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NONDELEGATION

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ABSTRACT: The U.S. Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States." Today, however, the foremost source of rules governing private conduct at the federal level is not Congress, but administrative agencies. The U.S. Code is replete with provisions authorizing agencies to issue regulations carrying the force of federal law, a fact about which the federal judiciary seems largely unconcerned. But this was not always so. Prior to its New-Deal era jurisprudential shift, the U.S. Supreme Court at least purported to take seriously the Nondelegation Doctrine, a principle of constitutional law holding that Congress violates the separation of powers when it delegates authority so open-ended as to be essentially "legislative" in nature. However, since the mid-1930s, the Court, while never explicitly abandoning the Nondelegation Doctrine, has effectively weakened it to the point of irrelevancy.

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Here, I argue that the Nondelegation Doctrine has a firm foundation in the Constitution's original meaning. While several commentators have undertaken similar projects, I contribute to existing literature by compiling the scattered historical evidence into a single comprehensive account, including a considerable amount of evidence that seems to have been overlooked in prior scholarship; and by responding to historical analyses expressing the contrary view. I then devise a historically-grounded judicial test for determining whether an unlawful delegation has occurred. Next, I present an argument in favor of the Nondelegation Doctrine based on constitutional structure and policy considerations. Finally, in recognition of the potential disruption a revived Nondelegation Doctrine would present for our system of government, I propose and evaluate a few compromise approaches in which courts would enforce a limited form of the Nondelegation Doctrine without a total upheaval of the modern administrative state.

INTRODUCTION

In March of 2017, as the Senate Judiciary Committee held a hearing on Neil Gorsuch's nomination to the U.S. Supreme Court, Senator Al Franken disapprovingly quoted a concurring opinion the nominee had written as a judge on the court of appeals, in which Gorsuch expressed concern that "[e]xecutive bureaucracies" had been "permitt[ed] … to swallow huge amounts of core judicial and legislative power"; for this, Franken chided Gorsuch, explaining that "[w]hen Congress passes laws that require agencies to implement them, … those agencies turn to experts to develop those policies …. And I think that is a good thing. We want experts doing the work. What we Senators do not want to be doing is deciding … what the distance in the slats are in a baby's crib." [1] But Franken had

[1] *Nomination of the Honorable Neil M. Gorsuch to be an Associate Justice of the Supreme Court of the United States*, *Hearing before the Senate Committee on the Judiciary*, 115th Cong., 1st Sess. 175 (2017) (*Gorsuch Confirmation Hearing*).

conspicuously omitted a key portion of the sentence he quoted from Gorsuch's concurrence, in which the judge elaborated on his concerns about administrative power: "executive bureaucracies," Gorsuch wrote, have been "permitt[ed] … to swallow huge amounts of core judicial and legislative power *and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design*."[2] Just over two years after his ascent to the Supreme Court, Justice Gorsuch doubled down on the skepticism he expressed as an appellate judge, penning a powerful opinion dissenting from the Court's decision in *Gundy v. United States* to uphold a federal statute delegating vast authority to the Attorney General.[3] Gorsuch began his opinion with the bold admonishment that "[t]he Constitution promises that only the people's elected representatives may adopt new federal laws restricting liberty. Yet the statute before us scrambles that design. It purports to endow the nation's chief prosecutor with the power to write his own criminal code governing the lives of a half-million citizens."[4]

Are Justice Gorsuch's concerns well-founded? I think such a fundamental constitutional question deserves thorough contemplation—even if the answer might inconvenience Al Franken and his colleagues. Gorsuch's misgivings certainly seem hard to dismiss summarily. The first operative sentence of the U.S. Constitution provides that "All legislative Powers herein granted shall be vested in a Congress of the United States."[5] Today, however, the foremost source of rules governing private conduct at the federal level is not Congress, but rather administrative agencies. Between 1976 and 2015, the number of pages of statutory law enacted annually

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[2] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch concurring) (emphasis added).
[3] 2019 WL 2527473, *10 (U.S.).
[4] Id. at *10 (Gorsuch dissenting).
[5] U.S. Const. Art. I, § 1. The preamble has no operative effect. See *Jacobson v. Massachusetts*, 197 U.S. 11, 13 (1905).

grew from just over 4,000 to about 6,200,[6] while pages of administrative regulation soared from 12,600 to nearly 24,700.[7] The U.S. Code currently stands at about 22 million words,[8] while the Code of Federal Regulations now exceeds 103 million.[9] The annual number of agency regulations deemed "major" by the Office of Information and Regulatory Affairs[10] has, for almost a decade, surpassed the annual number of non-ceremonial statutes passed by Congress.[11] The U.S. Code is replete with provisions authorizing agencies to issue regulations carrying the force of federal law,[12] a fact about which the federal judiciary seems largely unconcerned. But

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[6] *Vital Statistics on Congress*, *Table 6-4 (Brookings Inst., Mar. 2019), archived at https://perma.cc/Q79D-F7XY.

[7] Maeve P. Carey, *Counting Regulations: An Overview of Rulemaking, Types of Federal Regulations, and Pages in the* Federal Register, (Congressional Research Service, Oct. 4, 2016), archived at https://perma.cc/3GE3-WW44. These figures represent the number of pages of substantive regulation, as opposed to the total page count in the Federal Register.

[8] Michael J. Bommarito II and Daniel M. Katz, *A Mathematical Approach to the Study of the United States Code*, (Cornell U. Library, Mar. 22, 2010), archived at https://perma.cc/8BMW-UW2H.

[9] Patrick McLaughlin, *The Code of Federal Regulations: The Ultimate Longread*, (Mercatus Ctr., Apr. 1, 2015), archived at https://perma.cc/S27Y-FYU4.

[10] "Major" rules are those likely to result in "(A) an annual effect on the economy of $100,000,000 or more; (B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or (C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign- based enterprises in domestic and export markets." 5 U.S.C. § 804(2).

[11] See *Years of Congressional Productivity* (Pew Rsrch. Ctr., Aug. 28, 2017), archived at https://perma.cc/M4UX-DNCJ.

[12] The Secretary of the Food and Drug Administration, for instance, is authorized by statute to "promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container" if "in the judgment of the Secretary such [regulations] will promote honesty and fair dealing in the interest of consumers." 21 U.S.C. § 341. See also 15 U.S.C. § 6102(a)(1) ("The [Federal Trade] Commission shall prescribe rules prohibiting deceptive telemarketing … practices and other abusive telemarketing acts or practices.").

this was not always so. Prior to its New-Deal era jurisprudential shift, the U.S. Supreme Court at least purported to take seriously the Nondelegation Doctrine, a principle of constitutional law holding that Congress violates the separation of powers when it delegates authority so open-ended as to be essentially "legislative" in nature.[13] However, since the mid-1930s, the Court, while never explicitly abandoning the Nondelegation Doctrine, has effectively weakened it to the point of irrelevancy, making its uncertain status a popular subject of speculation.[14]

Here, I argue that the Nondelegation Doctrine has a firm foundation in the Constitution's original meaning. While several commentators have undertaken similar projects,[15] I contribute to existing literature by compiling the scattered historical evidence into a single comprehensive account, including a considerable amount of evidence that seems to have been overlooked in prior scholarship, and by responding to historical analyses expressing the contrary view.[16] I then devise a historically-grounded judicial test for

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[13] See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935) ("The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is … vested.").

[14] Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 328, 329 (2002) ("[T]he nondelegation doctrine [is] effectively a dead letter"). Some literature argues, however, that the values underlying the Nondelegation Doctrine have been preserved through various canons of statutory interpretation and administrative law. See, for example, Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315 (2000).

[15] See Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. at 404 (cited in note 14); Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1328-29 (2003); David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People Through Delegation* (Yale 2008); Philip Hamburger, *Is Administrative Law Unlawful?* (Chicago 2014).

[16] See Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1762 (2002); Harold J. Krent, *Delegation and its Discontents*, 94 Colum. L. Rev. 710, 734-745 (1994); Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 Yale L. J. 1256, 1300-01 (2006); Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. at 317-323 (cited in note 14); see also Keith E. Whittington and Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Penn. L. Rev. 379 (2017).

determining whether an unlawful delegation has occurred. Next, I present an argument in favor of the Nondelegation Doctrine based on constitutional structure and policy considerations. Finally, in recognition of the potential disruption that a revived Nondelegation Doctrine would present for our system of government, I propose and evaluate a few compromise approaches in which courts would enforce a limited form of the Nondelegation Doctrine without a total upheaval of the modern administrative state—such as prohibiting legislative delegation only to private actors, or only when criminal penalties are at issue.

In a line of cases beginning in 1825, the Supreme Court repeatedly acknowledged the Nondelegation Doctrine's validity whenever the issue arose[17]—yet it was not until the 1935 decision of *Panama Refining Co. v. Ryan* that the principle was invoked to strike down a federal statute.[18] There, the Court voted 8-1 to invalidate a law authorizing the president to "prohibit," at his discretion, "transportation in interstate and foreign commerce of petroleum … produced … in excess of the amount permitted … by any State law or … regulation."[19] A few months later, the Court unanimously held in *Schechter Poultry Corp. v. United States* that Congress had unconstitutionally delegated legislative power to the president by granting him discretionary authority to formulate and issue "codes of fair competition" for the poultry industry.[20]

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[17] See *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 42-43 (1825); *Bank of the United States v. Halstead*, 23 U.S. (10 Wheat) 51, 61-62 (1825); *Field v. Clark*, 143 U.S. 649, 692 (1892); *In re Kollock,* 165 U.S. 526 (1897); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *United States v. Grimaud*, 220 U.S. 506 (1911); *Interstate Commerce Commission v. Goodrich Transit Co.*, 224 U.S. 194 (1912); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928).

[18] 293 U.S. 388 (1935).

[19] National Industrial Recovery Act, 48 Stat. 195 (1932).

[20] 295 U.S. 495, 531 (1935) (quoting National Industry Recovery Act at § 3(a)-(f)).

But, with one possible exception,[21] the *Schechter* case was to be the last time the Court would invalidate an act of Congress under the Nondelegation Doctrine; indeed, later cases all but gutted the doctrine by permitting Congress to entrust federal agencies with powers as broad as that of issuing regulations that agencies judge to be "the public interest, convenience, or necessity" [22] ––or of promulgating "fair and equitable" price regulations[23]-- on the theory that, as long as a statute contained an "intelligible principle" to guide rulemaking,[24] any agency rules made pursuant to that grant of power were merely "exercises of … the 'executive Power,'"[25] since "a certain degree of discretion, and thus of lawmaking, inheres in most executive … action, and it is up to Congress … how small or how large that degree shall be."[26] What is more, even this questionable

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[21] In *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936), the Court invalidated a statute granting a board composed of coal producers and miners the power to set wage and hour regulations for the coal industry, calling it "legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be … adverse to the interests of others in the same business," yet the Court then appeared to rest its decision on Due Process grounds. See id. at 311.

[22] See *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943).

[23] See *Yakus v. United States*, 321 U.S. 414, 426-27 (1944).

[24] *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928). There is good reason to believe that the Court has misinterpreted what *Hampton* meant by "intelligible principle." Rather than serving as a vague policymaking goal, the *Hampton* opinion suggests that an intelligible principle requires that "nothing involving the expediency or just operation of such legislation" be delegated; Congress may merely declare that its policy "should take effect upon a named contingency," and the agency's duty is simply to "ascertain and declare the event upon which its expressed will was to take effect." Id. at 410-11.

[25] *City of Arlington v. Federal Communications Commission*, 569 U.S. 290, 304 n.4 (2013).

[26] *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia dissenting); see also *J.W. Hampton*, 276 U.S. at 408-09 ("Our Legislature has … vested our commission with full power to determine what rates are equal and reasonable in each particular case ...They have not delegated to the commission any authority or discretion as to what the law shall be—which would not be allowable—but have merely conferred upon it an authority and discertion [sic], to be exercised in the execution of the law … which is

line of reasoning has been undermined by subsequent decisions upholding delegations of rulemaking authority to entities that neither exercised executive power nor were part of the Executive Branch, even though such "delegation[s] [were] unsupported by any legitimating theory to explain why [they were] not … delegation[s] of legislative power."[27]

Until very recently, it thus seemed as if the Nondelegation Doctrine had been effectively exiled to the far reaches of the constitutional world, joining the Liberty of Contract in the legal graveyard. To be sure, from time to time, members of the federal bench had provocatively prodded this jurisprudential sleeping giant. At the Supreme-Court level, a few stray concurrences over the years have relied on the Nondelegation Doctrine to strike down executive action[28]; the opinion of the Court in a 1974 case construed a statutory grant of rulemaking authority narrowly out of concern that the law would otherwise unconstitutionally delegate legislative power[29]; and a smattering of lower federal court decisions within the last three decades or so have invalidated congressional enactments on nondelegation grounds without reversal on that issue.[30] But since 1935, every attempt by a Supreme Court litigant to argue that a

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entirely permissible." (quoting *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 298 (1888)).

[27] *Mistretta*, 488 U.S. at 421 (Scalia dissenting) (dissenting from decision upholding Sentencing Commission's rulemaking authority).

[28] See *Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 672 (1980) (Rehnquist concurring); *Clinton v. City of New York*, 524 U.S. 417, 449 (1998) (Kennedy concurring).

[29] National Cable Television Association, Inc. v. United States, 415 U.S. 336, 342 (1974) ("Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.").

[30] See *Texas v. United States*, 300 F. Supp. 3d 810, 843 (N.D. Tex. 2018), on reconsideration in part, 336 F. Supp. 3d 664(N.D. Tex. 2018); *Association of American Railroads v. U.S. Department of Transportation*, 721 F.3d 666 (D.C. Cir. 2013), vac'd and rem'd on other grounds, 135 S. Ct. 1225 (2015); *City of New York v. Clinton*, 985 F. Supp. 168, 181 (D.D.C.), aff'd on other grounds, 524 U.S. 417 (1998).

federal statute unconstitutionally delegates legislative power has been unsuccessful in so persuading a majority, or even a plurality, of the justices.[31]

Yet the Court's recent decision in *Gundy v. United States* intriguingly suggests that change is in the air. The petitioner in *Gundy* challenged as an unconstitutional delegation of legislative power the provision of the federal sex offender registration statute declaring that "[t]he Attorney General shall have the authority to specify the applicability" of the law's registration requirements "to sex offenders convicted before the enactment of this chapter … and to prescribe rules for the registration of any such sex offenders," without setting out any rules or standards to guide the Attorney General's discretion in deciding the degree to which the rules applied retroactively.[32] The petitioner thus had a credible argument that even "[u]nder more permissive conceptions of Congress's delegation power, [the provision] is unconstitutional because it transfers rulemaking authority without setting forth a sufficiently intelligible principle …. The intelligible principle must include, at minimum, standards or criteria to guide and restrain the exercise of the delegated power. But Section [this provision] is standardless. It includes no directives to the Attorney General as to whether he should make any pre-Act offenders register; which offenders should be required to register; or even what he must … consider in deciding these questions."[33]

A four-justice plurality of the Court (with Justice Kavanaugh not participating) rejected the Nondelegation challenge. In some outrageously strained and implausible statutory interpretation, the plurality relied heavily on the statute's declaration of purpose of establishing a "comprehensive" sex offender registration system (as

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[31] See, e.g., *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Touby v. United States*, 500 U.S. 160 (1991); *Loving v. United States*, 517 U.S. 748 (1996); *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001).

[32] 34 U.S.C.A. § 20913.

[33] Brief for Petitioner, *Gundy v. United States*, No. 17-6086, *16 (U.S. filed May 25, 2018) (available on Westlaw at 2018 WL 2441585.

well as vague snippets of legislative history) to conclude that the statute required the Attorney General, in specifying the applicability of the registration requirements to offenders convicted before the act's passage, "to order [those offenders'] registration as soon as feasible." [34] With the addition of this conjured-up intelligible principle, the plurality proceeded to uphold the law. However, Justice Alito concurred only in the Court's judgment (apparently in order to avert a 4-4 split vote), provocatively writing in a pithy opinion that, "since 1935, the Court has uniformly rejected nondelegation arguments and has upheld provisions that authorized agencies to adopt important rules pursuant to extraordinarily capacious standards. If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort. But because a majority is not willing to do that, it would be freakish to single out the provision at issue here for special treatment." [35] Justice Gorsuch, joined by Justice Thomas and Chief Justice Roberts, pulled no punches as he dissented from the Court's judgment, writing that he believed the statutory provision at issue to be a violation of the Nondelegation Doctrine because "[i]t gives the Attorney General the authority to 'prescrib[e] the rules by which the duties and rights' of citizens are determined, a quintessentially legislative power." [36] There are thus four sitting members of the Supreme Court who have signaled keen interest in at least some reinvigoration of the Nondelegation Doctrine. This Article discusses that possibility from various angles.

