedingly subjective; what strikes one judge as a determination about "whether" might strike another as a determination about "where" or "when." For example, a determination as to *whether* a probationer may work around children could easily be rephrased as a determination of *where* the probationer may work. The inherent manipulability of the "whether" standard means that, aside from perhaps the determination of "whether" a defendant is guilty or innocent—a decision so obviously encompassed within "the judicial Power" that few would debate it—nearly all other "whether" decisions regarding sentencing can be rephrased in ways that transform them into decisions that are delegable because they merely fill in the "when, where, and how" details.

A second problem with the "whether" standard is that it fails to reflect the individual-rights aspect of Article III's nondelegation principle. Recall that Article III's nondelegation principle protects two interests: the national interest in separation of powers and the individual's interest in the protections provided by a hearing before and decision by an Article III judge.[104] Circuit courts applying the "whether" standard have

1982), *in* 128 CONG. REC. 9092, 9093–97 (1982) ("Congress may not, . . . consistent with the Constitution, make 'exceptions' to Supreme Court Jurisdiction which would intrude upon the core functions of the Supreme Court as an independent and equal branch in our system of separation of powers.").

102. *Compare* United States v. Mangan, 306 F. App'x 758, 761 (3d Cir. 2009) (holding unconstitutional a delegation to a probation officer of the district court's authority to require a probationer to enroll in a mental health treatment program), *with* United States v. Stephens, 424 F.3d 876, 882 (9th Cir. 2005) (upholding a delegation to a probation officer of the district court's authority to require probationer to enroll in mental health treatment program).

103. United States v. Nash, 438 F.3d 1302, 1305–06 (11th Cir. 2006).

104. Commodity Futures Trading Comm'n. v. Schor, 478 U.S. 833, 850

devoted little time or attention to the standard's constitutional underpinnings.[105] It can be reasonably argued, however, that the test is consistent with separation of powers principles, since it reserves for the courts what is potentially the most important judicial function: deciding if punishment is appropriate in the first place and, in broad terms, what sort of punishment is appropriate.[106]

But satisfying the separation of powers function does not guarantee that the nondelegation principle's other key function—protecting individual rights—is also satisfied. An individual's right to a judicial determination of his sentence arguably is not limited to determination of "whether" considerations.[107] In the probation context, for example, details like when, where, and how can have a major impact on the character and inconvenience of a sentence.[108] Yet the "whether" test leaves such decisions outside the scope of the nondelegation principle's protections and, thus, leaves defendants at the mercy of decisionmakers not subject to Article III's requirements.[109]

The First Circuit's "significant penological decision" in *United States v. York*[110] fares no better than *Nash* under scrutiny. In *York,* the First Circuit essentially distinguished core and non-core functions by asking whether the delegation implicated a "significant penological decision."[111] But there is no objective definition of "significant penological decision."[112] What is

(1986).

105. *See, e.g.*, United States v. Johnson, 48 F.3d 806, 808–09 (1995) (devoting just one paragraph to the constitutional implications of a district court's delegation to a probation officer).

106. As a matter of logic, without an initial determination as to "whether" to impose a sentence, determinations as to "how, when, and where" are unnecessary and meaningless. The opposite is not true. For example, a decision that the defendant will serve a life sentence in prison is enforceable without any more detail.

107. *See* Higdon v. United States, 627 F.2d 893, 897 (9th Cir. 1980) (ruling that probationers have a right to a judicial determination that conditions of their probations are reasonably related to their rehabilitation or to the protection of the public).

108. Consider, for example, a determination that the probationer cannot work within two miles of a school. Such a requirement can dramatically limit a probationer's ability to find employment.

109. *See supra* notes 37–38 and accompanying text.

110. 357 F.3d 14 (1st Cir. 2004).

111. *Id.* at 21.

