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**The Nondelegation Doctrine: Justice Scalia's jurisprudence through the lens of
*Mistretta v. U.S.A. and Whitman v. American Trucking Association***- Juhi Senguttuvan¹**Abstract**

*Justice Scalia was one of the most famous dissenters in the history of the United States and, was known for his devotion to the Constitution. Two of his famous dissents relating to the nondelegation doctrine were in the cases of *Mistretta v. the United States*² and *Whitman v. American Truckers Association*.³ In the case of the former, Justice Scalia was the sole dissenter to conclude that Congress's delegation of power to the United States Sentencing Commission was unconstitutional as the nature of the function was nothing more than making guidelines concerning criminal sentencing. He stated that such delegation of pure law-making power was inconsistent with, and against the Constitutional principle of Separation of Powers.⁴ In *Whitman*, Justice Scalia unanimously held that the Congress's delegation of broad rulemaking power to the Environmental Protection Agency was unlimited as it was an exercise of their policymaking discretion.⁵ This paper aims to analyse these cases in view of the nondelegation doctrine and the troubles with Justice Scalia's approach in his jurisprudence on the same. The paper will do so by focusing on the nature of reasoning adopted by Justice Scalia, i.e. treating the discretion given to judges with considerable scepticism and his reliance on the structural argument.⁶ Part A focuses on the cases of *Mistretta* and *Whitman* and Justice Scalia's approach to the nondelegation doctrine. Part B attempts to analyse the nature of the underlying arguments by Justice Scalia and his approach. Followed by Part C, the conclusion.*

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²488 U.S. 361 (1989) (Scalia J. dissenting)

³531 U.S. 457 (2001)

⁴488 U.S. 361 (1989) at 420, 427

⁵531 U.S. 457 (2001) at 494

⁶William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

Key words: Nondelegation Doctrine, Delegated Legislation, Congress, US Constitution and Structural Argument.

Part A.

I. Background: *Mistretta v. United States*

Justice Scalia was a fierce defender of the nondelegation principle; however, when it came to its implementation in real cases, his application was inconsistent. The principle of nondelegation is vital in maintaining the integrity of the Constitution that Congress cannot delegate its legislative power to anyone.⁷ However, the Court in *Wayman v. Southard*⁸ recognised the power of Congress to delegate work to other agencies. The exact boundary of this power was susceptible to an intricate inquiry.⁹ In the case of *Mistretta*, the Supreme Court upheld the Sentencing Commissions constitutional validity and its function of formulating guidelines throughout the Country.

The goal of the Commission was to formulate guidelines to achieve consistency and further individual justice in the U.S.¹⁰ The delegation of power, was challenged on the grounds of unconstitutionality and the Court had to determine whether the Congress had gone too far in delegating the power to make such binding rules and of far-reaching importance.¹¹ With minimal difficulty, the Court upheld the validity and permissibility of the Commission.¹² The Court acknowledged that although such delegation to another Branch should not be permitted given the integrity of the Constitution, however, there is no bar on the power of the Congress to seek assistance from other branches which may be more capable in completing the task at hand which could be due to situational necessities.¹³ In doing so, Justice Blackburn formulated the 'intelligible principle' to determine the permissibility of delegation and the circumstances under which Congress could seek assistance from the Executive.¹⁴ The Court held that as long as there are intelligible contours within which such

⁷Keith E. Whittington and Jason Iuliano, 'The Myth Of The Nondelegation Doctrine' (2017) 165 Pennsylvania Law Review https://scholarship.law.upenn.edu/penn_law_review/vol165/iss2/3 accessed 22 May 2020. See *Field v. Clark* 143 U.S. (1892)

⁸23 U.S. (10 Wheat.) (1825)

⁹Ibid at 46

¹⁰William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

¹¹See *supra* note 10

¹²*Mistretta V. United States - Ballotpedia* (*Ballotpedia*) https://ballotpedia.org/Mistretta_v._United_States accessed 22 May 2020.