Perspectives on the Nondelegation Doctrine. For purposes of this paper, I divide modern perspectives on the Nondelegation Doctrine into four general types. First, there is the view reflected in the Court's post-1935 jurisprudence that so long as Congress provides an intelligible principle, even a vague one, to guide agency rulemaking,

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[34] *Gundy v. United States*, 2019 WL 2527473, *7 (U.S. June 20, 2019).
[35] Id. at *9–10 (Alito concurring).
[36] Id. at *21 (Gorsuch dissenting)

any rules promulgated pursuant to that authority are exercises of executive power and therefore do not violate the Nondelegation Doctrine. Second, there is the position taken by some commentators that, while Congress may not delegate legislative power, "a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power," because "agents acting within the terms of such a statutory grant are exercising executive power, not legislative power." [37] According to this theory, the Constitution limits Congress's power to delegate its authority only in the narrow sense that "[n]either Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other de jure powers of federal legislators."[38] Third, there is the view, notably espoused by Justice Stevens, that although broad grants of rulemaking power to agencies may constitute delegations of legislative power, such grants are constitutional because legislative power may be delegated.[39] Finally, there is the view that agency rulemaking pursuant to such broad grants of authority may very well contravene the Constitution's Nondelegation Doctrine—and that the mere inclusion of a vague "intelligible principle" does not cure the defect. Justice Thomas, in a series of solo concurring opinions dating back to 2001, has repeatedly endorsed this position.[40]

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[37] Posner and Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1721, 1723 (cited in note 16).

[38] Id.

[39] *Whitman v. American Trucking Associations*, 531 U.S. 457, 489–90 (2001) (Stevens concurring in part and concurring in judgment) ("In Article I, the Framers vested 'All legislative Powers' in the Congress …. Th[is] provision[] do[es] not purport to limit the authority of [Congress] to delegate authority to others …. 'The Court was probably mistaken from the outset in interpreting Article I's grant of power to Congress as an implicit limit on Congress' authority to delegate legislative power.'") (quoting K. Davis and R. Pierce, 1 *Administrative Law Treatise* § 2.6 (3d ed. 1994)).

[40] See *id*. at 487 (Thomas concurring) ("I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.' … On a future day, however, I would be willing to address the question whether our

Thomas has found an ally in Justice Gorsuch (and perhaps Chief Justice Roberts), who apparently shares his senior colleague's view of nondelegation, if his *Gundy* dissent is any indication.

In my view, the question of whether the Nondelegation Doctrine has a basis in the Constitution is the most important inquiry and must be thoroughly resolved before proceeding to the subsidiary issues of judicial enforcement and normative concerns, discussion of which would be pointless if there were no constitutional rule against legislative delegation. I accordingly devote most of this paper to the historical analysis of the Constitution's text. I conclude that it is the position of Justices Thomas and Gorsuch that carries the day: grants of rulemaking power to agencies very often constitute delegations of legislative authority, and such delegations violate the Constitution. In reaching this conclusion, I adhere to the philosophy of originalism, or the view that constitutional provisions "must be given the meaning they had when the text was adopted."[41]

I. NONDELEGATION AND ORIGINAL MEANING

For brevity's sake, I will not attempt to justify at length the validity of originalism as a method of constitutional interpretation. The subject has been debated ceaselessly for decades, and I doubt that my thoughts on it would persuade anyone not already persuaded by prior defenses of originalism. But it is nonetheless

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delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."); Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 1246 (2015) (Thomas concurring in judgment) ("Although the Court may never have intended the boundless standard the 'intelligible principle' test has become, it is evident that it does not adequately reinforce the Constitution's allocation of legislative power. I would return to the original understanding of the federal legislative power and require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process.").

[41] Antonin Scalia and Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 78 (West 2012).

constructive to summarize the arguments for this approach to reading the Constitution. First, a mode of interpretation based on the contrary premise—that the Constitution's meaning evolves over time—does too little to constrain the unelected, life-tenured judges who have the last word in constitutional cases. Judicial "proponents of The Living Constitution [do not] follow the desires of the American people in determining how the Constitution should evolve …. [I]ndeed, as a group they follow nothing at all. Perhaps the most glaring defect of Living Constitutionalism… is that there is no agreement, and no chance of agreement, upon what is to be the guiding principle of the evolution."[42] To be sure, originalism may also occasionally fail to generate a clear answer to constitutional questions—"[b]ut the difficulties and uncertainties of determining original meaning and applying it to modern circumstances are negligible compared with the difficulties and uncertainties of the philosophy which says that the Constitution *changes*."[43] The most fundamental flaw in non-originalist modes of constitutional interpretation, however, is that they are "incompatib[le] with the whole antievolutionary purpose" of a written constitution.[44] Such an instrument certainly does not "naturally suggest[] changeability; to the contrary, its whole purpose is to prevent change—to embed certain rights in such a manner that future generations cannot readily take them away."[45] Even a principled Living Constitutionalist who attempts to constrain herself by steadfastly evolving the Constitution according to public opinion still subverts the document's central objectives by "committ[ing]" its "meaning … to the very body it was meant to protect against: the majority."[46] This description of our written Constitution's fundamental purposes is not merely conjectural; rather, these were the purposes that Americans during

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[42] Antonin Scalia, *A Matter of Interpretation* 44-45 (Princeton 1997).
[43] Id. at 45.
[44] Id. at 44.
[45] Id. at 40.
[46] Scalia, *A Matter of Interpretation* at 47 (cited in note 42).

the Framing era understood themselves to be pursuing in adopting such a document.[47] While these early authorities cannot be relied upon to show that originalism is the proper approach to constitutional interpretation (as such an argument would be circular), they may at least be cited to demonstrate that originalism is internally coherent (i.e., that the Constitution was originally understood to be a document that would be interpreted according to the original understanding of its provisions).

It is certainly arguable that, at an even more fundamental level, the goal of enshrining certain principles in our society's basic law so as to place them beyond the ordinary machinations of politics is not a desirable aspiration; instead, some might say, we should opt for a

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[47] See, for example, *Rhode Island v. Massachusetts*, 37 U.S. 657, 723 (1838) ("In the construction of the constitution, we must look to the history of the times, and examine the state of things existing when it was framed and adopted to ascertain the old law, the mischief and the remedy."); *Fowler v. Halbert*, 7 Ky. 52, 56 (1815) (constitutional terms "must be construed according to their received and well known meaning and import when the constitution was adopted"); Saint George Tucker, 1 *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* (Birch & Small 1803) ("The fairest and most rational method to interpret the will of the legislator, is by exploring his intentions at the time when the law was made, by signs the most natural and probable. And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law"); *Letter from Thomas Jefferson to Providence Citizens* (Mar. 27, 1801), archived at https://perma.cc/XD6V-4LGP ("The constitution … shall be administered by me according to the safe and honest meaning … at the time of it's [sic] adoption: a meaning to be found in the explanations of those who advocated, not of those who opposed it, and who opposed it merely lest the constructions should be applied which they denounced as possible."); Joseph Story, 1 *Commentaries on the Constitution of the United States* § 426 (1833) ("The constitution … is to have a fixed, uniform, permanent construction. It should be, so far at least as human infirmity will allow, not dependent upon the passions or parties of particular times, but the same yesterday, to-day, and for ever [sic]."); *VanHorne's Lessee v. Dorrance*, 2 Dall. 304, 308 (C.C.D. Pa. 1795) ("What is a Constitution? It is the form of government, delineated by the mighty hand of the people, in which certain first principles of fundamental laws are established. The Constitution is certain and fixed; it contains the permanent will of the people, and is the supreme law of the land").

mode of governance that more readily permits the laws to evolve to keep pace with societal change. But, putting aside the desirability of such a goal, this line of argument seems to me an indictment not of originalist interpretation, but of the very concept of a written constitution. In my view, the political system most conducive to the proposition that laws should evolve to keep pace with societal change is one of legislative supremacy, much like the one that prevails in the United Kingdom today.[48] By contrast, a system in which the polity is bound by a written constitution, but where politically-unaccountable modern interpreters construe that codified basic law as "living" seems wholly irrational—an amalgamation constituting the "worst of both worlds"; we would be encumbered with all the undemocratic aspects of judicial review by unelected, life-tenured judges, yet we would get none of the continuity-related benefits that would come with binding those judges to the original meaning of an entrenched written constitution. In other words, if what we are after is a regime in which laws evolve to keep pace with societal change, I think we should be thorough in our commitment to such an objective, vesting supreme political authority in a democratically accountable institution. But if we maintain our current system, in which a politically unaccountable authority interprets a written basic law, I think that said authority must apply originalist interpretive methods.

I recognize, of course, that merely saying that constitutional text has the meaning it had when it was adopted raises and leaves unanswered another important methodological question: at what level of abstraction should modern interpreters construe original meaning? For instance, are modern readers bound by a constitutional provision's original expected applications to particular factual circumstances, or only by its original meaning as a general principle?[49] Important as such questions are, they are beyond the scope of this paper, and, at any rate, their resolution is not, in my

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[48] *Parliament's Authority* (UK Parliament), archived at https://perma.cc/5394-MVXX.
[49] Consider Jack M. Balkin, *Living Originalism* (Harvard 2011).

view, crucial to my argument; the legal rules I derive from evidence of the Constitution's meaning are already fairly general, and my historical conclusions rely more on Framing-era articulations of principles than on particular events.

As evidence of original meaning, I rely on a variety of sources roughly contemporaneous with the Constitution's ratification, including judicial decisions, high-profile commentary, reputable texts, and legislative debates.[50] I have done my best to be as exhaustive as possible, presenting all historical evidence that bears upon this issue. In order to highlight my contribution to existing originalist scholarship on the Nondelegation Doctrine, citations of historical evidence that, so far as I am aware, has been overlooked in the literature are preceded throughout this paper by an asterisk. In contrast to some originalist accounts, I do not examine in great detail any particular terms or phrases in the Constitution's text, such as "All legislative Powers," "herein granted," "vested," or "necessary and proper."[51] Such vague language is arguably susceptible to equally plausible readings both supporting and undermining the

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[50] The Framing generation understood that authorities such as these would provide future interpreters with insight into the Constitution's original meaning. See, for example, *Stuart v. Laird*, 5 U.S. 299, 304 (1803) ("That this was … intended … by the constitution is evident from the contemporaneous exposition of that instrument … by men high in the esteem of their country."); *Martin v. Hunter's Lessee*, 14 U.S. 304, 352 (1816) ("This weight of contemporaneous exposition by all parties, this acquiescence of enlightened state courts, and these judicial decisions of the supreme court … place the doctrine upon a foundation of authority which cannot be shaken"); *Cohens v. Virginia*, 19 U.S. 264, 421 (1821) ("This concurrence of statesmen, of legislators, and of judges, in the same construction of the constitution, may justly inspire some confidence in that construction."); Story, 1 *Commentaries* § 407 (cited in note 47) ("Contemporary construction is properly resorted to, to … confirm the text, to explain a doubtful phrase, or to expound an obscure clause; and in proportion to the … universality of that construction, and the known ability and talents of those, by whom it was given, is the credit, to which it is entitled.").

[51] See Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. at 335-53 (cited in note 14); Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. Chi. L. Rev. at 1304-20 (cited in note 15).

Nondelegation Doctrine,[52] and so even originalist arguments that focus intently on constitutional text must eventually resort to extrinsic historical evidence to defend their interpretation as the correct one. I streamline the process by skipping the textual and syntactic hyper-analysis and beginning with historical investigation of the Constitution's meaning (specifically, that of Article I's vesting clause).

It is certainly contestable how temporally close to the Constitution's ratification historical evidence must be to shed light on how the document was understood at the time of its adoption. In my view, there is no discrete point after which sources are inadmissible as evidence of original meaning, but, as the Supreme Court has recognized, sources' interpretive value gradually diminishes the further removed they are from 1789, when the relevant constitutional language went into effect.[53] Much of the evidence I rely on dates from between roughly ten years before and thirty years after ratification. Historical materials from this period, to the extent they express views that were common and mostly uncontested at that time, are generally regarded as valid evidence of the Constitution's original meaning, with an ideologically diverse array of commentators and jurists routinely citing sources from as late as the 1830s in making originalist arguments about constitutional provisions adopted prior to 1800, or sources similarly temporally

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[52] See Posner and Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1729 (cited in note 16) ("The significance of the burden is that it precludes justifying the [Nondelegation Doctrine] by reference to ambiguous inferences from text and structure …. All told, there is no clear textual … warrant for rebutting the presumption, and the [Nondelegation Doctrine proponents] cannot carry [their] burden."); Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. at 322 (2000) (cited in note 14) ("Nor do text and history provide unambiguous support for the conventional doctrine. The Constitution does grant legislative power to Congress, but it does not in terms forbid delegations of that power.").

[53] See *Powell v. McCormack*, 395 U.S. 486, 547 (1969) ("the precedential value of [historical] cases tends to increase in proportion to their proximity to the Convention in 1787").

removed from the adoption of whichever provision's meaning is at issue.[54] This seems to me to be entirely appropriate. 1830 is well within one lifetime of 1789, and unless one believes that language changed so much in forty years that informed citizens had universally forgotten the meanings of words in the document that governed them, an interpretation widely held in 1830 is likely to be consistent with original meaning. If any high-profile scholar or jurist in 1830 expressed an understanding of constitutional text that was contrary to its original meaning, I expect that there would be plenty of observers with memories long enough to repudiate the error.

I think the same can be said, albeit less forcefully, about some of the historical evidence from the 1840s, and perhaps even some from the 1850s, on which I rely. Authorities this distant in time from the framing are far from the gold standard of originalist analysis, and, by themselves, they would constitute an admittedly shaky foundation for an originalist argument. But because they are entirely in harmony with the overwhelming amount of historical evidence I cite from the six or seven preceding decades, I think that these "late" originalist sources are fairly reliable tools for interpreting the Constitution of 1789. My view is apparently shared by the many commentators and judges who have cited such sources in making historical interpretive arguments about constitutional text adopted before 1800.[55]

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[54] See, for example, *National Labor Relations Board v. Noel Canning*, 134 S. Ct. 2550, 2567-72 (2014) (Breyer); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798-819 (1995) (Stevens); *District of Columbia v. Heller*, 554 U.S. 570, 611-19 (2008) (Scalia); Akhil Reed Amar, *The Bill of Rights As A Constitution*, 100 Yale L. J. 1131, 1150 n.90, 1157 n.128, 1190 n.262 (1991); Cristina M. Rodríguez, *The Citizenship Clause, Original Meaning, and the Egalitarian Unity of the Fourteenth Amendment*, 11 U. Pa. J. Const. L. 1363 (2009); Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. Pa. J. Const. L. 183 (2003).