112. *See* Thornburgh v. Abbott, 490 U.S. 401, 413–14 (1989) (holding that the legitimacy of a penological interest is determined by a "reasonableness in-

"significant" to one court might not appear "significant" to another.[113] The Supreme Court has tried to apply a similar "substantiality" approach in other contexts and has ultimately rejected that approach as unworkable.[114]

Moreover, the *York* test does not indicate from whose perspective the substantiality of the interest is to be assessed.[115] From the separation of powers perspective, maybe the court's institutional interest in protecting its power relative to the other two branches should be the focal point.[116] But because the nondelegation doctrine has also been recognized as a safeguard for the individual's right to a fair trial,[117] it might be argued that "substantial" should be defined with reference to the defendant's interest. The *York* test leaves this question unanswered.[118]

The difficulty faced by courts in defining "core judicial functions" is underscored by the fact that courts confronting essentially the same facts have arrived at different conclusions about whether a delegation of authority implicates a core judicial function. For example, the Third and Fifth Circuits were each recently asked to decide whether a district court could constitutionally delegate to a probation officer the authority to determine whether a probationer would be required to partici-

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quiry" guided by a number of subjective standards).

113. *Compare* Amatel v. Reno, 156 F.3d 192, 194, 198 (D.C. Cir. 1998) (upholding federal prison system's limitation on availability of material known to be "sexually explicit or featur[ing] nudity" on grounds that the limitation furthered "legitimate and neutral goals"), *with* Mauro v. Arpaio, 147 F.3d 1137, 1142–44 (9th Cir. 1998) (invalidating a county prison system's ban on possession of all materials containing "any graphic representation of frontal nudity" for not furthering "legitimate penological interests"), *vacated*, 188 F.3d 1054 (9th Cir. 1999) (en banc).

114. *See, e.g.*, Kathleen Taylor, Note, *The Substantial Impact Test: Victim of the Fallout from* Vermont Yankee*?*, 53 GEO. WASH. L. REV. 118, 118–19 (1984) (referencing the "abandonment of substantial impact analysis" in administrative law).

115. *See, e.g.*, Austin v. Healey, 5 F.3d 598, 602 (2d Cir. 1993) (identifying a nondelegation argument as potentially raising both separation of powers and personal rights issues).

116. *See, e.g.*, Clinton v. New York, 524 U.S. 417, 449–453 (1998) (Kennedy, J., concurring) (emphasizing the nondelegation doctrine's central role in protecting the separation of powers).

117. *See, e.g.*, Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833, 848 (1986) (recognizing that Article III guarantees litigants the personal rights to have their claims adjudicated by judges endowed with certain protections of judicial independence).

118. *See* United States v. York, 357 F.3d 14, 21–22 (1st Cir. 2004) (neglecting to discuss whose perspective the substantiality of the interest is to be assessed).

pate in a medical treatment program.[119] Despite being confronted with the same question and virtually the same facts, the two courts reached opposite conclusions.[120]

In the end, attempts to define "core judicial functions" have been no more successful than attempts to define "the judicial Power."[121] Both concepts have defied objective definition. And while courts can apply the core judicial functions test with a fair degree of certainty to the most obvious cases involving the exercise of judicial authority—for example, finding a defendant guilty or innocent is clearly a core judicial function—the test does not resolve the more difficult questions at the margins, which are the hard questions so often litigated.[122]

B. FLAWS IN THE ULTIMATE AUTHORITY TEST

The ultimate authority test fares no better than the core judicial functions test under critical analysis. Consider, for example, its proponents' claim that the ultimate authority test adequately protects an individual's right to a hearing before an Article III tribunal.[123] The cost of appeal undermines that assertion. With the exception of indigent criminal defendants, who are not required to bear the court costs of an appeal,[124] other criminal defendants must bear some—if not all—of the considerable costs of challenging a probation officer's decision on appeal.[125] Faced with this prospect, many low-income, but non-indigent, probationers may simply forgo their constitution-

119. United States v. Bishop, 603 F.3d 279, 281 (5th Cir. 2010); United States v. Mangan, 306 F. App'x 758, 761 (3d Cir. 2009).

120. *Compare Mangan*, 306 F. App'x at 761 (holding delegation to probation officer unconstitutional), *with Bishop*, 603 F.3d at 281–82 (upholding delegation to probation officer).

121. *See, e.g.*, Magill, *supra* note 98, at 612–13.

122. *Id.* at 614–15 (explaining that definitions of "core" functions fall short at the margins).