¹³488 U.S. 361 (1989) At 488

¹⁴Ibid at 372

delegation functions along with the standards of conformity, the process of delegating legislative function is not forbidden within the Constitution.¹⁵

A perusal of the delegated power made it clear that there were ample guidelines in terms of how to formulate the sentences, etc..The Court acknowledged that the power given to the Commission was comprehensive and, over something of great significance.However, this was not a troubling factor for the Court as it recognised that such a labour and time-consuming work of formulating guidelines was not practical for the Congress to do on its own. Moreover, the Court acknowledged, as it had before,¹⁶ that broad legislation includes policymaking discretion for the Executive to use.¹⁷ The Court held that the delegation of power by the Congress was justified as long as it makes broad policy choices and leaves the detailed, time-consuming work to the experts.¹⁸

Justice Scalia, in his dissent, argued that the principle of nondelegation is essential to the functioning of the democratic government.¹⁹ He stated that the fundamental proposition is that Congress is responsible for making policies that govern the Country and that it is utterly incompatible with any 'situational necessity' that authorises the Executive with unbound discretion.²⁰ He recognised that the principle of nondelegation is not easily enforced in Courts as demarcating the distinction between what is permitted and what is not, is a question of degree and not of principle.²¹ His dissent in *Mistretta* was based on his belief that the work delegated by the Congress to the Commission suffered from one fundamental structural infirmity. He argued, since the Courts do not control the scope of delegation, it became more important for the Courts to preserve the structural limitations within the Constitution that prevented excessive delegation.²²

For him, the basis for permitting delegation of authority to an agency (inclusive of the power to make binding rules as in *Mistretta* and resolve to adjudication) was a matter of constitutional power, law execution. Separation of Powers within the Constitution ensures that the power to legislate vests only in the Congress and delegating that power to an agency is simply not allowed. Thus, the essence of the nondelegation doctrine is best understood as the line between what is and is not permitted to be the boundary between the permissibility of broad discretion and having unlimited discretion. Here, the intelligible principle encapsulates whether the instructions of the Executive provide enough guidance for law execution or the delegated legislation gives over discretion by the Congress that is unchecked by law.

¹⁵'Delegation Of Legislative Power' (*Justia Law*) <https://law.justia.com/constitution/us/article-1/04-delegation-legislative-power.html> accessed 22 May 2020.

¹⁶ See *Yukus v. United States* 321 U.S. 414 (1944)

¹⁷488 U.S. 361 (1989) at 378-379

¹⁸488 U.S. 361 (1989) at 425-426

¹⁹488 U.S. 361 (1989) At 413

²⁰See *supra* note 10

²¹Ibid At 415

²² Ibid at 416-417

For Justice Scalia, the power, along with the discretion that flows from it, is understood as an additional aspect of law execution. He believed that there could be no acceptable delegation of legislative power.²³ However, it can be said that the term 'delegation' is in fact, not delegation, but it is only a by-product of discretion that is inherent to the power of executing the law.²⁴ Justice Scalia was therefore untroubled with the broad rulemaking authority so long as it formed a part of a larger statutory scheme that the Executive would execute.²⁵ If this is not the case (as in the Sentencing Commission), then according to Justice Scalia, the grant of authority only relates to a pure power of law-making. If that is the case, then the Constitution is concerned with who exercises the law-making power and how. In application to the Sentencing Commission, the law-making power of the Commission was devoid of any responsibility of the execution of sentence or adjudication of private rights under the law.²⁶ The standards set by the Congress for the Commission to follow were nothing more than standards for further legislation and not standards relating to the exercise of judicial or executive power.²⁷ The Commission is a standalone agency, did nothing more than formulating sentencing guidelines which he considered to be like *junior-varsity Congress*.²⁸

II. Background: *Whitman v. American trucking Association*

In the *Whitman case*,²⁹ the Court was to determine the Constitutional validity of the Environmental Protection Agency Rules, entrusted to set up permissible levels of ozone emission under the Clean Air Act³⁰ to aid in establishing the National Ambient Air Quality Standards.³¹

Justice Scalia authored the unanimous opinion, holding that the traditional view of using the intelligible principle to decide the permissibility of delegated power was a sound way to implement the Constitution.³² The Court held that the Congress could never fully legislate with full specificity and foresight and that there will be times where generality in law will

²³Ibid at 419

²⁴ In *Field v. Clark* 143 U.S. 649, 693-694 (1892), Harlan J., states that the difference between delegation of power to make law involves discretion as to what the law shall be and; conferring authority and the exercise of discretion in pursuance of law during its execution. The latter is permitted while the former is impermissible.