[55] See, for example, *Heller*, 554 U.S. at 612-19; *Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2085 (2015) (Kennedy); *Printz v. United States*, 521 U.S. 898, 907 (1997) (Scalia); *U.S. Term Limits*, 514 U.S. at 856 (1995) (Thomas dissenting); Nicholas M. McLean, *Livelihood, Ability to Pay, and the Original Meaning of the Excessive Fines Clause*, 40 Hastings Const. L. Q. 833 (2013); Michael B. Rappaport, *The Original Meaning of the Recess Appointments*

Furthermore, all of the authorities I cite from the 1840s and '50s (treatises and judicial decisions) themselves adhered to originalist methodology in construing the relevant constitutional language;[56] their authors were not merely pontificating or offering personal notions, but were instead looking backward in order to capture what legal texts meant to those who adopted them. The self-consciously retrospective nature of these sources' analysis makes them more valuable than they otherwise would be for understanding a text ratified fifty or sixty years earlier. And while the materials I rely on from the 1840s and '50s are useful for constitutional *interpretation* (the "discovery … of the true meaning" of the words of the Constitution [57]), they are even more valuable as a means of constitutional *construction* (the act of "determining the meaning and application" of that instrument "as to the case in question"[58]). In order to devise a historically-grounded judicial framework for assessing whether a statute unconstitutionally delegates legislative power, stray remarks condemning such delegations in abstract terms will not suffice; I need a doctrinal framework that courts and commentators developed over time through adjudication, a process that cannot be expected to occur within a decade or two of the Framing. To that end, cases and other writings from the 1840s and '50s are highly instructive, as they outline the nondelegation case law

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Clause, 52 UCLA L. Rev. 1487 (2005); Jeremy M. Christiansen, *State Search and Seizure: The Original Meaning*, 38 U. Haw. L. Rev. 63 (2016).

[56] See *Parker v. Commonwealth*, 6 Pa. 507, 514 (1847); *Moers v. City of Reading*, 21 Pa. 188, 200 (1853); *Norris v. Clymer*, 2 Pa. 277, 285 (1845); *Union Bank of Tennessee v. State*, 17 Tenn. 490, 498-99 (1836); *Townsend v. Griffin*, 4 Del. 440, 443-44 (Del. Super. Ct. 1846); *State Bank v. Cooper*, 10 Tenn. 599, 620 (1831) (Kennedy); *Cox v. Breedlove*, 10 Tenn. 499, 501-02 (1831); Theodore Sedgwick, *Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* 486-88, 594-95 (1857); see also *People v. Green*, 1829 WL 2247 (N.Y. Sup. Ct. 1829).

[57] Thomas M. Cooley, *Treatise on the Constitutional Limitations Which Rest upon the Legislative Power of the States of the American Union* 38-39 n.1 (Little 1868) (quoting John Bouvier, 1 *Law Dictionary* 743, 337 (1867 ed.)).

[58] Id.

that emerged in the first sixty or seventy years of the Republic's history.

An admitted weakness of my account is that, although the historical sources all shared the premises underlying the Nondelegation Doctrine, there was considerable disagreement regarding its application to particular cases, so much so that even according to the test I devise, many early invocations of this constitutional rule were false alarms. Although principled application of the doctrine seems to have evaded many members of the Framing generation, it is noteworthy that their errors were all false positives—they scrupulously adhered to nondelegation values, even when the Constitution did not strictly require it. All told, my analysis thoroughly undercuts the claim that "[t]he only remotely relevant originalist evidence that nondelegation proponents can muster is a handful of isolated quotations from the post-ratification period."[59]

A. "LEGISLATIVE POWER": FOUNDATIONS & PRE-RATIFICATION EVIDENCE

As an initial matter, it is necessary to flesh out the concept of the "Legislative Power" that the Constitution vests in Congress, as an understanding of this phrase will be helpful in determining when, if ever, a statutory grant of authority constitutes a delegation of legislative power. Alexander Hamilton, writing as Publius in *The Federalist* (one of the most reliable authorities on the Constitution's original meaning[60]) explained that "[t]he essence of the legislative

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[59] Posner and Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1734 (cited in note 16).

[60] As the Supreme Court recognized in 1821, "[t]he opinion of the Federalist has always been considered as of great authority" on questions of constitutional interpretation; "[i]t is a complete commentary on our constitution …. Its intrinsic merit entitles it to this high rank; and the part … its authors performed in framing the constitution, put it … in their power to explain the views with which it was framed." *Cohens v. Virginia*, 19 U.S. 264, 418 (1821).

authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength, either for this purpose or for the common defense, seem to comprise all the functions of the executive magistrate."[61] "Laws," he reiterated in the same essay, were "rules prescribed by the sovereign to the subject."[62] He subsequently explained that the legislative power "prescribes the rules by which the duties and rights of every citizen are to be regulated,"[63] a definition endorsed by a prominent commentator of the era.[64] Chief Justice Marshall, writing for the Court in 1811, took approximately the same view: "It is the peculiar province of the legislature to prescribe general rules for the government of society."[65] Such characterizations of legislative power were consistent with definitions of "law" and "legislative" found in contemporary dictionaries.[66] Blackstone, as quoted in an 1803 American treatise, also defined a "law" as a "rule of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong."[67] Legislative power, it seems, did not refer to the authority to vote on legislation or exercise other de jure powers of legislators, but rather to the power to make general rules governing private conduct—a definition broad enough, at least in theory, to encompass a great deal of modern administrative rulemaking, although more concrete and specific historical evidence is of course

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[61] Federalist 75 (Hamilton), in *The Federalist* 503, 504 (Wesleyan 1961) (Jacob E. Cooke, ed.).
[62] Id. at 504-05.
[63] Federalist 78 (Hamilton), in *The Federalist* 521, 523 (cited in note 61).
[64] Tucker, 1 *Blackstone's Commentaries* at 127 (cited in note 47).
[65] *Fletcher v. Peck*, 10 U.S. 87, 136 (1811).
[66] "Legislative" was defined as "1. Giving or enacting laws; as a legislative body. 2. Capable of enacting laws; as legislative power," and "Law" was defined as 1) "A rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions," or 2), as "a rule of civil conduct prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear." * Noah Webster, *American Dictionary of the English Language* (Converse 1828).
[67] Tucker, 2 *Blackstone's Commentaries* at 3 (cited in note 47).

required before such rulemaking can be condemned as unconstitutional.

As it turns out, such evidence abounds. John Locke, in his 1690 *Second Treatise of Civil Government*, had contemplated—and condemned—the delegation of legislative power, writing

> The legislative cannot transfer the power of making laws to any other hands. For it being a delegated power from the people, they, who have it, cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting a legislative, and appointing in whose hands that shall be; and when the people have said, we will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say, other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen and authorised to make laws for them. The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed; which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands.[68]

Locke's ideas profoundly influenced the development of America's Constitution,[69] and there is substantial evidence that his disapproval of legislative delegation in particular was incorporated into our founding document and thereafter became part of an unbroken legal tradition in the United States that continued until at least the Civil

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[68] John Locke, *Two Treatises of Government* 408-09 (Laslett ed. 1963).

[69] As John Quincy Adams remarked in an 1839 speech, "the Constitution of the United States [is] … founded upon one and the same theory of government, then new, not as a theory, for it had been working itself into the mind of man for many ages, and been especially expounded in the writings of Locke." John Quincy Adams, *The Jubilee of the Constitution: A Discourse* (1839). Archived at https://perma.cc/JW63-7LAS.

War. American revolutionary James Otis, "an early hero in the patriot cause of the 1760s,"[70] endorsed Locke's words condemning delegation of legislative power in "The Rights of the British Colonies Asserted and Proved," a 1763 political pamphlet widely distributed in the colonies.[71] The 1799 and 1832 American editions of Rutherforth's *Institutes of Natural Law*, an influential treatise often cited by Framing-era courts and widely read by the informed public,[72] took the firm position that legislative power (which Rutherforth defined in the same manner as the authorities cited earlier[73]) could not be delegated, calling the language to that effect from Locke's *Second Treatise* "decisive."[74] John Adams, in an 1818 letter to Attorney General William Wirt, likewise expressed

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[70] Akhil Reed Amar, *America's Unwritten Constitution* 59 (Basic Books 2012).

[71] * James Otis, *The Rights of the British Colonies Asserted and Proved*, archived at https://perma.cc/NLF8-TMNW (1763) ("The legislature cannot transfer the power of making laws to any other hands.").

[72] See Gary L. McDowell, *The Limits of Natural Law: Thomas Rutherforth and the American Legal Tradition*, 37 Am. J. Juris. 57, 58 (1992) ("*Institutes of Natural Law* was a work widely read and cited among those of the Founding generation and of the first generation under the Constitution of 1787."); Thomas C. Gray, *Origins of the Unwritten Constitution: Fundamental Law in American Revolutionary Thought*, 30 Stan. L. Rev. 843, 860 (1978) ("the works of … Rutherforth had prestige and influence, and helped shape the constitutional ideas of the American colonists."). For favorable citations of Rutherforth's *Institutes* in early American judicial opinions, see *Bank of Toledo v. City of Toledo*, 1 Ohio St. 622, 666 (1853) (citing Rutherforth's definition of legislative power); *Mott v. Pennsylvania Railroad Co.*, 30 Pa. 9, 27 (1858) (same); *Gray v. Combs*, 30 Ky. 478, 484 (1832) (same); *Ware v. Hylton*, 3 U.S. 199, 230 (1796) (Chase) (citing earlier edition); *United States v. Smith*, 18 U.S. 153, 163 n. h (1820); *Hylton v. Brown*, 12 F. Cases 1129, 1132 (C.C.D. Pa. 1806); *Ansley v. Timmons*, 14 S.C.L. 329, 337 (S.C. App. L. & Eq. 1825); *People v. McLeod*, 1841 WL 3645 (N.Y. Sup. Ct. 1841).

[73] * Thomas Rutherforth, 2 *Institutes of Natural Law* 214, 52 (3d ed. 1799) ("legislative power … is [the] right to prescribe such rules for [a citizen's] conduct, as the common understanding of the society shall judge to be neccesary or conducive to the general good," or, said otherwise, the "power, in [a] society, to settle or ascertain, by its joint or common understanding, the several rights and duties of those; who are members of it.").

[74] Id. at 144; see also * Thomas Rutherforth, *Institutes of Natural Law* 319-20 (2d Am. Ed. 1832).

agreement with Locke's disapproval of legislative delegation.[75] A preeminent[76] 1868 treatise on American constitutional law remarked that "[o]ne of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority"—a proposition for which the author cited Locke, among other sources.[77]

Similarly, Thomas Jefferson, in a 1774 tract presented to the First Continental Congress and also widely read by the general public, expressed numerous political grievances against King George III, among which was a denunciation of an act passed during the preceding session of Parliament providing that "[t]wo wharves are to be opened again when his Majesty shall think proper: the residue which lined the extensive shores of the bay of Boston, are for ever interdicted the exercise of commerce"; Jefferson objected on the ground that the law improperly delegated legislative authority: "This little exception [allowing reopening of wharves when the King thinks proper] seems to have been thrown in for no other purpose, than that of setting a precedent for investing his Majesty with legislative powers. If the pulse of his people shall beat calmly under this experiment, another and another will be tried, till the measure of despotism be filled up."[78]

While skeptics of the Nondelegation Doctrine's constitutional bona fides point out that "[t]he Constitution does grant legislative power to Congress, but it does not in terms forbid delegations of that power,"[79] the foregoing authorities suggest that this argument rests on the mistaken premise that legislative power was presumptively

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[75] * *Letter from John Adams to William Wirt* (Mar. 7, 1818), in *Works of John Adams, Second President of the United States* 293 (Charles Francis Adams ed. 1856).

[76] See Akhil Reed Amar, *The Constitution and Criminal Procedure: First Principles* 15 (Yale 1997) (calling this treatise "monumental").

[77] Cooley, *Constitutional Limitations* at 116-17 (cited in note 57).

[78] * Thomas Jefferson Randolph, ed., *A Summary View of the Rights of British America (1774)*, in 1 *Memoirs, Correspondence, and Private Papers of Thomas Jefferson* 112-13 (Colburn & Bentley 1829).

[79] Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. at 322 (2000) (cited in note 14).

delegable. On the contrary, the Framing generation would have assumed that the legislature could *not* delegate such power without explicit constitutional authorization to that effect. Sovereign power, it was believed, is ultimately vested in We the People; when the People delegated legislative power (the power to make laws, "rule[s] prescribed by the supreme power of a state to its subjects, for regulating their actions"[80]) to an arm of the state, the grant did not come with implicit permission to delegate that power to another governmental department. According to this formulation, a legislative act that prescribes no rules of conduct for society, but instead empowers another entity to do so, is not only invalid—it is *not a law*. Indeed, as we shall see, this is precisely the view early American courts expressed in striking down statutes as unconstitutional delegations of legislative power.[81]

During the Constitutional Convention,[82] the delegation issue arose as the delegates debated the composition and powers of the executive branch. James Madison suggested that

> after the words "that a national Executive ought to be instituted" there be inserted the words following viz. "with power to carry into effect national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers 'not Legislative nor Judiciary in their nature,' as may from time to time be delegated by the national Legislature". The words "not legislative nor judiciary in their

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[80] Webster, *American Dictionary* (cited in note 66).

[81] See *Rice v. Foster*, 4 Del. 479, 491 (1847) (invalidating an "act, which is not a law in itself when passed, and has no force … until it shall have been created … by the will and act of some other persons").

[82] I cite records from the Convention "not because [the] Framers[′] … intent is authoritative and must be the law; but rather because their writings, like those of other intelligent and informed people at the time, display how … the Constitution was originally understood." Scalia, *A Matter of Interpretation* at 38 (cited in note 42). The Supreme Court has long used Convention records in this manner. See *Veazie Bank v. Fenno*, 75 U.S. 533, 540 (1869).

> nature" were added to the proposed amendment in consequence of a suggestion by Gen Pinckney that improper powers might otherwise be delegated.[83]

James Wilson seconded the motion. But General Pinckney's younger second-cousin, Charles Pinckney,

> moved to amend the amendment by striking out the last member of it; viz: "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated." He said they were unnecessary, the object of them being included in the "powers to carry into effect the national laws."[84]

Edmund Randolph seconded the younger Pinckney's view of the phrase as redundant. Madison responded by conceding that he "did not know that the words were absolutely necessary,"[85] but reported that, as a "consequence of the motion of [the younger] Mr. Pinkney, the question on Mr. Madison's motion was divided; and the words objected to by Mr. Pinkney struck out."[86] This exchange suggests that the view that an overly permissive statutory grant of power to the executive could amount to an impermissible delegation of legislative power was held by at least some delegates, including Madison and General Pinckney (both of whom wanted to explicitly specify that the powers "delegated by the national legislature" could not be "legislative … in their nature"), as well as Randolph and Charles Pinckney (both of whom felt that this limitation was inherent in the executive's power to "carry into effect" the laws). Indeed, the contrary views––that a statutory grant can never amount to a delegation of legislative power, or that delegations of legislative

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[83] Max Farrand, ed., 1 *The Records of the Federal Convention of 1787* 67 (Yale 1911).
[84] Id.
[85] Id.
[86] Id.

power were permissible--appeared to have no adherents at the Convention, or at least none that felt like speaking up.[87]

Hamilton's writings in *The Federalist* support the Convention's apparent understanding that legislative power could not be delegated. In defending the president's authority to pardon, Hamilton argued that, in times of crisis, it may be desirable to declare lawful certain acts that would ordinarily be unlawful. In response to the argument that such a "discretionary power … might be occasionally conferred upon the President," he disagreed, writing that it was "questionable, whether, in a limited Constitution, that power could be delegated by law"; it was therefore necessary to constitutionalize the authority to pardon.[88] Granted, Hamilton does not explicitly characterize the power that he doubts could be delegated as "legislative," but it is a reasonable inference that the objectionable aspect of such a statutory delegation would be its conferral of discretion upon the president to decide what conduct would be lawful or unlawful—the sort of decisions at the core of exercises of legislative power.

B. POST-RATIFICATION LEGISLATIVE EVIDENCE

That the Constitution prohibited Congress from delegating powers that were legislative in nature was the prevailing view during the early years of the Republic. The issue arose as early as December of 1791, as the House of Representatives debated a proposed bill establishing a post office and routes of mail delivery. Representative Sedgwick introduced an amendment that would have authorized the delivery of mail "by such route as the President

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[87] Posner and Vermeule somehow interpret this exchange as indicating that "legislative delegation to the executive was viewed as unproblematic." *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1734 (cited in note 16). I do not understand how one could conclude such a thing from Madison's notes, which suggest that some delegates thought these delegations should be explicitly prohibited, while others thought this prohibition was already clear from the text.