123. *See, e.g.*, Fallon, *supra* note 79, at 937–42 (arguing that nondelegation protects both the public interest in separation of powers and the individual litigant's interest in a fair trial).

124. *See* Griffin v. Illinois, 351 U.S. 12, 19 (1956) ("Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts.").

125. *See, e.g.*, United States v. Gering, 716 F.2d 615, 626 (9th Cir. 1983) (holding that, because the district court had found the defendant non-indigent, all cost items assessed by that court were rightfully imposed on the defendant, consistent with 28 U.S.C. § 1918); United States v. Green, 144 F.R.D. 631, 638 (W.D.N.Y. 1992) (requiring the government to pay the cost of copying documents and tapes for indigent defendants, but not for non-indigent defendants).

al right to a hearing before an Article III tribunal,[126] rather than pursue a costly and time-consuming appeal.[127] To rely upon the appellate process as the safeguard of Article III judicial review of probation officers' decisions is to ignore the reality that this protection is effectively denied to individuals who lack the resources to adequately fund an appeal.[128]

Where defendants are willing and able to appeal conditions imposed by probation officers, an entirely different problem arises: the ultimate authority test promotes a flood of appeals in an era when our judicial system is already severely overburdened.[129] The test is effective in protecting probationers' constitutional rights to judicial review only to the extent that probationers exercise their right to appeal.[130] In essence, the test works only if probationers are incentivized to pursue their right to an appeal since, otherwise, probationers effectively surrender at least part of their right to a sentence determined by an Article III tribunal. But encouraging additional appeals at a time when courts are already chronically overworked is not good policy.[131] In 2009, for example, almost 58,000 appeals were filed in the federal circuit courts.[132] Consistent application of the ultimate authority test stands only to increase that number.

The problem of increased judicial workload is exacerbated by the fact that some percentage of the appeals will inevitably

126. *See* United States v. Dobey, 751 F.2d 1140 (10th Cir. 1985) (recognizing that a criminal defendant has the right to a disposition of his case by an Article III judge).

127. *See, e.g.*, Frederick Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361, 377 n.43 (1985) ("[T]he effort and expense of an appeal deters some from appealing meritorious claims."); *see also* Paula R. Markowitz & Walter I. Summerfield, Jr., Note, *Philadelphia Police Practice and the Law of Arrest*, 100 U. PA. L. REV. 1182, 1216 (1952).

128. Bruce J. Havighurst & Peter MacDougall, Note, *The Representation of Indigent Criminal Defendants in the Federal District Courts*, 76 HARV. L. REV. 579, 588 n.31 (1963) ("It may be that persons on the borderline of indigency presently obtain the least adequate representation.").

129. *See, e.g.*, Gerstein v. Pugh, 420 U.S. 103, 122 n.23 (1975) ("Criminal justice is already overburdened by the volume of cases and the complexities of our system . . . . A constitutional doctrine requiring [additional] adversary hearings . . . could exacerbate the problem of . . . delay.").

130. *See, e.g.*, United States v. Wynn, 553 F.3d 1114, 1120 (8th Cir. 2009).

131. *See, e.g.*, *Gerstein*, 420 U.S. at 122 n.23.

132. *U.S. Court of Appeals–Judicial Caseload Profile*, U.S. COURTS, http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsa2009.pl (select "NATIONAL TOTALS" from drop-down menu; then follow "Generate" hyperlink) (last visited Oct. 21, 2011).

be frivolous.[133] As with other grounds for appeal, some probationers will likely use the option to appeal the imposition of certain conditions by probation officers as another way to frustrate implementation of their sentence.[134] The ultimate authority test, then, is posited on necessary assumptions that have the undesirable systemic effect of additionally burdening the judicial system in the name of ensuring preservation of "the judicial Power."

When considering the systemic impact of application of the ultimate authority test, it is also helpful to consider the basic purposes of delegation to probation officers. Delegating courts often cite the use of probation officers as a means of increasing judicial efficiency.[135] But, by requiring appellate courts to review the imposition of conditions by a probation officer, the ultimate authority test does nothing to further—and arguably cuts back on—the efficiency of such delegations.[136] Rather than taking certain decisionmaking functions out of the hands of Article III courts, the ultimate authority test just shifts the burden from district courts onto appellate courts or other district courts.[137] If the goal is judicial efficiency, giving decisionmaking responsibilities to probation officers, whose decisions must be reviewed by an Article III court to have any final and binding effect, appears counterproductive.