²⁵See *supra* note 10 and; 488 U.S. 361 (1989) 419-420

²⁶Ibid At 420

²⁷Ibid

²⁸Ibid at 427

²⁹531 U.S. 457 (2001)

³⁰42 U.S.C. ch. 85, subch. I § 7401 et seq

³¹*Whitman V. Am. Trucking Ass'ns* | Case Brief For Law School | Lexisnexis' (*LexisNexis*) <https://www.lexisnexis.com/community/casebrief/p/casebrief-whitman-v-am-trucking-ass-ns> accessed 24 May 2020.

³²William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 *Notre Dame Law Review* https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

leave room for discretion to be exercised by the Executive while executing the law. How this discretion is to be granted to determine what is and is not permitted, was the real issue in controversy.³³ Justice Scalia's statutory construction of Section 109 (b) of the Clean Air Act, affirming the express prohibition of considering economic costs led to a nondelegation issue.³⁴

The Court of Appeals held that the approach of the Agency to set up permissible emission levels was based on the violation of the nondelegation doctrine.³⁵ The chosen number of .08 parts per million was a mere display of arbitrary action because there was no explanation given as to why this number was sufficient to protect public health or why any other alternative would not be appropriate for the same. Hence, it led to a violation of the nondelegation principle.³⁶ Interestingly, the Court of Appeals did not strike down Section 109 of the Clean Air Act but rather, issued a direction to read the statute in such a way that it curbed their discretion to surpass the Constitution.³⁷

The decision was reversed unanimously, with Justice Scalia untroubled in rejecting the view of the Court of Appeals. The Court held that adopting a view which cures the statute of an unlawful delegation of legislative power to a lawful one was not correct.³⁸ The Court explained this to mean that even if such an attempt were made, it would still inevitably violate the nondelegation doctrine.³⁹ The sole fact that the Congress has not given discretion in the standard within which the Agency was required to function means, that it is an exercise of forbidden legislative authority.⁴⁰ Then, the issue before the Court was whether Section 109 of the Clean Air Act was unconstitutional as the Congress failed to prescribe an intelligible guiding principle which formed an essential requirement under the nondelegation doctrine? The Court answered in the affirmative. The simple reason being that the Agency had clear terms on which the powers were to be exercised, the standards therein had a uniform application and that Section 109 Clean Air Act was within the limits as established by judicial precedents.⁴¹ The role of Congress was to give sufficient guidance to the Agency to help in determining the air standards that effected the whole Country.⁴² However, it was incorrect for the Court of Appeals to seek a 'determinate criterion' of how much is too much as none of the previous precedents sought for one.⁴³ The Court held it was within the discretion of the Agency to select the emission levels in implementing the statutory scheme

³³ *Wayman v. Southyard* 23 U.S. (1825)

³⁴ 531 U.S. at 465-471

³⁵ *American Trucking Association v. Environmental Protection Agency* 175 F.3d 1027 (D.C. Cir 1999)

³⁶ *Ibid* at 1035-1037

³⁷ *Ibid* at 1039

³⁸ 531 U.S. 457, 472 (2001)

³⁹ *Ibid* at 472-473

⁴⁰ *Ibid* at 473

⁴¹ The Supreme Court Upholds EPA Standard- Setting Under The Clean Air Act: *Whitman V. American Trucking Ass'ns'* (*Everycrsreport.com*, 2001) <https://www.everycrsreport.com/reports/RS20860.html> accessed 22 May 2020.

⁴² 531 U.S. 457 (2001) at 474

⁴³ *Ibid* at 475

of the Clean Air Act and that the discretion followed to the Agency when it was assigned the task by Congress.⁴⁴

Justice Scalia's approach in the *Whitman case* significantly relied on previous cases to support of his view that these precedents permitted ample of discretion to be conferred on agencies, therefore, embracing discretion rather than discouraging it.⁴⁵This inconsistency, in his approach, connects us to the next part of the paper. His jurisprudence on the nondelegation doctrine showcases his commitments to Originalism in interpreting the Constitution. However, when it came to the implementation of these commitments, two competing issues are raised. These relate to his general aversion to using discretion in determining questions of degree or through balancing tests and the structure of the Constitution that permits judges to apply Separation of Powers established by the Constitution objectively.⁴⁶

Part B: Constitutional Argument and Nondelegation Doctrine

I. Discretion and Questions of Degree

Justice Scalia acknowledges that there is an immense discretion given to administrators as there are gaps within the statute that need to be left for the Executive the judges to fill.⁴⁷ Therefore, the argument of the constitutionality of delegated legislation is not related to principle but rather, a question of degree,⁴⁸falling within the ambit of Court's discretion.