[88] * Federalist 74 (Hamilton), in *The Federalist* 500, 502 (cited in note 61).

of the United States shall, from time to time, cause to be established." [89] But the proposal was immediately controversial; Representative Livermore believed that, because one of Congress's had the constitutional authority "to establish post offices and post roads," it would be unconstitutional for them to delegate that power to the executive.[90] Sedgwick responded not by denying the existence of a constitutional prohibition on such delegations, but by characterizing the power delegated by his proposal as executive, rather than legislative, in nature.[91] Representative Hartley echoed Livermore's concern that Congress, being "constitutionally vested with the power of determining upon the establishment of post roads … ought not to delegate the power to any other person." [92] Representatives Page and Vining also each spoke in opposition to the measure, agreeing with their colleagues who considered it an unconstitutional delegation of legislative power.[93] Representative Benson took a more nuanced view. He seemed to concede that the delegation might be unconstitutional, yet he believed that, because "attempting a definition of [legislative and executive] powers, or determining their respective limits" would be "extremely difficult to

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[89] 3 Annals of Cong. 229 (1791).

[90] Id. at 229-30 (It was "clearly [Congress's] duty to designate the roads as to establish the offices; and he did not think they could with propriety delegate that power, which they were themselves appointed to exercise …. [I]f the House gave up that, they might as well leave all the rest of the business to the discretion of the Postmaster, and permit him to settle the rates of postage, and every other particular relative to the post office, by saying, at once, 'there shall be a Postmaster General, who shall have the whole government of the post office, under such regulations as he from time to time shall be pleased to enact.'").

[91] Id. at 230 ("Mr. Sedgwick [was] by no means disposed to resign all the business of the House to the President, or to any one else; but he thought that the Executive part of the business ought to be left to Executive officers.").

[92] Id. at 231.

[93] 3 Annals of Cong. 233-35 (statement of Rep. Page) ("[I]f this House can … leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction …. I look upon the motion as unconstitutional.").

do, he would only observe that much must necessarily be left to the discretion of the Legislature"; accordingly, "he believed it would be better to delegate the power, and let the regulations be made by the President."[94] But Representative (James) Madison disagreed:

> However difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers, [Madison] was of opinion that those arguments were not well founded, for they admit of such construction as will lead to blending those powers so as to leave no line of separation whatever …. He concluded by saying, that there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution.[95]

After Madison delivered his remarks and Sedgwick offered a few more arguments in defense of his amendment (largely on policy, rather than constitutional, grounds),[96] a vote was taken, and the proposed delegation to the President was rejected and replaced with specific enumeration of the various routes along which mail was to be carried,[97] with no further discussion of the matter following the vote. Of course, we cannot be certain that Sedgwick's amendment was rejected on constitutional, as opposed to practical, grounds. But records of the proceedings that day undoubtedly weigh in favor of the propositions that Congress could *not* delegate legislative power, and that an act of Congress *could* amount to such a delegation. The only argument offered in favor of the proposal's constitutionality was Sedgwick's contention that his amendment delegated only executive power, an odd angle for him to take if it were widely

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[94] Id. at 236.
[95] Id. at 238-39.
[96] See id. at 239-41.
[97] See An act to establish the Post-Office and Post Roads within the United States, 1 Stat. 232 (1792).

accepted that there was nothing wrong with delegating legislative power, or that a statutory grant of authority could never amount to such a delegation.

Legislative debates and documents concerning the controversial Alien and Sedition Acts of 1798 further support the view that Constitution contained a nondelegation principle. Both laws were broadly condemned by reputable commentators and the public as unconstitutional.[98] The Alien Act was decried as, among other things, an impermissible delegation of power because it authorized the president "to order all such aliens as he shall judge dangerous to the peace and safety of the United States … to depart out of the United States."[99] Representative Edward Livingston denounced this provision in an impassioned speech on the House floor, arguing that the "[l]egislative power prescribes the rule of action; the judiciary applies that general rule to particular cases, and it is the province of the executive to see that the laws are carried into full effect"; yet, under the Alien Act, "the president alone, is empowered to make the law, to fix in his own mind, what acts, what words what thoughts or looks, shall constitute the crime contemplated by the bill …. This, then comes completely within the definition of despotism, and union of legislative, executive, and judicial powers."[100] Equally noteworthy is a 1799 resolution of the Virginia General Assembly condemning the Alien Act, as well as an Assembly committee report authored by James Madison on the Act's constitutional defects. Regarding the Resolution's contention that the Act violated the U.S. Constitution by "unit[ing] legislative, judicial, and executive powers in the hands of the President," the report explained that "details should leave as little as possible to the discretion of those who … execute the law. If nothing more were required, in exercising a legislative trust, than a

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[98] See Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 6 (Yale 2008) ("[T]he Alien and Sedition Acts were seen as violating both the First and the Tenth Amendments.").

[99] An Act Concerning Aliens, 1 Stat. 570-71 (1798).

[100] * 8 Annals of Cong. 2007-08 (1798).

general conveyance of authority, without laying down any precise rules, … it would follow, that the whole power of legislation might be transferred by the legislature from itself," which would be "unconstitutional."[101] It is significant that the phrase "as he shall judge dangerous"—a phrase that would likely qualify as an "intelligible principle" under current Supreme Court case law—was considered insufficiently specific to avert impermissible delegation of legislative power.

Although existing scholarship has largely neglected them, other congressional debates from this period consistently support the view that the Constitution, as originally understood, contained a nondelegation principle. For example, during an 1842 debate over a proposed statutory amendment that would have authorized executive branch officers to issue "rules and regulations" (backed by criminal penalties) that, "unless disapproved by Congress, [would] be the law of the land," then-Congressman John Quincy Adams objected to the measure on the ground that it unconstitutionally delegated legislative power; the amendment was almost immediately withdrawn.[102] A similar scenario unfolded in 1810 as the House considered a proposed amendment to an embargo bill that would have authorized the President "to employ the public armed vessels in protecting the commerce of the United States, and to issue instructions which shall be conformable to the laws and usages of nations, for the government of the ships which may be employed in that service"; Representative (and later federal judge) John Jackson

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[101] James Madison, *Report of the Committee to Whom Were Referred the Communications of Various States, Relative to the Resolutions of the Last General Assembly of this State, Concerning the Alien and Sedition Laws* (1799), archived at https://perma.cc/8B2Y-SNN8.

[102] See * Cong. Globe, 27th Cong., 2nd Sess. 510 (1842) ("it was a transfer of legislative power to a board of officers which he doubted whether Congress had the power to make. It would be just as reasonable to transfer the power of legislation from … Congress to the President, and to say that he shall make the laws for the people of this Union, which should operate as laws unless Congress disapproved them. Now he hoped that never would be done.").

objected, invoking the Constitution's nondelegation principle; other legislators agreed, and the proposal was voted down by an almost 2-1 margin.[103]

The delegation issue also arose in a 1798 debate in the House, albeit with a different outcome. A proposed bill authorizing the President, in certain circumstances, to raise an army of no more than 10,000 men [104] immediately prompted objections from Representatives Nicholas, Gallatin, and McDowell that the measure unconstitutionally delegated legislative power to the President.[105] Supporters of the bill, however, countered that it merely authorized the President to take specified actions "until a certain contingency shall have taken place," and therefore was not a delegation of "legislative" power. [106] Critics alleged that if the bill were constitutional, it would imply that Congress could delegate to the President the power to set tax rates, but Representative Harper denied such an implication, suggesting that Congress could only delegate such a decision if it "determine[d] upon a tax" and authorized the President to collect it when "a certain event should take take [sic] place."[107] The measure passed––though it is worth emphasizing that no one in Congress so much as suggested that there were no constitutional limits on statutory delegations of authority; indeed, several emphatically stated otherwise. Supporters of the Act

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[103] See * 21 Annals of Cong. 2022 (1810) ("It seems to me with equal constitutionality we might refer to the President the authority of declaring war, levying taxes, or of doing everything which the Constitution points out as the duty of Congress. All legislative power is by the Constitution vested in Congress. They cannot transfer it.").
[104] See An act authorizing the President of the United States to raise a provisional army, 1 Stat. 558 (1798) ("The President … is … authorized, in the event of a declaration of war against United States, or, of actual invasion of their territory, by a foreign power; or of imminent danger of such invasion discovered, in his opinion, to exist, before the next session of Congress, to cause to be enlisted … a number of troops, not exceeding ten thousand … to be enlisted for a term not exceeding three years; each of whom shall be entitled to receive … ten dollars").
[105] See * 8 Annals of Cong. 1525, 35 (1798).
[106] Id. at 1528 (statement of Rep. Sewall).
[107] Id. at 1529.

would soon be vindicated by a Supreme Court decision, as I explain in the next Section.

At any rate, although early Congresses were apparently befuddled by the exact boundaries of the Nondelegation Doctrine, lawmakers at least generally agreed with the proposition that, as Virginia's Alexander Smyth put it in an 1818 debate, "[l]egislative power, when granted, is not transferable; nor can it be exercised by substitute; nor in any other manner than according to the constitution granting it,"[108] as they made clear on many other occasions.[109] Acting in apparent accordance with that principle, "[e]arly Congresses … micromanaged administration … through specific instructions. Many statutes laid out the duties of officers and of private parties subject to the legislation in excruciating detail."[110] There were a few exceptions to this early practice, but, as I explain in Part II(c), they are consistent with a constitutional prohibition on delegation of legislative power and do not reflect a view among the framing generation that no such prohibition existed.

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108 * 31. Annals of Cong. 1144 (1818).

109 See, for example, * 8 Cong. Deb. 3846 (1832) (statement of Rep. Barbour) ("if we have this power to tax, can we transfuse it at will into the local legislation of the several States? Is this power so mutable that we can retain or transfer it at our pleasure? I rely upon that salutary principle which is engrafted into our system of jurisprudence, and drawn from the wisdom of antiquity [and] drawn to us from our Anglo-Saxon forefathers. When a lawless king, meanly sunk in loose, inglorious luxury, aimed at still more lawless power, and claimed the right of unlimited taxation as being within himself, by the ready grant of a tame and supple Parliament, a … baron … said-'*Delegatus non potest, delegare*.'") (the motion against which Barbour was arguing was then voted down); * Jonathan Elliot, ed., 4 *The Debates in the Several State Conventions, on the Adoption of the Federal Constitution: As Recommended by the General Convention at Philadelphia, in 1787. Together with the Journal of the Federal Convention, Luther Martin's Letter, Yates' Minutes, Congressional Opinions, Virginia and Kentucky Resolutions of '98-'99, and Other Illustrations of the Constitution* 404 (Taylor & Maury 1854) (statement of Rep. Gerry) ("If the legislature … have [a power], it is a legislative power, and they have no right to transfer the exercise of it to any other body.") (Aug. 1, 1790).

110 Mashaw, *Federalist Foundations*, 115 Yale L. J. at 1292 (cited in note 16).

C. EARLY FEDERAL CASE LAW

Three U.S. Supreme Court decisions from the era shortly after the Ratification addressed the nondelegation issue, and although none held a statute invalid on that basis, neither did any of them reject the Nondelegation Doctrine as a constitutional mandate (indeed, language in some of the opinions actually recognized the principle's constitutional validity). The first of these cases was *The Brig Aurora v. United States*, decided in 1813.[111] The controversy arose when the cargo of a ship was condemned by federal authorities for violating the embargo against Great Britain and France, a restriction that, as provided by statute, went into effect three months after the President proclaimed that either of the two countries had, "before the third day of March next" modified its "edicts, as that they shall cease to violate the neutral commerce of the United States." [112] The appellants attacked the law as an unconstitutional delegation of legislative power.[113] The Court ultimately rejected this argument, not because there was no constitutional prohibition on the delegation of legislative power, but because "[t]he legislature did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect."[114] In the 1825 decision *Wayman v. Southard*,[115] the Court, speaking through Chief Justice Marshall, upheld a statute authorizing federal courts "to make all necessary rules for the orderly conducting business in the said Courts."[116] While the majority was not persuaded by the argument that the statute unconstitutionally delegated legislative power, it conceded that the Constitution

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[111] 11 U.S. 382 (1813).
[112] An Act concerning the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes, 2 Stat. 606 (1810).
[113] 11 U.S. at 386 ("Congress could not transfer the legislative power to the President. To make the revival of a law depend upon the President's proclamation, is to give to that proclamation the force of a law.").
[114] Id. at 387.
[115] 23 U.S. 1 (1825).
[116] Judiciary Act of 1789, 1 Stat. 83 (1789).

prohibited Congress from delegating authority so broad as to be legislative in nature:

> It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. … The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which … power given to those who are to act under such general provisions to fill up the details.[117]

In order "[t]o determine the character of the power" delegated by a congressional statute, the Court said, it is necessary to "inquire into [the delegation's] extent," explaining that

> The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, and declare whether it shall be on credit, or for ready money, is certainly a more important exercise of the power of regulating the conduct of the officer, but is one of the same principle. It is, in all its parts, the regulation of the conduct of the officer of the Court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered.[118]

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[117] *Wayman*, 23 U.S. at 42-43 (emphasis added).
[118] Id. at 45.

In other words, the statute was constitutional because it was not a delegation of *legislative* power; instead, it delegated to the judicial branch the power to make rules regulating its own internal administration, a power that is merely incidental to performing judicial functions (a point that the Court had made even more emphatically in a prior case[119]). Regulations promulgated under such a law were not "rule[s] of civil conduct prescribed by the supreme power in a state, commanding what is right and prohibiting what is wrong," and therefore were not exercises of pure legislative power, even if Congress could have made them itself. The Court reaffirmed this principle later that year in *Bank of the United States v. Halstead*, where it upheld the same law against another nondelegation attack: the delegated authority was within "the ministerial duty of the officer, and part[ook] no more of legislative power than that discretionary authority entrusted to every department of the government in a variety of cases."[120]

The originalist case for the Nondelegation Doctrine finds further support in *United States v. Knight*,[121] an 1838 federal circuit court decision authored by Joseph Story, "the most famous legal scholar and Supreme Court Justice in [early Nineteenth Century] America,"[122] as he rode circuit. The question in *Knight* was whether

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[119] See *Anderson v. Dunn*, 19 U.S. 204, 227-28 (1821) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates …. It is true, that the Courts of justice of the United States are vested, by express statute provision, with power to fine and imprison for contempts; but it does not follow, from this circumstance, that they would not have exercised that power without the aid of the statute …; on the contrary, it is a legislative assertion of this right, as incidental to a grant of judicial power, and can only be considered either as an instance of abundant caution, or a legislative declaration, that the power of punishing for contempt shall not extend beyond its known and acknowledged limits of fine and imprisonment.").

[120] 23 U.S. 51, 61-62 (1825).

[121] * 26 F. Cas. 793 (C.C.D. Me. 1838).

[122] Orrin G. Hatch, ed., *Jury and the Search for Truth: The Case Against Excluding Relevant Evidence at Trial: Hearing on S. 3 Before the Senate Comm. on the Judiciary, U.S. Senate*. 10 (Diane 1995) (statement of Akhil R. Amar).

an inmate in a federal debtor's prison was guilty of an escape when he was outside the jail walls, but within the jail yard, at night. An 1800 federal statute provided that debtors imprisoned under federal authority had the same privileges and restrictions with respect to conditions of confinement as did debtors imprisoned under the authority of the state where the federal prison is located. But it was not entirely clear whether the federal statute adopted the state laws in force in 1800, when it was passed, or if it prospectively adopted any subsequent changes in states' laws. In order to avoid putting the constitutionality of the 1800 act in doubt, Justice Story construed it as incorporating only the state laws that were in effect when it was enacted, explaining, "I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively state legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power. And I think my doubts strengthened by what fell from the supreme court, on this point, in *Wayman* … and … *Halstead*."[123] The district judge hearing the case along with Story joined this opinion. The *Knight* holding had been foreshadowed two years earlier by the Supreme Court's *dicta* in *Hobart v. Drogan*. [124] Writing for a unanimous Court, Justice Story had noted that the case presented "an argument of a grave cast": that "the act of congress, so far as it adopts the future laws to be passed by the states on the subject of pilotage, is unconstitutional and void; for congress cannot delegate their powers of legislation to the states …. But we are spared from any discussion of [the issue] on the present occasion, because we are of opinion, that the present is not a case of pilotage, but of salvage."[125]

Another early Supreme Court decision, *Cary v. Curtis*, [126] is sometimes cited for the proposition that the framing generation did

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[123] *Knight*, 26 F. Cas. at 797.
[124] * 35 U.S. 108 (1836).
[125] Id. at 120.
[126] 44 U.S. 236 (1845).

not recognize the Nondelegation Doctrine.[127] In fact, the case says no such thing, but still warrants discussion, as it illustrates the important conceptual distinction between legislation and adjudication. In this 1845 decision, the Court rejected a constitutional challenge to a federal statute providing that a person who paid a duty under protest (i.e., accompanied by notice of objection) was entitled to a refund "whenever it shall be shown to the satisfaction of the Secretary of the Treasury, that in any case of … duties paid under protest, more money has been paid … than the law requires should have been paid."[128] This is not a delegation of legislative power, for it does not authorize the Secretary to issue general rules governing private conduct that carry the force of law. Rather, it permits the Secretary to apply such rules to particular cases, a duty inherent in all discretionary exercises of executive power.[129] True, the act in some sense delegates judicial power, in that it makes the Secretary the sole "tribunal for the examination of claims for duties said to have been improperly paid,"[130] but because this question of law arises in a controversy between government and citizen, the Public-Rights doctrine permits Congress provide for its adjudication by tribunals other than Article III courts.[131] As long as the mode of adjudication

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[127] See Krent, *Delegation and its Discontents*, 94 Colum. L. Rev. at 740 n. 129 (cited in note 16).