The biggest problem with the ultimate authority test, though, is that its rationale extends logically to sanction delegations of nearly any judicial power by a district court. If the Article III Vesting Clause is construed to require only that

133. Paul D. Carrington, *Justice on Appeal in Criminal Cases: A Twentieth-Century Perspective*, 93 MARQ. L. REV. 459, 472 (2009) (recognizing that many criminal appeals are filed for "hopeless" or frivolous reasons).

134. *Cf.* Charles B. Radlauer, Note, *A Clash of Power and Jurisdiction: The United States Supreme Court v. The International Court of Justice*, 11 ST. THOMAS L. REV. 489, 512 (1999) (noting that it "is in the interest of all death row inmates . . . to frustrate [the justice system's goal of limiting unnecessary delay and abuse] by prolonging the appeals process indefinitely"). A similar set of incentives, albeit involving less serious consequences, operate in the context of delaying the imposition of conditions on probation.

135. *See, e.g.*, United States v. Bernardine, 237 F.3d 1279, 1283 (11th Cir. 2001) ("For purposes of efficiency, district courts 'must be able to rely as extensively as possible on the support services of probation officers.'" (quoting United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995))).

136. *See* CATHARINE M. GOODWIN ET AL., FEDERAL CRIMINAL RESTITUTION § 10:8 (2011 ed. 2011).

137. *See, e.g.*, United States v. Miller, 77 F.3d 71, 77–78 (4th Cir. 1996) (noting that the ultimate authority test required court approval of a probation officer's determination of the amount of restitutionary installment payments).

some Article III courts have the power to hear an appeal regarding a given governmental action,[138] virtually any decision regarding an individual's rights could be delegated, at least initially, to a non-Article III authority, given the broad reach of judicial review.[139]

Despite this logical corollary, courts applying the ultimate authority test have struck down a significant number of delegations as unconstitutional.[140] For example, the Fourth Circuit determined that a district court's delegation to a probation officer to determine the amount of and schedule for restitution payments by a probationer did not satisfy the ultimate authority test.[141] Yet, the condition of probation at issue in that case was reviewable by an Article III court, since the probationer could have appealed the imposition of the condition to the court of appeals.[142] Courts applying the ultimate authority test at least implicitly recognize, then, that the availability of appellate review is not always sufficient to rescue an otherwise unconstitutional delegation. Consistent with precedent, there must be a point at which reviewability does not save a delegation from Article III's nondelegation principle.[143] The problem with the ultimate authority test is that it does not provide any guidance as to what that point might be.

The current standards for enforcing Article III's nondelegation principle are logically and practically unsatisfactory. It is

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138. *See, e.g.*, United States v. Bowman, 175 Fed. App'x. 834, 838 (9th Cir. 2006) (explaining that the availability of appeal to an Article III court was sufficient to render a court's grant of authority to a probation officer constitutional).

139. *See* GOODWIN ET AL., *supra* note 136 (noting that courts always retain ultimate authority over restitution decisions in the context of probation); *see, e.g.*, C.A. Gavilondo, Sabine River Authority v. Department of Interior*: NEPA's Applicability to Federal Inaction*, 67 TUL. L. REV. 560, 564 (1992) (noting that the requirements for bringing a suit in federal court, following an agency action, "traditionally have proven relatively easy to satisfy").

140. *See, e.g.*, United States v. Kent, 209 F.3d 1073, 1079 (8th Cir. 2000).

141. *See* United States v. Johnson, 48 F.3d 806, 809 (4th Cir. 1995).

142. The Fourth Circuit held that because *the district court*, itself, did not retain authority over the decisions, the ultimate authority test was not satisfied. *See id.* But Article III's Vesting Clause does not contain any language suggesting that a specific *type* of Article III court must decide federal criminal cases. Rather, it requires only that *some* Article III court have the capacity to decide them. *See* Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205, 210–11 (1985).

143. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 667–70 (2004) ("[T]he appellate review approach is embarrassed by a variety of factors.").

time to look elsewhere for a workable judicial test. That "elsewhere" is the intelligible principle standard.

III. BACK TO THE INTELLIGIBLE PRINCIPLE STANDARD

Courts are consistently unable to coherently reconcile Article III's nondelegation doctrine with the judiciary's growing need to delegate responsibilities. The reason is that those two imperatives—nondelegation and the need to delegate—lie at opposite ends of a single spectrum, such that choosing more of one necessarily means having less of the other. Not surprisingly, when courts try to satisfy both, the resulting tests are not only confusing, but frequently inconsistent.[144]

Using probation officers in a way that saves judicial resources necessarily entails diminished Article III oversight and control over the probation officers' assigned tasks. Efficiency means giving probation officers more discretionary authority, which is only possible under a less stringent reading of the limits of Article III's Vesting Clause. But how loosely should the Vesting Clause be read? What is the minimum involvement that we ought to require of an Article III Court with respect to decisions made by probation officers (or any other non-Article III official)?

Given the similarities between the Article III Vesting Clause and its Article I counterpart, the logical starting point is the intelligible principle standard described earlier.[145] Recognizing and applying that standard would not only be more intellectually consistent and coherent than the current approach, but would also permit courts to follow the Constitution and adjust their use of probation officers to accommodate modern needs.

A. THE INTERPRETIVE ARGUMENT FOR APPLYING THE INTELLIGIBLE PRINCIPLE STANDARD

The Vesting Clauses that give rise to both Article I's and Article III's nondelegation principles are virtually identical—using basically the same language and having basically the same structure.[146] That suggests they be given similar effect.

144. *See supra* Part II.

145. *See supra* Part I.E.

146. *Compare* U.S. CONST. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States . . . ."), *with* U.S. CONST. art. III, § 1 ("The judicial Power of the United States, shall be vested in one supreme Court . . . .").

Article I nondelegation is informed by the same concerns—protection of individual rights and liberties and separation of powers—as Article III nondelegation.[147] The few differences that do exist between the two Vesting Clauses are largely semantic or stylistic.[148] Thus, the same standard courts apply to evaluate delegations of Article I power—the intelligible principle standard—should, logically, apply to delegations of Article III power.[149]

Moreover, to the extent there are differences in how the Constitution allocates Article I power versus how it allocates Article III power, those differences tend to support the idea that Article III power should be *more* delegable than Article I power, not *less* (as it is under the current judicial analysis). For example, Article III gives Congress substantial power to structure the federal court system and strip federal courts of jurisdiction over a significant array of subjects.[150] Nothing in Article I, by contrast, allows another branch to divest Congress of aspects of the legislative power therein granted.[151] This distinction is at least consistent with a more generous allowance of delegation in an Article III context than is permitted where Article I powers are concerned.

Any attempt to analogize between delegations of judicial power to executive officers and delegations of legislative power to executive officers runs headlong into an obvious counter-argument rooted in a popular misconception of the Framers' vision of the differences between the branches of government. Under this view, the president and Congress are the "political

147. *See, e.g.*, Clinton v. City of New York, 524 U.S. 417, 450–52 (Kennedy, J., concurring) (recognizing that Article I nondelegation embraces both separation of powers and individual liberty).

148. *See, e.g.*, William Michael Treanor, *Taking Text Too Seriously: Modern Textualism, Original Meaning, and the Case of Amar's Bill of Rights*, 106 MICH. L. REV. 487, 530–31 (2007) (arguing that the history of the "herein granted" language—contained in Article I's Vesting Clause, but not Article III's Vesting Clause—shows that the Framers considered the different language "stylistic rather than of great interpretive consequence").

149. *See* Sullivan v. Stroop, 496 U.S. 478, 484–85 (1990) (reaffirming the general rule of construction that similar terms used in a single legal document, akin to a national constitution, should carry similar meanings).

150. *See* U.S. CONST. art. I, § 8, cl. 9 (granting Congress the power to create and, implicitly, to define the jurisdiction of lower federal courts); U.S. CONST. art. III, § 1 (same); U.S. CONST. art. III, § 2 (granting Congress the power to make exceptions and regulations for the Supreme Court's appellate jurisdiction); John Harrison, *The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III*, 64 U. CHI. L. REV. 203, 210–13 (1997).