In his iconic dissent in the case of *Morrison v. Olson*,⁴⁹ Justice Scalia criticises the "totality of circumstances" approach taken by the Court,for it was not based on any rule or law.⁵⁰ Instead, it was based on Constitutional adjudication where the Courts were to tell various Branches, on an ad hoc basis, how much is too much, and how far is too far. This was inconsistent with Justice Scalia's idea of the rule of law as itfor it was based on producing results that made the majority happy with the law, on an ad hoc basis.⁵¹Justice Scalia's aversion to discretion existed throughout his career,which made him suspicious of judges relying on judicial discretion.⁵²To avoid falling within the same category, Justice Scalia relied heavily on the text of the Constitution and statutes in an attempt to curb his own

⁴⁴William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

⁴⁵Ibid

⁴⁶Ibid

⁴⁷*Mistretta*488 U.S. 361, 415 (Scalia J., dissenting)

⁴⁸Ralph A Rossum, *American Constitutional Law* (10thedn, Routledge 2019).

⁴⁹487 U.S. (1988) (Scalia J., dissenting)

⁵⁰Ibid at 733

⁵¹Ibid at 734

⁵²John F. Manning, 'Justice Scalia And The Idea Of Judicial Restraint' (2017) 115 SSRN Electronic Journal <https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1646&context=mlr> accessed 5 May 2020.

discretion. And as Prof. Manning attempts to show, Justice Scalia did not succeed at doing so.⁵³

Justice Scalia acknowledged that a textual interpretation of the Constitution prohibited the delegation of law-making power of Congress, however, the nature and power of statute is such that inevitably, there will be gaps for the Executive to fill.⁵⁴ This gap-filling exercise on law execution was recognised from the time of Justice Marshall.⁵⁵ The nondelegation test of drawing the line between permissible (gaps are inevitable which need to be filled by the Executive) and impermissible (delegation of pure legislative power), for Justice Scalia, was a practical one. He regarded this as the Court entering a doctrinal field, i.e. using the intelligible principle to guide the constraints on delegation by the Congress.⁵⁶ This led him to conclude that although the nondelegation doctrine is fundamental to the Constitution, it is not an element which is readily enforced by Courts as the line which draws the permissibility and impermissibility of delegation, at its core, is a political one (based on discretion) which requires no legal analysis.⁵⁷ From the perspective of the constitutional argument, it is clear that he was not willing to let judges intervene while determining the contours within which permissibility of delegated legislation was determined. At the same time, it is important to mention that he never independently examined the original meaning of the nondelegation doctrine or why he was unwilling to let judges determine permissible or impermissible delegated discretion.⁵⁸

Justice Scalia once referred to himself as a faint-hearted Originalist,⁵⁹ a statement which he withdrew later.⁶⁰ He did attempt to follow the meaning of the Constitution wherever it led him, however, a part of his faint-heartedness did persist throughout.⁶¹ He claimed that *stare decisis* was a pragmatic exception to his Originalist philosophy which left him vulnerable to criticism.⁶²

The decisions in *Mistretta* and *Whitman* are proof that the conclusions reached therein are based entirely on the treatment of the Court in previous cases relating to the application of the nondelegation doctrine. It seems as though no thought has been applied to reconsider the doctrine and its implementation. The decisions in the newer cases are based on traditional analogical reasoning that if the doctrine was upheld in the previous case, it must be lawful in

⁵³Ibid at 754-771

⁵⁴*Mistretta* 488 U.S.at 417

⁵⁵See *Wayward v. Southard* 23 U.S. 1825

⁵⁶William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

⁵⁷*Mistretta* 488 U.S.at 415

⁵⁸See *supra* note 54

⁵⁹Anton Scalia, 'Originalism: The Lesser Evil' (1989) 57 University of Cincinnati law review <https://heinonline.org/HOL/LandingPage?handle=hein.journals/ucinlr57&div=36&id=&page=> accessed 23 May

⁶⁰See *supra* 54

⁶¹Ibid

⁶²Amy C. Barret, 'Originalism And *Stare Decisis*' (2017) 92 Notre Dame Law Review <https://scholarship.law.nd.edu/ndlr/vol92/iss5/2/> accessed 24 May 2020.