[128] *Curtis*, 44 U.S. at 240-41 (quoting Act of March 3, 1839, Chap. 82, § 2).

[129] See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. 272, 280 (1855) ("That the [act] may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties the performance of which involves an inquiry into the existence of facts and the application to them of rules of law …. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact.").

[130] *Cary*, 44 U.S. at 242.

[131] Since the government has sovereign immunity and is under no obligation to let citizens call it into court at all, it follows that government has the lesser power of providing that controversies between it and a citizen will be adjudicated by a tribunal other than an Article III court. *Cary*, 44 U.S. at 244-46; *Murray*, 59 U.S. at 284 ("there are matters, involving public rights, … which are susceptible of judicial determination,

satisfies the procedural requirements of Due Process[132] (as the Court suggested it did in *Cary*[133]), and as long as the rules of conduct the adjudicator applies are not unconstitutionally vague, [134] the Constitution is not violated. That Congress may, subject to Due Process's requirements, delegate this sort of adjudicatory power to executive departments in no way calls into question the validity of the Nondelegation Doctrine.

It is true, however, that many adjudicatory decisions issued by modern administrative agencies are merely prospective; they do not penalize past conduct, but instead serve as declaratory statements of legal rights or obligations going forward.[135] Under current doctrine, agencies' decisions in such cases are not constrained by Due Process principles of fair warning.[136] That being so, what, one might ask, is to stop administrative adjudicators from evading a strong Nondelegation Doctrine by simply adopting a freewheeling and flexible approach to construing the general rules they apply, and thereby effectively making law? I think the answer is that, if the Nondelegation Doctrine were ever resurrected in all its former glory,

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but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper.").

[132] See *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

[133] *Cary*, 44 U.S. at 245-46 ("It is not imagined, that … Congress is justly chargeable with usurpation, or that the citizen is thereby deprived of his rights. There is nothing arbitrary in [the Act's] arrangements; they are general in their character; are the result of principles inherent in the government; are defined and promulgated as … law.").

[134] See *Federal Communications Commission v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) ("A conviction or punishment fails to comply with due process if the statute or regulation under which it is obtained 'fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.'") (quoting *United States v. Williams*, 553 U.S. 285, 304 (2008)).

[135] See, for example, *MCI Express, Inc.-Petition for Declaratory Order-DSL Transportation Services, Inc.*, 1999 WL 438985, at *1 (S.T.B. 1999) ("the [Surface Transportation] Board has discretionary authority to issue a declaratory order to terminate a controversy or remove uncertainty.").

[136] See *ECM BioFilms, Inc. v. Federal Trade Commission*, 851 F.3d 599, 618 (6th Cir. 2017) ("This [fair notice] doctrine … only applies when agencies seek to impose sufficiently grave or drastic sanctions." (int'l quotes & cites omitted)).

thoroughgoing adherence to this constitutional rule would require that courts apply the fair-warning principle to all administrative adjudications that determine private rights or obligations, even when no penalty for past conduct is imposed. In other words, a reviewing court would inquire whether the agency's declaratory interpretation of a general rule in a specific case, had it been applied so as to penalize past conduct, would have been so arbitrary that violators would not have had fair warning that their actions were prohibited. If the answer is "yes," a court should invalidate the agency's decision on the grounds that it was, for all intents and purposes, an act of legislation. There are doubtless instances where this proposed test would make no sense; if, for example, a declaratory adjudication finds that some course of conduct would *not* violate the law, then it is impossible to inquire whether this conclusion would violate the principle of fair warning if applied to past conduct. But I am perfectly content to give administrative adjudicators free rein when they are declining to find that some conduct violates the law, since, even if the adjudicator's interpretation of the law is implausible, their decision not to enforce it against the conduct in question is merely an act of prosecutorial discretion (provided, of course, that their decision is not given preclusive effect).

D. EARLY STATE COURT DECISIONS

An important source of evidence of the U.S. Constitution's original meaning, one often overlooked in the nondelegation debate, is state courts' jurisprudence interpreting analogous language in state constitutions and, in one case, the federal Constitution. As the Supreme Court recognized during the early years of the Republic,[137]

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[137] See *Ex parte Hennen*, 38 U.S. 230, 260 (1839) (interpreting federal constitution based on "the decisions of the State Courts in this country, whenever the power of appointment and tenure of office has been drawn into discussion. The questions have been governed by the construction given to the constitution and laws of the state where they arose.").

such sources provide a great deal of insight into the meanings of terms such as "legislative" and "executive," and the implications of vesting those powers in separate departments, as all state constitutions did during this period.[138] That insight, if the views of state courts are any indication, is that the U.S. Constitution, as originally understood, incorporated the principle of a strong Nondelegation Doctrine.

So far as I am aware, the first post-ratification case to consider the issue of whether legislative power may be delegated was *Commonwealth v. Peters*, an 1807 decision of the Massachusetts Supreme Judicial Court.[139] The court unanimously voted to dispose of the case on a procedural issue, quashing the suit for failure to name the proper parties as defendants—but the court's opinion, in a lone footnote twice the length of the main text, offered in-depth *dicta* commenting on the merits of the action:

> it might well be doubted whether any highway can legally be made through the lands of any individual without the express authority of the legislature having been previously given for that particular purpose …. The legislature are solely and specially intrusted with the discretionary power of declaring whether, in their judgment, the public exigency requires, in any … particular case which may arise, that the property of any individual should be taken for the public use; and this is a power which they cannot delegate. The rule, *delegatus non potest delegare* ["one to whom power is

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[138] See *Townsend v. Griffin*, 4 Del. 440, 444 (Del. Super. Ct. 1846) ("A leading feature of the constitutions of all the States, is the division of powers into three … branches; and the keeping of these powers separate").

[139] * 3 Mass. 229, 230 n.1. In *Respublica v. Duquet*, 1799 WL 240 (Pa. 1799), a nondelegation challenge was rejected, but without addressing whether legislative delegation was allowed in general. It later became clear that the statute fell under the municipal-corporation exception to the nondelegation rule. See *Parker v. Commonwealth*, 6 Pa. 507, 521 (1847).

> delegated cannot further delegate that power"], is as applicable to a public body as to an individual.[140]

Though the passage above speaks of one particular power of the legislature—that of deciding when to take an individual's property for public use—the principle it endorses is arguably more general, as is evident from the last sentence of the quoted language: the legislature may not delegate to any other entity powers that are legislative in nature. Though it was not part of the court's holding, this statement is appropriately characterized as an early articulation of the Nondelegation Doctrine.

The views expressed in *Peters* were far from idiosyncratic in the early years of the Republic. In 1830, the Tennessee Supreme Court unanimously held in *Marr v. Enloe* that a statute authorizing the judges of each county, by a majority vote, to "levy a tax to meet the current expenses of their county for the ensuing year," without specifying in the statute the tax rates or the things subject to taxation,[141] was "unconstitutional and void, because it vests in the justices legislative authority upon a subject of the most vital importance," a violation of the Tennessee Constitution's declaration that "the legislative authority" was "vested in the General Assembly."[142] The power delegated was "clearly" legislative because "[u]ntil county courts by its order … imposes the tax, the people have no knowledge what they have to pay," or even "to what end [the tax] is to be applied."[143]

Also relevant is *Moore v. Allen and Grant*, an 1832 decision of the Court of Appeals of Kentucky.[144] There, a federal statute provided that "prisoners, confined under federal authority," were entitled to

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[140] *Peters*, 3 Mass. at 230 n.1.
[141] 9 Tenn. 452, 453 (1830) (quoting Act of 1827, Chap. 49, § 1).
[142] Id. at 453-54 (quoting TN Const.).
[143] Id. at 454-55. "[T]o meet the current expenses of their county" would certainly qualify as an "intelligible principle" under current Supreme Court jurisprudence. But the Tennessee high court found this vague guideline insufficient to prevent a delegation of legislative power.
[144] 30 Ky. 651 (1832).

freely roam "the prison yards or walks allowed by the laws of the states." Kentucky enacted a law in 1822 declaring that the areas where imprisoned debtors were entitled to roam consisted of the entire state of Kentucky (because Kentucky had previously ended imprisonment for debt under its own laws, the 1822 statute applied only to debtors confined under *federal* authority.). The Kentucky court declared the state's 1822 law invalid because, in effectively freeing all those convicted of a certain federal offense, it constituted state meddling in an area of federal concern alone. The court declined to interpret the federal statute to mean that Congress had permitted Kentucky to assume control over federal prisoners, as it believed that doing so would render the law an unconstitutional delegation of federal legislative power to the states.[145]

In 1843, Pennsylvania's Supreme Court held in *In re Borough of West Philadelphia* that a statute authorizing the Court of Quarter Sessions to incorporate a town or village on the petition of a majority of freeholders residing therein was an unconstitutional delegation of legislative power to the extent it authorized the court to incorporate into one borough two "distinct" villages.[146] In the 1847 case *Rice v. Foster*, the Delaware Court of Errors and Appeals unanimously held invalid a state statute that allowed the people of each county to decide by ballot whether the retail sale of liquor would be permitted in their respective counties; the act, the court said, was an unconstitutional delegation of legislative power to the electorate, a violation of the Delaware Constitution's vesting of the legislative

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[145] Id. at 652 ("The legislative authority of congress cannot be delegated to the legislatures of the states. The power confided to members of congress is a personal trust, which cannot be transferred by them.").

[146] 1843 WL 5033, at *3 (Pa. 1843) ("the legislature can no more delegate its proper function than can the judiciary …. [C]onsolidated sovereignty … is a despotism in so far as it subjects the governed, not to prescribed rules of action, to which he may safely square his conduct before-hand, but to the unsettled will of the ruling power, which cannot be foreseen; and a government becomes consolidated in proportion as its legislative branch abandons its own functions, or usurps those which have been vested elsewhere.").

power in the General Assembly: "in no case whatever can [legislative power] be transferred or delegated to any other body or persons."[147] The announcement of the *Rice* holding coincided with *Parker v. Commonwealth*, a decision of the Pennsylvania Supreme Court holding invalid an essentially identical law delegating to the voters in each county the decision of whether to permit the sale of liquor.[148]

Over the course of the next decade or so, a deluge of judicial decisions followed the well-worn path of the cases discussed above, striking down legislative acts as unconstitutional delegations of legislative power to voters, judges, or executive officials.[149] To be

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[147] 4 Del. 479, 489 (1847). The court reasoned that the legislature may not "pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body." Id. at 492. The statute in question, the court said, was, "[i]n a legal sense, … not a law … It is not a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act." Id. It thus improperly "delegate[d] the legislative power of the State" to voters in each county; while laws may "be limited to expire at a certain period," or not go into effect until a certain date, or only upon some contingent circumstances, the legislature could *not* pass an act whose force depended on others' policy judgments, or "the creative power of other persons." Id. at 491-92.

[148] 6 Pa. 507 (1847). The opinion observed that the people of Pennsylvania, "following the example set by the Federal Constitution … decreed that the legislative power *shall* be vested in a General Assembly, to consist of a Senate and House of Representatives." Id. at 514. Thus, the Assembly's "delegation of authority to make rules for the government of the people of the state, or any portion of them," was unconstitutional. Id. at 522. Paraphrasing Blackstone, the court defined "law" as "a rule of civil conduct prescribed by the legislative power … commanding what is right, and prohibiting what is wrong." Id. at 516. The statute at issue, however, had "no innate force …. It operates not *propria vigore,* but … only by virtue of a mandate expressed subsequently." *Parker*, 6 Pa. at 518.

[149] *Thorne v. Cramer*, 1851 WL 5417, *112 (N.Y. Gen. Term. 1851) (invalidating delegation to state electorate at large); *Barto v. Himrod*, 8 N.Y. 483, 491 (1853) (same); * *Santo v. State*, 2 Iowa 165, 203 (1855) (same); * *State v. Copeland*, 3 R.I. 33 (1854) (same); * *Scott v. Clark*, 1 Iowa 70, 79 (1855) (invalidating delegation to governor); * *Maize v. State*, 4 Ind. 342, 351 (1853) (invalidating delegation to voters of each township), aff'd in part, rev'd in part on other grounds, *Meshmeier v. State*, 11 Ind. 391, 393 (1859); * *Geebrick v. State*, 5 Iowa 491, 493-95 (1858) (invalidating delegation to voters of each county); * *State v. Armstrong*, 35 Tenn. 634, 654-55 (1856) (invalidating delegation to

sure, courts during this period sometimes rebuffed nondelegation challenges to statutes,[150] but never on the basis that no constitutional nondelegation principle existed; rather, the courts in these cases

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judges); * *Hardenburgh v. Kidd*, 10 Cal. 402 (1858) (same); * *Morristown v. Shelton*, 38 Tenn. 24, 25 (1858) (same); * *People v. Town of Nevada*, 6 Cal. 143, 144 (1856) (same); *State v. Field*, 17 Mo. 529, 536 (1853) (same); *Wells v. City of Weston*, 22 Mo. 384, 389 (1856) (invalidating delegation to municipal governments power to tax beyond city limits).

There are admittedly a few cases from this period that buck the trend. For example, at least two courts upheld legislation delegating to the electorate the decision of whether or not a statute would go into effect, on the ground that such a vote of the people was merely a factual contingency, on which a legislative act certainly could be made to depend. See *Bull v. Read*, 54 Va. 78 (1855); *State v. Parker*, 26 Vt. 357 (1854). However, even if one finds these decisions more logically persuasive than those reaching contrary conclusions, the formers' logic still cannot support the constitutionality of modern administrative regulation. For one, the legislation these cases upheld delegated to voters the power to make a one-off judgment, rather than the perpetual power to repeal or reenact a law at will; "there is a plain distinction between the act to be done by the voters and the legislative function. They have no power to alter or amend the act or substitute something else in its place." *Bull*, 54 Va. at 91. Moreover, in both the Virginia and the Vermont cases, the rules of private conduct had already been formulated by the legislature, and the power delegated to the electorate was only that of deciding whether the rules would go into effect.

In any event, the Virginia and Vermont decisions were considered deviations from the prevailing view at that time. See Cooley, *Constitutional Limitations* at 120 (cited in note 57) ("If the decision of these questions is to depend upon the weight of judicial authority up to the present time, it must be held that there is no power to refer the adoption or rejection of a general law to the people of the State, any more than there is to refer it to any other authority."); Sedgwick, *Rules Which Govern the Interpretation* at 164-65 (cited in note 56) ("Efforts have been made, in several cases, by the State legislatures to relieve themselves of the responsibility of their functions, by submitting statutes to the will of the people, in their primary capacity. But these proceedings have been held, and very rightly, to be entirely unconstitutional and invalid. The duties of legislation are not to be exercised by the people at large.").