151. *See* U.S. CONST. art. I.

branches" of government designed specifically to act on popular concerns.[152] The federal courts, by contrast, were deliberately made independent of politics because judicial business requires impartiality.[153] Thus, the argument goes, a transfer of power from the judiciary to a political branch is fundamentally different from a transfer of power between the two political branches, since the Framers deliberately sought to make the judicial power totally independent of politics.[154] Given those differences, it might seem wrong to apply the same standard to review delegations of Article III power as is used to review delegations of Article I power.[155]

This argument's weakness is that it is predicated on a bifurcation of the branches that has little basis in history or theory. Rather than looking at the branches as either politically independent or politically dependent, the Framers envisioned different government actors as existing along a single continuum of political accountability, with some actors more accountable than others.[156] This is why James Madison distinguished between representatives (who he saw as the most politically accountable actors) and senators (who he described as substantially more independent), even though both categories of official perform essentially the same function.[157] Lumping the "political

152. *See, e.g.*, David A. Strauss, *Is* Carolene Products *Obsolete?*, 2010 U. ILL. L. REV. 1251, 1254 ("The central premise of this theory is that the political branches of government—Congress, the President, and the state legislatures—should run the show. Those political institutions—not the courts—have the primary responsibility for deciding disputed issues that arise in society.").

153. *E.g.*, Gubiensio-Ortiz v. Kanahele, 857 F.2d 1245, 1261 (9th Cir. 1988) (noting that, whereas the "political branches" are subject to political pressure and influence, the Constitution deliberately separates the judiciary from such influences, in order to preserve the judiciary's impartiality and independence).

154. *See* Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats:* Mistretta *and* Morrison *Revisited*, 38 WM. & MARY L. REV. 417, 480 (1997) (criticizing the Supreme Court for "fail[ing] to draw a clear distinction between delegations involving the political branches and delegations involving the judicial branch").

155. *See id.*

156. *See* Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1424–25 (1993) (identifying an "independence-accountability spectrum").

157. *See* THE FEDERALIST NO. 51, *supra* note 37, at 165–66 (James Madison) (explaining that the House of Representatives and Senate should be rendered separate and distinct so that each would serve as a check on the other); THE FEDERALIST NO. 62, *supra* note 37, at 244, (James Madison); *see also* William N. Eskridge, Jr., Lawrence*'s Jurisprudence of Tolerance: Judicial Review to Lower the Stakes of Identity Politics*, 88 MINN. L. REV. 1021, 1070 (2004)

branches" together also ignores the institutional differences between the Executive and the Legislature that, no less than the differences between those branches and the Judiciary, animate the system of separation of powers.[158] Finally, treating the Judiciary as entirely apolitical ignores the numerous and important ways in which the Framers sought to make the Judiciary at least somewhat accountable to the political process.[159] Thus, to draw a hard-line distinction between the Judiciary, on the one hand, and Congress and the president, on the other, is to oversimplify our government.[160]

When all three of the branches are perceived as existing along a single continuum of political accountability—rather than as having been devised to fit within neatly divided compartments of accountability or non-accountability—the courts' delegation of power to executive officials is inherently no more problematic than the legislature doing the same thing; each type of grant is simply a delegation of power between differently accountable political entities.

A comparison of Articles I and III and their Vesting Clauses, then, provides no basis for making judicial power any less delegable than legislative power. Indeed, given the significant and substantial similarities between the two clauses, it seems reasonable that the intelligible principle test—consistently applied by Courts, virtually without serious challenge, for more than a century in the Article I context[161]—should apply to Ar-

("[R]epresentatives in two different (*and differently accountable*) chambers have to approve proposals before they can become law." (emphasis added)).

158. *See* Daryl J. Levinson & Richard H. Pildes, *Separation of Parties, Not Powers*, 119 HARV. L. REV. 2311, 2312 (2006) ("American political institutions were founded upon the Madisonian assumption of vigorous, self-sustaining political competition between the legislative and executive branches. Congress and the President would check and balance each other . . . .").