the present case as well. Justice Scalia was criticised for this reason as he applied the doctrine where and how he deemed fit, never taking the time to examine the real meaning. He did not say anything more, different or opposite to, in the cases of *Mistretta* and *Whitman*.⁶³ Should he have taken upon himself to reconsider the precedents and his jurisprudence on nondelegation doctrine? Justice Thomas, in his concurring opinion in the *Whitman case*, did wonder if the doctrine of nondelegation was now perhaps too far away from what the original lawmakers thought to be the Separation of Powers.⁶⁴ This expression of interest was a window to scrutinise the nondelegation doctrine and to test its jurisprudence in the backdrop of previous precedents. However, Justice Scalia ignored this expression probably because of his strong attachment to the concept of *stare decisis*.⁶⁵

A comparison between Justice Scalia and Justice Thomas is often brought up as one could argue the latter's Originalism of the Constitution is purer than the former. For example, Originalism demands that every doctrine has to be considered afresh, which contradicts with Justice Scalia's pragmatic exception to his Originalists commitments.⁶⁶ However, it is difficult to always resort to this view as it is not possible to consider all doctrine at face value, anew. Even if some might be in favour, none have gone so far as to implement it.⁶⁷ Moreover, the Courts have preferred the application of *stare decisis* as it promotes predictability, consistency and even-decision making. This is not a reflection of the numerous precedents that have been considered and overturned. Even with his attachment to *stare decisis*, Justice Scalia thought that a serious error is a sufficient cause for a precedent to be reconsidered.⁶⁸ From this reasoning, I believe, it is fair to infer that Justice Scalia's application of precedents in nondelegation doctrine cases is a reflection that these precedents were not suffering from any serious infirmity. It is clear that no case and the form of delegation therein, made him reconsider precedents afresh. If that were the case, Justice Scalia would have been acting outside the generally accepted norm of the Court while deciding cases. Moreover, if a case can be decided without questioning other precedents and no question to that effect has been raised, then the issue of a precedent being inconsistent with the original meaning of the Constitution simply does not arise.⁶⁹ Perhaps this factors in as another reason why he avoided discussing the original meaning of the nondelegation doctrine. It could be argued that Justice Scalia's dedication to his non-interventionist approach may have acted as blinders for him, making him overlook the original meaning of the Constitution which sought for an interventionist approach in establishing the boundaries of

⁶³Ibid

⁶⁴531 U.S. (2001) At 487 (J. Thomas concurring)

⁶⁵William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

⁶⁶See *supra* note 59

⁶⁷See *supra* note 62

⁶⁸See *Planned Parenthood v. Casey* 505 U.S. 833 (1992)

⁶⁹William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

permissibility in delegated legislation. However, it is unfair to say that his jurisprudence on nondelegation is reflective of his betrayal to being an Originalist.

II. *Mistretta case and Justice Scalia's Structural Argument*

Justice Scalia dedication to the structural argument is in line with his commitment to the Constitution. He believed that the makers of the Constitution have appropriately divided the powers amongst all the branches of the government.

A suitable example of is the case of *Morrison v. Olson*⁷⁰ where Justice Scalia, in his powerful dissent, stated that the Congress simply could not limit the power of the President by watering down the Executive power. As a strong advocate of Originalism, he found this absurd. The Constitution did not assign *some* power to the President but instead, *all* executive power to him.⁷¹ In his textual reading of the Constitution, he was of the view that the structure of the Constitution made it impossible for the Congress to diminish the power of the President and thus, he was able to formulate one of the most powerful dissents in history of the United States.

In *Mistretta*, Justice Scalia stated that Congress must be the only source of legislative law-making (supra). The Sentencing Commission had no power to determine the liability of individuals under the law as that was the role of the Courts. The mere rulemaking power by the Commission was similar to what the Congress was doing, and hence, it was not permitted as under the Constitution. This, according to Justice Scalia, meant that the Commission was exercising its powers only to make law, which fit perfectly with the previous precedents of the Court when it came to the structural jurisprudence on law-making.⁷²

In one of the earlier cases of *Immigration & Naturalization Service v. Chadha*,⁷³ the Court had an opportunity to examine the nature of the legislative power of the Congress. The Court held the actions of Congress that effect outside actors and their rights, obligations and liabilities concerns the Constitution. Following its text through Articles, I, Section 7, the structure of the Constitution is such that only the Congress is permitted to legislate.⁷⁴