[150] See, for example, *Respublica v. Duquet*, 1799 WL 240 (Pa. 1799) (delegation permissible because if fell under political-subdivision exception discussed in Part I(g)); *People v. Collins*, 3 Mich. 343, 349-52 (1854) (same); *Mayor v. Morgan*, 7 Mart. (n.s.) 1, 5-6 (La. 1828) (same); *Thompson v. Floyd*, 47 N.C. 313, 315-16 (1855) (same); *People v. Reynolds*, 10 Ill. 1, 20-21 (1848) (same); *Dubuque County v. Dubuque & Pacific Railroad Co.*, 4 Greene 1, 2-3 (Iowa 1853) (same); *In re Adams*, 21 Mass. 25, 28-29 (1826) (avoiding delegation challenge by deciding case on other grounds).

merely concluded, for various reasons, that the laws in question did not unconstitutionally delegate legislative power. Indeed, a unanimous 1851 decision of a New York appellate court, in striking down a statute on nondelegation grounds, observed that the prohibition on delegation of legislative power had become "a well established rule of law."[151] An 1868 treatise likewise remarked that the principle was by then a "settled maxim[] in constitutional law."[152] In 1851, Indiana went so far as to enshrine this prohibition in its constitution.[153] And the exceptions to, and limitations on, the nondelegation rule recognized at that time were still not broad enough to permit most modern administrative rulemaking, as I explain in Part II.

Before concluding this review of early state-court nondelegation jurisprudence, I want to point out another lesson that can be gleaned from these cases. Some critics of a strong Nondelegation Doctrine have cited the federal Constitution's Necessary-and-Proper clause as a justification for Congress's delegation of legislative powers.[154] But this argument mistakenly assumes that the only constitutional objection to the delegation of regulatory authority is that Congress lacks any enumerated powers that clearly permit such delegations. As the state cases from the early Republic show, however, what gave rise to the nondelegation principle was the mere fact that legislative, executive, and judicial powers had been constitutionally allocated to three distinct branches. The state constitutions at issue here conferred upon state legislatures a plenary legislative prerogative to make all laws for the general welfare (i.e., a police power),[155] and so the fact

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[151] *Thorne v. Cramer*, 1851 WL 5417, *116 (N.Y. Gen. Term. 1851).
[152] Cooley, *Constitutional Limitations* at 116 (cited in note 57).
[153] * Ind. Const. of 1851 Art. 1 § 25 ("No law shall be passed, the taking effect of which shall be made to depend upon any authority except as provided in the Constitution.").
[154] See Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 736 (cited in note 16) ("the constitutional authorization for Congress to make all laws "necessary and proper for carrying into Execution the foregoing Powers" could readily include delegating policymaking authority"); Posner and Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1733 (cited in note 16).
[155] See Sedgwick, *Rules Which Govern the Interpretation* at 589 (cited in note 56).

that early courts still prohibited delegations of legislative power by state lawmaking bodies demonstrates that this constitutional rule was understood to apply to every constitution that established distinct legislative, executive, and judicial branches. The historical evidence gleaned from early legislative debates and federal case law further drives home this point; while lawmakers and judges often discussed delegations of legislative power, never once did any of them suggest that the Necessary-and-Proper clause would make permissible an otherwise unconstitutional legislative delegation.

E. THE PROBLEM OF COMMON LAW

Modern readers might justifiably wonder how the views expressed by these state-law sources (and virtually all other historical evidence) condemning delegation of legislative power coexisted with the then-widespread phenomenon of judicially developed common-law, a fixture of American jurisprudence even in the early days of the Republic. Today, most would describe common law as judge-made—and the process of making it as legislating. At the time of the Founding, however, the prevailing wisdom was that judges in common-law cases merely "discovered" and "applied" existing legal principles that reflected societal customs.[156]

While perhaps somewhat naïve, this view reflected the notion, widely accepted during that period, that judges' development of the common law was constrained in ways that legislatures' enactment of laws was not. By way of an 1812 decision of the Supreme Court, federal courts were prohibited from exercising common-law jurisdiction in criminal cases; instead, "[t]he legislative authority of

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[156] See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004) (In 1789, "the accepted conception was of the common law as 'a transcendental body of law outside of any … State but obligatory … unless … changed by statute.'" (quoting *Black and White Taxicab & Transfer Co. v. Brown and Yellow Taxicab & Transfer Co.*, 276 U.S. 518, 533 (1928) (Holmes dissenting))); William Blackstone, *Commentaries on the Laws of England* 69 (1765) (a "judge … determine[s], … according to the known laws and customs …; not … to pronounce a new law, but to … expound the old one.").

the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."[157] This limitation bound even federal courts sitting in admiralty jurisdiction,[158] an area in which they were otherwise free to apply the common law of the sea.[159] Nor did federal courts routinely exercise, prior to 1842's *Swift v. Tyson*,[160] the authority to develop a "general" federal common law (though early cases on this issue were not entirely consistent).[161] In addition, all Framing-era courts exercising common law jurisdiction considered themselves presumptively bound by existing common law principles and without the authority to freely abolish such principles or establish new ones, as those powers were reserved for the legislature.[162] Tucker's 1803 American edition of Blackstone's *Commentaries* articulated this view as follows:

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[157] *United States v. Hudson*, 11 U.S. 32, 34 (1812).

[158] *United States v. Coolidge*, 14 U.S. 415, 416 (1816).

[159] See *American Insurance Co. v. 356 Bales of Cotton*, 26 U.S. 511, 546 (1828) ("[T]he law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.").

[160] 41 U.S. 1.

[161] *The Rules of Decision Act and Swift v. Tyson,* 20 Fed. Prac. & Proc. Deskbook § 57 (West 2018). Compare *United States v. Worrall*, 2 U.S. 384, 394 (C.C.D. Pa. 1798) (Chase) (divided court) ("the United States, as a Federal government, have no common law"), and *Wheaton v. Peters*, 33 U.S. 591, 658 (1834) ("It is clear, there can be no common law of the United States."), with *Robinson v. Campbell*, 16 U.S. 212, 222–23 (1818) ("the remedies in the courts of the United States, are to be, at common law or in equity, not according to the practice of state courts, but according to the principles of common law and equity, as distinguished and defined in [Britain].").

[162] See, for example, *Card v. Grinman*, 5 Conn. 164, 168 (Conn. 1823) (quotation marks and citations omitted) (quoting *Bauerman v. Radenius*, 7 Term Rep. 664) ("by an assumption of legislative power, this Court can promulge as law, any provision, which will meet a particular mischief; but … I cannot legislate; but by my industry, I can discover what our predecessors have done, and I will servilely tread in their footsteps. The English common law … our ancestors … brought with them; and until it is abrogated, by statute, I must … consider it as the common law of this state. I deprecate a departure from … the common law, by the indulgence of a disposition to decide on principles of equity and convenience, which often are notional and imaginary."); *The Avery*, 2 F. Cas. 242, 243 (C.C.D. Mass. 1815) ("it is a part of the admiralty law, which

> For it is an established rule to abide by former precedents, where the same points come again in litigation; as well to keep the scale of justice even and steady, and not liable to waver with every new judge's opinion; as also because the law in that case being solemnly declared and determined, what before was uncertain, and perhaps indifferent, is now become a permanent rule, which it is not in the breast of any subsequent judge to alter or vary from, according to his private sentiments: he being sworn to determine, not according to … private judgment, but according to the known laws and customs of the land; not delegated to pronounce a new law, but to maintain and expound the old one.[163]

Such constraints on courts' common-law powers were taken especially seriously in the penal context. A 1795 treatise declared that "[c]ourts of law … ought never to be allowed to depart from the well known boundaries of express law, into the wide field of discretion"; courts lacked the "discretionary power of punishing the acts of mankind, as criminal, by an expost facto determination."[164] The strong presumption of a common-law precedent's correctness could be overcome only "where [a] former determination [was] most evidently contrary to reason," "manifestly absurd or unjust," and did

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this court is bound to respect; and we are not at liberty, upon any notions of supposed inconvenience, to create a novel regulation. If the present be found unsuitable to our circumstances, as a maritime power, it will be for the legislature to devise a more just and equitable rule. Stare decisis is a great maxim in the administration of the law of nations."); *Hannum v. Askew*, 1791 WL 462, at *2 (Pa. 1791) (Shippen) ("whatever may be the inconveniences resulting from [existing] doctrine, I conceive myself bound [by] '*stare decisis*.'"); *Lion v. Burtiss*, 1823 WL 1962, *487 (N.Y. Sup. Ct. 1823) ("*Stare decisis* is a maxim essential to the security of property; … and where [a] rule has been sanctioned and adopted in our courts, it ought to be adhered to, unless it be manifestly wrong and unjust.").

[163] Tucker, 1 *Blackstone's Commentaries* at 69 (cited in note 47).

[164] Zephaniah Swift, 2 *A System of the Laws of the State of Connecticut* 366-67 (1795).

not in fact reflect "the established custom of the realm."[165] However, even when "the particular reason of [a] rule in the law" is unclear or unknown, or has been forgotten with the passage of time, "it is sufficient that there be nothing in the rule flatly contradictory to reason, and then the law will presume it to be well founded."[166] The rule, plainly stated, was that common-law "precedents … must be followed, unless flatly absurd or unjust: for though their reason be not obvious at first view, yet we owe such a deference to former times, as not to suppose that they acted wholly without consideration."[167]

Still, the extent to which Framing-era common-law courts were actually constrained by the foregoing limitations is debatable, to say the least. Some apparently had few reservations about altering common-law rules[168]—although it seems fair to say that federal courts, forbidden from fashioning a common law of crimes, were more constrained than state courts. At any rate, these constraints at least formed the logical basis for the distinction between courts' development of common law and the exercise of legislative power. To the extent one considers that distinction sound, it explains how the rule against delegation of legislative power coexisted with unwritten common law; to the extent one does not, judge-made common law may be characterized as an exception to the principle that none but the legislature may exercise purely legislative power. But it seems clear that no one at the Founding would have thought that the existence of common law would excuse delegations of legislative authority to regulatory agencies, which do not even purport to observe anything like *stare decisis* when issuing rules

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[165] Tucker, 1 *Blackstone's Commentaries* at 69-70 (cited in note 47).

[166] Id.

[167] Id.

[168] See *Means v. Trout*, 1827 WL 2731, *2 (Pa. 1827) ("in cases of this sort, where the recurrence of the mischief may be prevented, without disturbing what has already been done, the rule of *stare decisis* must yield to the justice and policy of a new practice.").

carrying the force of law, and are free, with statutory authorization, to issue rules backed by criminal penalties.

In addition, the modern Supreme Court has constitutionalized an important limitation on courts' common-law-making powers. The Court has relied on the federal Constitution's Due Process clauses to hold that "judicial alteration of a common law doctrine of criminal law" [169] or a "construction of a criminal statute" [170] "violates the principle of fair warning, and hence must not be given retroactive effect, … where it is 'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.'" [171] Judicial decision-making in the civil context is also subject to at least some constitutional constraints.[172] Administrative agencies issuing legislative rules are subject to no such limitations. True, federal statutes do prohibit changes in agency policy that are "arbitrary" and "capricious,"[173] but this is a "'narrow' standard of review," requiring only that the agency "articulate a satisfactory explanation for its action"; a reviewing court will "not … substitute its judgment for that of the agency," and will "uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned." [174] There is certainly no requirement that an agency's issuance, repeal, or modification of a policy not be "unexpected."

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[169] *Rogers v. Tennessee*, 532 U.S. 451, 462 (2001).

[170] *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

[171] *Rogers*, 532 U.S. at 462 (quoting *Bouie*, 378 U.S. at 354).

[172] See *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930); see also *Bouie*, 378 U.S. at 354–55. Federal courts, unlike administrative agencies, also lack the power to declare that any new rules of law (whether common, constitutional, or statutory) announced in their decisions are applicable only prospectively. See *MCI Telecommunications Corp. v. GTE Northwest, Inc.*, 41 F. Supp. 2d 1157, 1162 (D. Or. 1999); *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993).

[173] 5 U.S.C. § 706(2)(A).

[174] *Federal Communications Commission v. Fox Television Stations, Inc.*, 556 U.S. 502, 513-14 (2009) (quoting *Motor Vehicle Manufacturers Association of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983) and *Bowman Transportation, Inc. v. Arkansas–Best Freight System, Inc.*, 419 U.S. 281, 286 (1974)).

I admit, however, that a revived Nondelegation Doctrine would be logically in tension with, and would perhaps call into question, federal courts' current practice with respect to development of federal common law. While "[t]here is no federal general common law,"[175] federal common law continues to "exist[] … in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases."[176] And nowadays, "where a court is asked to state or formulate a common law principle in a new context, there is a general understanding that the law is not so much found or discovered as it is either made or created."[177] Federal courts do not pretend to abide by the Framing-era constraints on common-law decision-making. The Supreme Court has referred to itself "as a source of judge-made law," largely free to fashion the common-law rules it considers "desirab[le]."[178] Today's "federal common law is rooted in a positivist mindset utterly foreign to the American common-law tradition of the late 18th century. [Modern] federal common lawmaking … is … far removed from that general-common-law adjudication."[179] Though my central aim in writing this paper is not to critique current practices surrounding federal common law, I think that, in observance of the principle that none but the legislature should exercise legislative power, modern federal courts should scrupulously adhere to the constraints on judicial common-law-making that existed at the Founding.

F. TREATISES & OTHER COMMENTARY

Another useful source of evidence regarding the Constitution's original meaning is the treatises and other writings of preeminent

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[175] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78 (1938).
[176] *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981).
[177] *Sosa v. Alvarez-Machain*, 542 U.S. 692, 725 (2004).
[178] *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 502 (2008).
[179] *Sosa*, 542 U.S. at 745 (Scalia concurring in part and concurring in judgment).

commentators of the era. These sources, largely neglected in existing nondelegation scholarship, also bolster the originalist case for a robust Nondelegation Doctrine.

At the time of the framing, it was an accepted principle of jurisprudence—applicable to every field from constitutional law to wills and trusts—that *delegatus non potest delegare* ('one to whom power is delegated cannot further delegate that power'): "An agent, ordinarily, and without express authority, has not power to employ a sub-agent to do the business …. [T]he agency is generally a personal trust and confidence which cannot be delegated," explained an 1832 treatise.[180] The maxim was frequently invoked in support of the view that legislatures could not delegate to other entities authority that was legislative in nature. Examples of such invocations appear in an array of sources from that era, including congressional debates, judicial decisions, and law journals.[181]

George Tucker, in his 1803 American edition of Blackstone's *Commentaries*, also unmistakably acknowledged the Nondelegation Doctrine to be a constitutional imperative:

> The right of issuing proclamations is one of the prerogatives of the crown of England. No such power being expressly given by the federal constitution, it was doubted … whether

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[180] * James Kent, 2 *Commentaries on American Law* 713-14 (3d ed. 1832).

[181] See, for example, * 8 Reg. Deb. 3846 (1832) (statement of Rep. Barbour) ("if we have this power to tax, can we transfuse it at will into the local legislation of the several States? Is this power so mutable that we can retain or transfer it at our pleasure? I rely upon that salutary principle which is engrafted into our system of jurisprudence, and drawn from the wisdom of antiquity… [and] drawn to us from our Anglo-Saxon forefathers. When a lawless king, meanly sunk in loose, inglorious luxury, aimed at still more lawless power, and claimed the right of unlimited taxation as being within himself, by the ready grant of a tame and supple Parliament, a … baron … said-'*Delegatus non potest, delegare*.'"); * *Commonwealth v. Peters*, 3 Mass. 229, 230 (1807); * W.M. Corey, *Review of the Decisions of the Court in Bank, 1846-7*, 4 W. L. J. 460, 464 (1847) ("even if the Legislature possessed … a paramount authority over reason and justice, they are but representatives of the people, and cannot impart their function to another body created by themselves. "*Delegatus non potest delegare*.").