159. *See* Scott D. Wiener, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 203 n.113 (1996) (cataloguing the many ways in which the political branches influence Article III courts); *see also* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279, 283–86 (1957), *reprinted in* 50 EMORY L.J. 563, 568–71 (2001) (arguing that presidential appointment and Senate confirmation make the Supreme Court a part of the political process and ensure that it does not stray far from prevailing political majorities).

160. *See* RICHARD A. POSNER, THE FEDERAL COURTS 16–19 (1985) (suggesting that judges, like congressmen and presidents, are political, rather than apolitical—albeit more autonomously political than either of the other two branches).

161. *See* Mistretta v. United States, 488 U.S. 361, 373–74 (1989) (reciting the history of the Court's application of the intelligible principle standard).

ticle III power, as well. If that standard satisfies the constitutional requirements of Article I's Vesting Clause, there is no reason it should not also satisfy the constitutional requirements of Article III's Vesting Clause.

B. The Practical Argument for Applying the Intelligible Principle Standard

In the context of probation officers, applying the intelligible principle standard would be simple: Courts could constitutionally delegate any sentencing decision to a probation officer, as long as they announced some intelligible principle to guide the exercise of the delegated authority.[162] What constitutes an intelligible principle could be determined using the same permissive standards the Court has long applied to Article I delegations.[163] For example, a judge could say, "I commit you to Probation Officer *X* for two years, subject to such conditions as he deems will most effectively promote the public interest."[164] If Probation Officer *X* violates his charge upon this delegation, the probationer might then appeal imposition of the supposedly incorrect condition and might also pursue a claim at law against Probation Officer *X* for damages.[165]

Such a standard has the advantage of being both consistent with the Court's overall nondelegation jurisprudence and more capable of consistent application than the current hodgepodge of standards that is the judiciary's Article III delegation jurisprudence.[166] It also allows district and appellate courts to stem the tide of probation cases brought before them.

One might ask how a remedy that explicitly allows civil suits for injunctive and monetary relief can have the effect of

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162. *See* J.W. Hampton, Jr., & Co. v. United States, 276 U.S. 394, 409 (1928) (describing application of the intelligible principle standard).

163. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 473–75 (2001) (discussing the relative permissiveness of the intelligible principle standard).

164. The Court has routinely upheld the use of "public interest" standards against nondelegation challenges in the Article I context. *See Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting) ("What legislated standard, one must wonder, can possibly be too vague to survive judicial scrutiny, when we have repeatedly upheld, in various contexts, a 'public interest' standard?").

165. *See, e.g.*, Martin v. Sias, 88 F.3d 774, 775 (9th Cir. 1996) (involving a prisoner's action against his probation officer alleging that the probation officer had acted outside his authority in supervising the prisoner's probation).

166. *See* N. Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 93 (1982) (White, J., dissenting) (describing the Court's Article III delegation jurisprudence as having "been characterized as one of the most confusing and controversial areas of constitutional law").

limiting litigation. The answer is that most "intelligible principles," as interpreted in the Article I context, have been generously construed to be extremely permissive, thus suggesting that it would be far easier than it is now for reviewing courts to dismiss most allegations of probation officer excess as frivolous.[167] Courts, already functioning within a judicial system burdened by crowded dockets are unlikely to go out of their way to look for ways to overturn delegations of judicial authority which find some support in the law.[168]

But even if it will improve judicial economy, what is to stop unelected federal judges from abusing the intelligible principle standard in sentencing? After all, in the Article I context, we have seen that the intelligible principle standard has rendered Article I nondelegation a dead letter.[169] There are a number of responses to this concern. First, probationers themselves have the power to compel judicial review of their sentences. Federal law allows probationers to request that courts review or modify the terms of their probations.[170] Federal courts are constitutionally obligated to consider the substance of such requests, so long as they have jurisdiction.[171] By moving the courts to reevaluate the terms of their probation, probationers can use judicial review to check the consequences of excessive judicial delegation.