The question is what principles does one need to follow if rulemaking is the execution of the law as the Executive is merely filling in the gaps left by the Congress – what other functions does it need to combine for it to pass the test of constitutionality? And, was the Commission in *Mistretta*, from its very existence, destined to fail as it was not a part of a

⁷⁰ 487 U.S. 654 (1988)

⁷¹ 487 U.S. 654 (1988) at 705

⁷² 488 U.S. 361 at 420

⁷³ 462 U.S. 919 (1983)

⁷⁴ U.S. Constitution Articles I, Section 7

larger scheme of law execution?The division of execution of the law is not new to the Congress and had done before.⁷⁵Under the Occupational Safety and Health Act,⁷⁶rulemaking power and adjudicatory power is divided between two agencies, i.e. Secretary of Labour and Health and Safety Commission, respectively. The *Mistretta* theory,as perpetrated by Justice Scalia, begs the question of whether a standalone adjudicatory agency will fail as well?Justice Scalia joined the opinion of the Court in the case of *Martin v. Occupational Safety and Health Review Commission*⁷⁷where the Court held that the Secretary of Labour and not the Commission administered the statute for the*Chevron doctrine*.⁷⁸Surprisingly, Justice Scalia was not botheredby the single function of the Commission.This leads to another question regarding Justice Scalia's jurisprudence on the nondelegation doctrine that, if the process of adjudication is a regulatory action, binding private individuals, how is *Mistretta* different than the *Martin*case?⁷⁹

The Court in the *Chadha* case was primarily concernedwith ensuring that each branch of the government functioned within their constitutional boundaries. TheCourt agreed that Congress could legislate but, only through specific commands, however,the Court was seemingly unbothered by the Executive achieving the same outcomes.⁸⁰ The difference here pertains only to the fact that the Constitution does not concern itself with different forms that law execution can take.⁸¹The Constitution cares about the levels of accountability between the branches of the government.⁸² Hence, it is understood that Congress cannot remove or control those agencies whose power includes law execution and the nondelegation doctrine states that no one can legislate if their role includes law execution.⁸³ From this, it is not easy to determine whether the Sentencing Commission, in isolation or as a part of another department, makes any constitutional significance. Either way, there is no duty owed to Congress as the Agency is answerable to the President. Hence, the argument in *Mistretta* is a misapplication of the structural argument by Justice Scalia because there is no structural difference in whether an agency stands alone (Sentencing Commission in isolation) or not (within the Department of Justice) as long as it is within the Constitutional lines.

Part C

Conclusion

⁷⁵See Occupational Safety and Health Act 29 U.S.C 651-678 (2012)

⁷⁶Ibid

⁷⁷499 U.S. 144 (1991)

⁷⁸William K. Kelly, 'Justice Scalia, The Nondelegation Doctrine, And Constitutional Argument' (2017) 92 Notre Dame Law Review https://scholarship.law.nd.edu/law_faculty_scholarship/1311 accessed 22 May 2020.

⁷⁹Ibid

⁸⁰462 U.S. 919 (1983) at 953 n. 16

⁸¹See *supra* note 78

⁸²See *Bowsher v. Synar* 478 U.S. 714 (1986)

⁸³See *supra* note 74

Justice Scalia's aversion to discretion while determining questions of degree was an indicator of his undying dedication to rules over standards. This view of his fit ideally in the Court's application of the nondelegation doctrine. Justice Scalia's eloquence on maintaining structures as established by the Constitution is consistent with his view in the *Mistretta* wherein he insisted that delegation of legislative power is not permissible as the Constitution does not permit the same. At the same time, he held that a certain degree of discretion vests with the Executive and the Judiciary for gap-filling and that it is on the Congress to determine how wide or narrow this discretion can be. However, as in the case of the Sentencing Commission, Constitution structure was violated, no balance of tests or degree of permissibility was to be decided for a single-functioning delegation for it was simply unconstitutional.

On the question of Justice Scalia's jurisprudence on nondelegation, acting as a betrayal to his Originalist commitments, it is submitted that this failure can be traced to his commitment to stare decisis and his inclination to defer the burden on political actors when the question is of degree and not of principle. In Justice Scalia's application of stare decisis, he used the precedents as he found them, untouched, strikingly similar to his approach in the nondelegation doctrine.