> the president possessed any such authority under it …. The commencement or determination of laws is frequently made to depend upon events, of which the executive may be presumed to receive and communicate the first authentic information: the notification of such facts seems therefore to be the peculiar province and duty of that department …. *But if a proclamation should enjoin any thing to be done, which neither the law of nations, nor any previous act of the legislature, nor any treaty or compact should have made a duty, such injunction would not only be merely void, but an infringment* [sic] *of the constitution*. Proclamations are then only binding, when they reinforce the observance of a duty, enjoined by law, but connected with some particular fact, which it may be the duty of the executive to make known.[182]

This is perhaps the clearest conceivable articulation of the Nondelegation Doctrine that does not use the words "delegate," "legislate," or any derivatives thereof (which probably explains why existing scholarship on this issue has overlooked the quoted passage). Elsewhere in the same work, Tucker reinforced this view by remarking that, notwithstanding Congress's constitutional power "[t]o exercise exclusive Legislation in all Cases whatsoever" for the District of Columbia,[183] "it seems highly questionable whether" Congress could "establish a subordinate legislature" for the District, "unless it be supposed that a power to exercise exclusive legislation in all cases whatsoever, comprehends an authority to delegate that power to another subordinate body. If the maxim be sound, that a delegated authority cannot be transferred to another to exercise, the project here spoken of will probably never take effect."[184]

Tucker was, of course, wrong in his prognosis, though correct in supposing that the power to legislate in all cases may include the

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[182] * Tucker, 1 *Blackstone's Commentaries* at 346-47 (emphasis added) (cited in note 47).
[183] U.S. Const. Art. I, § 8, cl. 17.
[184] Tucker, 1 *Blackstone's Commentaries* at 278 (cited in note 47).

power to establish a subordinate legislature for the District. As a federal circuit court explained in 1833, delegations under the District clause (and, I would add, the territories clause[185]) were *sui generis*: although the appellee argued that Congress's "right to legislate for this District … cannot be delegated," the court replied that Congress had the power "of granting charters to corporations aggregate within the District," including municipal corporations (i.e., cities), since the corporation's "by-laws extend only to those members, and such as voluntarily place themselves within the jurisdiction of the corporation."[186] State supreme courts during this period relied on analogous reasoning to conclude that, notwithstanding state constitutions' prohibition on delegation of legislative powers, state legislatures could delegate to municipal corporations the power to legislate within their city limits, on the theory that the non-delegable "legislative power" referenced in their constitutions was that "of the state government only" to legislate "over every part of [the state]"; however, "the legislature, in establishing corporations, may enable them to exercise subordinate legislation, within a particular district, over their members."[187] None of this was thought to undermine the Nondelegation Doctrine as a general principle, but instead merely affirmed that where Congress has plenary power (the District of Columbia and territories), it may establish subordinate legislatures for that region without offending the Nondelegation Doctrine.

The logical basis for this exception to the rule against legislative delegation is concededly flimsy. What justifies it, it seems, is not logic, but tradition; delegations to subordinate bodies to legislate within specific geographic areas had been a common phenomenon long before the country's founding, and so such delegations were

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[185] U.S. Const. Art. IV, § 3, cl. 2. ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.").

[186] *Corp. of Washington v. Eaton*, 29 F. Cas. 345, 348 (D.C. Cir. 1833).

[187] * *Mayor v. Morgan*, 7 Mart. (n.s.) 1, 2-5 (1828); accord, *People v. Reynolds*, 10 Ill. 1 (1848).

"grandfathered in," notwithstanding the general rule prohibiting the legislature from delegating its lawmaking authority.[188] One might wonder if a Framing-era state legislature hell-bent on creating a state-level system of administrative law could wriggle through this loophole by simply declaring 99% of the state's territory to be a single county or municipality and then delegating to a regulatory agency the discretionary power to formulate, issue, and repeal regulations applicable within that geographic region. I do not know how an early American state court confronting this sort of maneuver would handle it. Fortunately, however, there is no need for me to resolve that conundrum here, since, at the federal level, the justification for such an end-run around the nondelegation rule would rely on Congress having plenary power over the region in question[189] — which is true only within the territories, the District of Columbia, and, under current case law, Indian country [190] (though the constitutional basis for Congress's alleged plenary power over Indian tribes has been ably called into question by numerous authorities[191]).

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[188] See Cooley, *Constitutional Limitations* at 118 (cited in note 57) ("We have elsewhere spoken of municipal corporations, and of the powers of legislation which may be … bestowed upon them, and *the bestowal of which is not to be considered as trenching upon the maxim that legislative power is not to be delegated*, since that maxim is to be understood in the light of the immemorial practice … which has always recognized the propriety of vesting in the municipal organizations certain powers of local regulation").

[189] See *Parker v. Commonwealth*, 6 Pa. 507, 528 (1847) ("it has been suggested, that instances of a valid delegation of legislative authority are to be found in the statutes made by Congress, from time to time, erecting portions of the public domain into territories, and organizing them for the purposes of government …. It is true that, by these congressional acts, the legislative function is bestowed … [upon] a body which is itself subordinate. But the right to exercise this high power is expressly granted by the Federal Constitution… [in] art. 4, sect. 3").

[190] See *United States v. Lara*, 541 U.S. 193, 200 (2004).

[191] See *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 659 (2013) (Thomas concurring); Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201 (2007); Saikrishna Prakash, *Against Tribal Fungibility*, 89 Cornell L. Rev. 1069 (2004).

The Nondelegation Doctrine finds further support in an 1819 treatise by John Goodenow, a U.S. congressman and justice of the Ohio Supreme Court. In a chapter discussing the separation of powers in the Ohio Constitution and in general, Goodenow wrote that

> the people have delegated to the assembly the exercise of [the] right [to make laws], within certain limits prescribed by the constitution. No individual has the right, or the power, to determine for the whole, what is injurious, or what is beneficial: even the *officers* of government, whatever may be their rank or dignity, have no power to decide of the policy or impolicy, the good or evil, flowing from any act, unless that power be *delegated* to them by THE PEOPLE. Although the King's Bench exercises a prerogative power derived through the crown and recognised in the *common law*, of guarding the public morals; of punishing whatever tends to jeopardize the safety of the people, or to the misgovernment of the kingdom; determining, in the plenitude of this power, what the safety, the welfare, the happiness, of the kingdom requires; … yet, I appeal to the good sense and enlightened judgment of all jurists …, if this is not a legislative power, expressly prohibited, by our constitution, to be exercised by any but the legislature.[192]

Accordingly, Goodenow considered it a fundamental principle that "the legislative power" is "require[d] … to define the crime and prescribe the punishment" itself.[193] Note that the prerogative power Goodenow condemns was essentially a delegation of rulemaking

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[192] * John M. Goodenow, *Historical Sketches of the Principles and Maxims of American Jurisprudence* 394-95 (Wilson 1819).
[193] Id. at 413.

authority to the Crown[194]—and that the "intelligible principles" guiding such rulemaking (e.g., "whatever tends to jeopardize the safety of the people," etc.) did not render it permissible. In a treatise published the very next year, prominent political commentator John Taylor wrote that "[t]he people, by all our constitutions, have delegated to their representatives a power of legislation; but by none have they delegated to their representatives a power to delegate legislative powers to persons …. [L]egislatures have no power to appoint deputy or attorney legislatures."[195] Thomas Jefferson would

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[194] See Rutherforth, 2 *Institutes of Natural Law* at 61-62 (cited in note 73) ("If we continue to speak of the legislative and executive power in the abstract; it will be difficult to explain rightly, what is meant by prerogative. It cannot properly be called discretionary executive power; because the executive power in the nature of the thing is not discretionary in any part: wherever it acts at discretion, this privilege, unless it arises from the necessity of the case, as in the heat of military action, comes from the legislative either by original establishment, or by long usage and custom, or by occasional permission …. Where the person, so entrusted with the executive power, is left by the legislative to act in any instances, at his own discretion, to direct by his own understanding the public force, which is naturally under the direction of the public understanding, such a discretionary power … is called prerogative."); Hamburger, *Is Administrative Law Unlawful?* at 5 (cited in note 15) ("administrative law looks remarkably similar to the sort of governance that thrived long ago in … England under the name of the 'prerogative.'").

[195]*John Taylor, *Construction Construed, and Constitutions Vindicated* 320 (Shepherd & Pollard 1820). It warrants mention that Taylor's 1820 work was largely devoted to arguing against the constitutionality of the Bank of the United States, a view which had been famously rejected by a unanimous Supreme Court a year prior. See *McCulloch v. Maryland*, 17 U.S. 316 (1819). Taylor's invocation of nondelegation was a component of his assault on the Bank: "our legislatures cannot … invest bank directors with legislative power …. Now I ask, if a power of regulating the national currency … is not both a formal and substantial legislative power? What is legislative power? Something able to dispense good or harm to a community. Cannot bank directors do this?" Taylor, *Construction Construed* at 320 (cited in note 195).

Taylor's arguments reflect concerns that some historically-minded modern observers are likely to raise in response to my originalist account here: what about the First and Second Banks of the United States? How could they have coexisted with the nondelegation principle? The answer is that both institutions were essentially private corporations that carried out their functions through what would today be called open market operations. Though the First and Second Banks of the United States may have

later call Taylor's 1820 work "the most logical retraction of our governments to the original and true principles of the Constitution creating them, which has appeared since the adoption of that instrument."[196]

Some mid-Nineteenth Century treatises helpfully outline the nondelegation case law that courts had developed in the first sixty or seventy years of the Republic's history. The following passage from Theodore Sedgwick's 1857 treatise is instructive in that regard:

> [There are] cases where the legislature has sought to divest itself of its real powers. Efforts have been made, in several cases, by the State legislatures to relieve themselves of the responsibility of their functions, by submitting statutes to the will of the people, in their primary capacity. But *these*

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in some sense "regulated" national currency and credit, they did so by acting as market participants, accepting deposits, making loans, and setting interests rates on those loans; though both arguably enjoyed special advantage by virtue of their status as holders of the federal government's deposits, neither had any more sovereign regulatory power than a commercial bank. See Alexander Hamilton, *Opinion as to the Constitutionality of the Bank*, in 1 Henry Cabot Lodge, ed., 3 *The Works of Alexander Hamilton* 461 (Putnam 1904) ("The by-laws of [the] bank can operate only on its own members can only concern the disposition of its own property, and must essentially resemble the rules of a private mercantile partnership."); *The Second Bank of the United States: A Chapter in the History of Central Banking* *9 (Federal Reserve Bank of Philadelphia, Dec. 2010), archived at https://perma.cc/P9AM-5HUH ("Unlike modern central banks, the second Bank of the United States did not officially set monetary policy. Nor did it regulate other banks …. By managing its lending policies and the flow of funds through its accounts, the bank could … alter the supply of money and credit in the economy and hence the level of interest rates charged to borrowers."); Act of Feb. 25, 1791, 1 Cong., Ch. 10 (establishing First Bank); Act of April 10, 1816, 14 Cong., Ch. 44 (establishing Second Bank). The powers the Banks exercised were, in short, not powers of the sort that were within the exclusive province of the legislature.

[196] Thomas Jefferson, *Letter to Spencer Roane* (1821), in *The Jefferson Cyclopedia: A Comprehensive Collection of the Views of Thomas Jefferson Classified and Arranged in Alphabetical Order Under Nine Thousand Titles Relating to Government, Politics, Law, Education, Political Economy, Finance, Science, Art, Literature, Religious Freedom, Morals, etc.* 859 (John Foley ed., 1900).

> *proceedings have been held, and very rightly, to be entirely unconstitutional and invalid*. The duties of legislation are not to be exercised by the people at large. *The majority governs, but only in the prescribed form*; the introduction of practices of this kind would remove all checks on hasty and improvident legislation, and greatly diminish the benefits of representative government …. *For the same reason,* [*the legislature's*] *powers cannot be delegated by it to any inferior authority*.[197]

Sedgwick also made clear that because "the Federal Constitution intends to preserve the same lines of demarkation [sic] between the executive, the legislative, and the judicial powers, as those which the States have described"; the prohibition on "the delegation of legislative power by Congress" was "analogous to that" which binds state legislatures.[198] Thomas Cooley's oft-quoted 1868 treatise on constitutional law offers a similar account:

> One of the settled maxims in constitutional law is, that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority. Where the sovereign power of the State has located the authority, there it must remain; and by the constitutional agency alone the laws must be made until the constitution itself is changed. The power to whose judgment, wisdom, and patriotism this high prerogative has been intrusted cannot relieve itself of the responsibility by choosing other agencies upon which the power shall be devolved, nor can it substitute the judgment, wisdom, and

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[197] * Sedgwick, *Rules Which Govern the Interpretation* at 164-66 (emphasis added) (cited in note 56).
[198] Id. at 590.

> patriotism of any other body for those to which alone the people have seen fit to confide this sovereign trust.[199]

For the proposition that legislative power could not be delegated, Cooley cited no less than seventeen judicial decisions.[200] He agreed, however, with the Supreme Court's conclusion in *Brig Aurora* that the legislature may prescribe rules that go into effect upon some contingency.[201]

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The foregoing evidence constitutes the totality of my affirmative originalist case for the Nondelegation Doctrine, and it seems to me that the position of Justices Thomas and Gorsuch on this issue is clearly correct. At the very least, it is apparent that both the view taken in Posner and Vermeule's article on this subject (that statutory grants of authority can never amount to delegations of legislative power) and Justice Stevens's view (that legislative power may be delegated) are lacking in historical support and indeed are flatly inconsistent with virtually every antebellum authority that opined on the issue.[202] With respect to the former, one would expect, given the article's confident tone, that its bold claims would be backed by unassailable historical analysis. Not so. I simply cannot agree with the assertion that "the early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine."[203] The approach to the Nondelegation Doctrine currently taken by the

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[199] Cooley, *Constitutional Limitations* at 116-17 (cited in note 57).
[200] Id. at 117.
[201] Id. ("A statute may be *conditional*, and its taking effect may be made to depend upon some subsequent event.").
[202] As for the former, the contention that congressional statutes delegating rulemaking authority never amount to delegations of legislative power is utterly untenable. If it were true, none of the debates about delegation from the Constitutional Convention onward would make any sense, for all of them involved overbroad statutory grants. And Stevens's position—that the Constitution permits the delegation of legislative power—looks no better. Every ratification-era source with anything to say about this subject either condemned the delegation of legislative power or dodged the issue by arguing that a specific law did not constitute such a delegation.
[203] Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 738 (cited in note 16).

Supreme Court (that the doctrine is not violated so long as the statute includes an "intelligible principle," even a vague one, to guide rulemaking) is slightly more difficult to reject based on the historical evidence, but it should be rejected nonetheless. The presence or absence of an intelligible principle never seemed to matter in antebellum debates over delegations of legislative power; rather, the question was whether the legislature had authorized another agent to issue general rules governing private conduct and made the content or effectiveness of such rules dependent on the agent's policy judgment.

There are, however, some early congressional enactments that supposedly demonstrate that the Nondelegation Doctrine has no basis in the Constitution's original meaning; these statutes, the argument goes, uncontroversially delegated legislative power, and thus weigh heavily against the idea that such delegations were then considered unconstitutional. But in order to respond to this alleged counterevidence, I first need to formulate a historically grounded test for determining what constitutes an unconstitutional delegation of legislative power.

II. JUDICIAL ENFORCEMENT

A. A TEST

In order to resurrect the Nondelegation Doctrine, it is not enough to merely say that it is embodied in the Constitution, a document containing at least a few principles that, while mandatory, are nonjusticiable by nature.[204] Some would relegate the Nondelegation Doctrine to this judicially unenforceable category, arguing that the question of whether Congress has impermissibly delegated legislative power is one of degree, and there are no "judicially discoverable and manageable standards for resolving"[205] the

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[204] See, for example, *Nixon v. United States*, 506 U.S. 224 (1993).
[205] Id. at 228 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

resulting line-drawing problems.[206] This view is seriously called into question by numerous states whose judiciaries continue to meaningfully enforce state constitutional limits on delegation of legislative power.[207] In any event, the question of a delegation's constitutionality is, as Gary Lawson has correctly pointed out, a matter not of *degree* of discretion delegated, but of *type*. Lawson accordingly proposes that courts adopt the following rule: "Congress must make whatever decisions are sufficiently important to the relevant statutory scheme that Congress must make them …. The line between legislative and executive power … must be drawn in the

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[206] "[T]he debate over unconstitutional delegation" has become "a debate not over a point of principle but over a question of degree." *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia dissenting); "The difference between a permissible and impermissible delegation… is one of degree." Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. at 11 (cited in note 14); determining whether legislative delegation has occurred involves "questions of degree, not kind." Peter H. Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L. Rev. 775, 791 (1999).