Moreover, the relative minimization of constitutional constraints on judicial delegations to probation officers does not mean there will not be any such standards. There are rules and statutes, like the Federal Sentencing Guidelines[172] and the

167. *See, e.g.*, *Martin*, 88 F.3d at 775 (rejecting probationer's *Bivens* action as frivolous); Sims v. Dehaan, No. 84-1659, 1985 WL 13404, at *1 (6th Cir. June 14, 1985) (affirming dismissal of probationer's mandamus petition directed toward his probation officer because the action was "frivolous and [therefore] dismissal under 28 U.S.C. § 1915(d) was appropriate").

168. *Cf.* Harris v. City of Cleveland, 7 Fed. App'x. 452, 457–58 (6th Cir. 2001) (applying a presumption of qualified immunity to a prisoner's *Bivens* claim against a police officer and holding that the prisoner had not established his burden of meeting that presumption).

169. *See supra* text accompanying notes 81–86.

170. 18 U.S.C. § 3562 (2006) (listing the circumstances under which probation may be modified amended, or appealed).

171. *See* Ankenbrandt v. Richards, 504 U.S. 689, 705 (1992) ("[F]ederal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." (quoting Colo. River Water Conservation Dist. v. United States, 424 U.S. 800, 817 (1976))); Cohens v. Virginia, 19 U.S. 264, 404 (1821) ("[Federal courts] have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not.").

172. U.S. SENTENCING COMM'N, GUIDELINES MANUAL ch. 5 (2010).

Sentencing Reform Act of 1984,[173] which serve to constrain probation officers' sentencing authority, even where the Constitution does not. As Professor Kristin Hickman has argued, the existence of similar statutory limitations—like the Administrative Procedure Act—is a major reason why courts have been so comfortable with the intelligible principle standard in the Article I context.[174]

A third response to the criticism is: Consider the alternative. Yes, the intelligible principle standard is permissive and can be a blank check for executive officers to act with the courts' authority.[175] But it is still a consistently enforceable standard. The alternative, as illustrated above, is an incoherent collection of tests susceptible to all sorts of theoretical and logical challenges.[176] These standards are vulnerable to slippery slope problems because they do not offer any well-defined baselines from which judges can proceed. What they do offer is the illusion of a baseline, on which unsuspecting parties might rely, only to find that any stability or consistency is illusory.

In summary, adopting the intelligible principle standard facilitates a number of desirable ends. It brings consistency to nondelegation law. It promotes judicial economy. And it brings a modicum of judicial consistency to the sentencing process. Applying that standard to judicial delegations to probation officers is a significantly better option than the current, messy framework.

CONCLUSION

Criminal law, to a greater extent than is true of other legal fields, demands clarity. In no other area of the law does legal uncertainty or ambiguity have the potential to bring about such profound consequences for individuals' lives and liberties.[177] For that reason, and because it impacts hundreds of thousands of Americans currently subject to federal probation, parole, or

173. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 217(a), 98 Stat. 2017, 2019 (1984).

174. Kristin E. Hickman, *The Promise and the Reality of U.S. Tax Administration*, *in* THE DELICATE BALANCE: TAX, DISCRETION AND THE RULE OF LAW 39, 41 (Christopher Evans et al. eds.) (forthcoming 2011); *see also* 5 U.S.C. §§ 551–59 (2006).

175. PIERCE, *supra* note 82, at 87.

176. *See supra* Part II.

177. *See* Adam H. Kurland, *First Principles of American Federalism and the Nature of Federal Criminal Jurisdiction*, 45 EMORY L.J. 1, 66 (1996) (acknowledging "the unique and profound consequences of the criminal sanction").

some other form of community supervision,[178] the ongoing circuit split regarding delegation of judicial authority to probation officers deserves prompt and decisive resolution.

Yet, as problematic as is the current circuit split, its existence provides the opportunity for a much needed advancement of the law. By abandoning current standards—with their theoretical and logical deficiencies, inconsistencies in application, and resulting inefficiencies—and instead applying the intelligible principle standard, courts can draw a defensible line between delegation and non-delegation in a way that makes sense both in terms of its Constitutional underpinnings and its practical application. Adopting the intelligible principle standard in the probation context would greatly help to eliminate the confusion that currently confronts both courts and probationers, so that appellants like Maurice Turpin might finally find some certainty regarding their legal rights and obligations.

178. *See* GLAZE ET AL., *supra* note 25, at 23.