[207] The following are examples of state courts invalidating laws as unconstitutional delegations of legislative power: *North Dakota Legislative Assembly v. Burgum*, 916 N.W.2d 83, 102-03 (N.D. 2018); *Protz v. Workers' Compensation Appeal Board (Derry Area Sch. Dist.)*, 639 Pa. 645, 663 (2017); *Hobbs v. Jones*, 2012 Ark. 293, 15 (2012); *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26 (Fla. Dist. Ct. App. 2008); *Cobb v. State Canvassing Board*, 140 N.M. 77, 90 (2006); *Board of Trustees of Judicial Form Retirement System v. Attorney General*, 132 S.W.3d 770, 785 (Ky. 2003); *State v. Miller*, 857 S.2d 423, 430; *New Jersey State Firemen's Mutual Benevolent Association v. North Hudson Regional Fire & Rescue*, 340 N.J. Super. 577, 595 (App. Div. 2001); *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000); *Leathers v. Gulf Rice Arkansas*, Inc., 338 Ark. 425 (1999); *Opinion of the Justices*, 143 N.H. 429, 445 (1999); *Advocates for Effective Regulation v. City of Eugene*, 160 Ore. App. 292, 313 (1999); *Ferland Corp. v. Bouchard*, 1998 WL 269098 (R.I. Super Ct. 1998); *Texas Boll Weevil Eradication Foundation v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *City of Oklahoma City v. State*, 918 P.2d 26, 30 (Okla. 1995); *B.H. v. State*, 645 S.2d 987 (Fla. 1994); *Blue Cross & Blue Shield of Michigan v. Milliken*, 422 Mich. 1, 55 (1985); *Gumbhir v. Kansas State Board of Pharmacy*, 228 Kan. 579, 587 (1980); *In re Powell*, 92 Wash.2d 882, 890 (1979) (en banc); *In re Authority to Conduct Savings & Loan Activities etc.*, 182 Mont. 361, 371 (1979); *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467, 477 (1974); *Jetton v. Sanders*, 49 Ala. App. 669, 673 (Civ. App. 1973); *Krol v. County of Will*, 38 Ill. 2d 587, 593 (1968); *Carolina-Virginia Coastal Highway v. Coastal Turnpike Authority*, 237 N.C. 52, 64 (1953).

context of each particular statutory scheme. In every case, Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts."[208] As much as I admire Lawson's efforts to revive the Nondelegation Doctrine, this proposed test seems to me rather nebulous, and, in my view, is not the approach most consistent with the historical sources.

As an alternative, I advocate a categorical approach; drawing on prior analysis of this issue by Justices Thomas and Gorsuch,[209] I aim to draw clear lines between unconstitutional and constitutional delegations, and explain (in footnotes) how the originalist sources support the test I devise, which is as follows: a statute unconstitutionally delegates legislative power when it 1) allows the agent (the actor to whom authority is delegated) to issue general rules governing private conduct that carry the force of law and 2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency, the determination of which could be subject to review by a court.[210] To these criteria, I add three caveats.

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[208] Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. at 376-77 (cited in note 14).

[209] See *Gundy v. United States*, 2019 WL 2527473, *20 (U.S. June 20, 2019) (Gorsuch dissenting); Department of Transportation v. Association of American Railroads, 135 S. Ct. 1225, 1246 (2015) (Thomas concurring in judgment).

[210] The legislature may not "pass an act, which is not a law in itself when passed, and has no force or authority as such, and is not to become or be a law, until it shall have been created and established by the will and act of some other persons or body." *Rice v. Foster*, 4 Del. 479, 492 (1847). A law … "is a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act." Id. While laws may "be limited to expire at a certain period," or not go into effect until a certain date, or only upon some contingent circumstances, the legislature cannot pass an act whose force depended on others' policy judgments, or "the creative power of other persons." Id. at 491-92. Accord, *Marr v. Enloe*, 9 Tenn. 452, 454-55 (1830) ("Until county courts by its order (clearly amounting to a legislative act) imposes the tax, the people have no knowledge what they have to pay; nor have they any knowledge afforded them, even by the order fixing the tax, to what end it is to be applied, save that the act tells us it is for county purposes."); Tucker, 1 *Blackstone's Commentaries* at 346-47 (cited in note 47) ("But if a proclamation should enjoin any thing to be done, which neither the law of nations, nor any previous act of the legislature, nor any treaty or compact should have

First, Congress may delegate authority to make rules concerning matters of internal administration, even if Congress itself could have made such rules under its Necessary-and-Proper Clause authority.[211] So, as the Court recognized in *Wayman*, Congress may delegate to the courts the power to issue rules governing their internal business and proceedings, or to the president the power to issue rules governing executive branch or military personnel.[212] These decisions, though Congress could make most of them itself, are not purely "legislative," in that they do not prescribe rules of conduct for the citizenry at large, but instead govern the internal operations of the government. The same is true for rules regulating government property; Congress may delegate the power to issue such rules because government, in making rules regarding use of its property, is acting as a landowner rather than a legislator.

Second, Congress has broad license to delegate rulemaking authority to the president in the area of foreign affairs, even if such rules incidentally affect private actors domestically.[213] This is because the president has a degree of inherent power over the

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made a duty, such injunction would not only be merely void, but an infringment [sic] of the constitution. Proclamations are then only binding, when they reinforce the observance of a duty, enjoined by law, but connected with some particular fact, which it may be the duty of the executive to make known.").

[211] See *Wayman v. Southard*, 23 U.S. 1, 43 (1825) ("Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. …. The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which … power given to those who are to act under such general provisions to fill up the details.").

[212] See id. at 45 ("The power given to the Court to vary the mode of proceeding in this particular, is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution … It is … the regulation of the conduct of the officer of the Court in giving effect to its judgments. A … superintendence over this subject seems to be properly within the judicial province, and has been always so considered.").

[213] See *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936).

country's foreign relations[214] (a great deal of which he likely may exercise even without statutory authorization[215]), and because legislative power and foreign-relations powers (including the treaty power) were viewed as distinct, though occasionally overlapping, spheres of

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[214] See, for example, Alexander Hamilton, *The Letters of Pacificus No. 1* (1793) ("This power of determining virtually in the case supposed upon the operation of national Treaties, as a consequence, of the power to receive ambassadors and other public Ministers, is an important instance of the right of the Executive to decide the obligations of the Nation with regard to foreign Nations….This serves as an example of the right of the Executive, in certain cases, to determine the condition of the Nation, though it may consequentially affect the proper or improper exercise of the Power of the Legislature …. [I]t belongs to the "Executive Power" to do whatever … the laws of Nations cooperating with the Treaties of the Country enjoin, in the intercourse of the United States with foreign Powers.") archived at https://perma.cc/QE6C-UZLX; Story, 3 *Commentaries* § 1563-64 (cited in note 47) ("There are other incidental powers, belonging to the executive department, which are necessarily implied from the nature of the functions … confided to it …. In … 1793, president Washington … issue[d] a proclamation, forbidding the citizens of the United States to take any part in the hostilities, then existing between Great Britain and France; warning them against carrying goods, contraband of war; and enjoining upon them an entire abstinence from all acts, inconsistent with the duties of neutrality …. [T]he deliberate sense of the nation has gone along with the exercise of the power, as one properly belonging to the executive duties."); 8 *Compilation of Reports of the Committee on Foreign Relations, United States Senate, 1789-1901* 24 (1901) ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with the greatest prospect of success."); 10 Annals of Cong. 613 (1800) (statement of Rep. Marshall) ("The president is the sole organ of the nation in its external relations, and its sole representative with foreign nations. Of consequence, the demand of a foreign nation can only be made on him. He possesses the whole Executive power. He holds and directs the force of the nation. Of consequence, any act to be performed by the force of the nation is to be performed through him.").

[215] See *Little v. Barreme*, 6 U.S. 170, 177 (1804) ("It is by no means clear that the president of the United States whose high duty it is to "take care that the laws be faithfully executed," and who is commander in chief of the armies and navies of the United States, might not, without any special authority for that purpose, in the then existing state of things, have empowered the officers commanding the armed vessels of the United States, to seize and send into port for adjudication, American vessels which were forfeited by being engaged in this illicit commerce.").

authority.[216] Framing-era Congresses apparently took the position that "[e]ssentially standardless regulatory authority" over these matters could be delegated to the president because some such discretion was considered incidental to "the exercise of the war and foreign affairs powers."[217] Indeed, it was observed in a 1790 House debate that "intercourse with foreign nations is a trust specially committed to the President of the United States; and after the Legislature has made the necessary provision to enable him to discharge that trust, the manner how it shall be executed must rest with him."[218] This appears to be the best way to harmonize a series

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[216] See, for example, Federalist 75 at 504-05 (cited in note 61) (The treaty power "partake[s] more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them. The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society; while the execution of the laws, and the employment of the common strength… comprise all the functions of the executive… The power of making treaties is, plainly, neither the one nor the other. It relates neither to the execution of the subsisting laws, nor to the enaction of new ones; and still less to an exertion of the common strength. Its objects are CONTRACTS with foreign nations, which have the force of law, but derive it from the obligations of good faith. They are not rules prescribed by the sovereign to the subject, but agreements between sovereign and sovereign."); Story, 3 *Commentaries* § 1513 (cited in note 47) ("The essence of legislation is to prescribe law, or regulations for society; while the execution of those laws and regulations, and the employment of the common strength, either for that purpose, or for the common defense, seem to comprise all the functions of the executive magistrate. The power of making treaties is plainly neither the one, nor the other… Treaties are not rules prescribed by the sovereign to his subjects; but agreements between sovereign and sovereign."); Jonathan Elliot, 3 *Debates in the Several State Conventions on the Adoption of the Federal Constitution* 514 (1827) (quoting James Madison) ("The object of treaties is the regulation of intercourse with foreign nations, and is external."); 5 Annals of Cong. 663 (1796) (statement of Rep. Hillhouse) ("nor can there be any danger of the President and Senate having it in their power, by forming Treaties with an Indian tribe or a foreign nation, to legislate over the United States. The Treaty-making power cannot affect the Legislative power of Congress but in a very small and limited degree.").

[217] Mashaw, *Federalist Foundations*, 115 Yale L. J. at 1300 (cited in note 16).

[218] 12 *Documentary History of the First Federal Congress of the United States of America, 4 March 1789-3 March 1791* 72 (John Hopkins 1994).

of early congressional enactments delegating regulatory power to the president in the area of foreign affairs, and particularly national security,[219] with the then-widely-accepted maxim that legislative power could not be delegated; in fact, George Tucker, in the same passage in his 1803 treatise in which he enunciated the rule against delegation of legislative power, distinguished these early statutes from impermissible delegations of legislative power by making precisely this argument: that those laws delegated powers to the president in an area in which he had some inherent power, and that were not purely legislative in nature.[220] And it was the basis on which

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[219] Act of June 4, 1794, 3 Cong., Chap. 41, 1 Stat. 372; Act of March 3, 1795, 3 Cong., Chap. 53, 2 Stat. 444 ("in cases connected with the security of the commercial interest of the United States, … the President of the United States be, and hereby is authorized to permit the exportation of arms, cannon and military stores, the law prohibiting the exportation of the same to the contrary notwithstanding."); Act of June 13, 1798, 5 Cong., Chap. 53, § 5, 1 Stat. 566 ("if, before the next session of congress, the government of France … shall clearly disavow, and shall be found to refrain from the aggressions, depredations and hostilities … against the vessels and other property of the citizens of the United States … thereupon it shall be lawful for the President … to remit and discontinue the prohibitions and restraints hereby enacted and declared"); Act of February 9, 1799, 5 Cong., Chap. 2, § 4, 3 Stat. 615.

[220] Tucker, 1 *Blackstone's Commentaries* at 346-47 (cited in note 47) ("The right of issuing proclamations is one of the prerogatives of the crown of England. No such power being expressly given by the federal constitution, it was doubted, upon a particular occasion, whether the president possessed any such authority under it: Both houses of congress appear to have recognized the power as one that may be constitutionally exercised by him. Independent of such authority, we might perhaps be justified, in concluding that the obligation upon the president to take care that the laws be faithfully executed, drew after it this power, as a necessary incident thereto. The commencement or determination of laws is frequently made to depend upon events, of which the executive may be presumed to receive and communicate the first authentic information: the notification of such facts seems therefore to be the peculiar province and duty of that department. If the nation be in a state of war with another nation, acts of hostility are justifiable, on the part of our citizens towards theirs; if a truce be concluded; such acts are no longer to be permitted. The fact that such a truce has been made, must be announced by the competent authority; and the law arising from the promulgation of this fact, according to the rules of war and peace, among civilized nations, is such, as to give to the proclamation the apparent effect of a new law to the people.").

a federal circuit court in 1808 upheld against constitutional attack the embargo law later upheld by the Supreme Court in *United States v. The Brig Aurora*; rather than characterizing the act as permissible because it called on the president to make a mere factual judgment (as the Supreme Court had done), the circuit court approved the delegation as a constitutional exercise of the foreign relations powers, and particularly the war powers.[221] Most unequivocal of all was an 1829 treatise that, reflecting on the first few decades under the Constitution, observed that "[a]mong other incidents arising from foreign relations, it may be noticed that congress … may devolve on the president, duties that at first view seem to belong only to themselves."[222] As a matter of public policy, it is quite sensible that the Constitution affords Congress greater latitude to delegate this sort of authority to presidents; as a unitary actor, the Executive is better equipped to act decisively in emergencies, and to freely conduct negotiations with foreign powers on behalf of the United States.

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[221] *United States v. The William*, 28 F. Cas. 614, 622 (D. Mass. 1808) ("the sphere of legislative discretion is … widely extended; and, in time of war, or of great impending peril, it must take a still more expanded range. Congress … has power to prepare for war; and the time, the manner, and the measure, in the application of constitutional means, seem to be left to its wisdom and discretion. Foreign intercourse becomes, in such times, a subject of peculiar interest, and its regulation forms an obvious and essential branch of the federal administration …. [C]ases may occur, in which the indefinite character of a law … may be essential to its efficacious operation …. In addition to the authority given to the president to suspend the acts, upon the contingency of certain events, we have evidence, from the very nature of their provisions, that they cannot be designed to be perpetual. An entire prohibition of exportation, unaccompanied with any restriction on importations, could never be intended for a permanent system; though the laws, in a technical view, may be denominated perpetual, containing no specification of the time when they shall expire …. If an embargo, or suspension of commerce, of any description, be within the powers of congress, the terms and modifications of the measure must also be within their discretion.").

[222] * William Rawle, *A View of the Constitution of the United States of America* 196 (2d. ed. 1829).

Finally, as was discussed earlier, Congress's plenary power over territories and the District of Columbia includes power to establish subordinate bodies that exercise legislative authority within those regions.

To better understand how this test would function, it is helpful to apply it to a few provisions of the current U.S. Code. Recall the statute cited in the introduction, which authorizes the Secretary of the Food and Drug Administration to "promulgate regulations fixing and establishing for any food, under its common or usual name so far as practicable, a reasonable definition and standard of identity, a reasonable standard of quality, or reasonable standards of fill of container" if "in the judgment of the Secretary such [regulations] will promote honesty and fair dealing in the interest of consumers."[223] This enactment is, "in a legal sense … not a law …. It is not a rule prescribed by the supreme power of the State to its citizens, enforcing some duty or prohibiting some act."[224] Nor is it merely a law that is "limited to expire at a certain period,"[225] or one that authorizes other branches to govern their internal administration, or one that does not go into effect until a certain date, or upon executive discernment of factual circumstances. The statute itself defines no private conduct to be regulated or commandments to be obeyed, but instead permits the Secretary to do so. Its force depends entirely on the Secretary's policy judgments, or, "the creative power of … persons" other than Congress.[226] I would accordingly strike it down as an unconstitutional delegation of legislative power. By contrast, consider another provision of federal law, which provides that "[d]uring a national emergency declared by the President, the regular working hours of laborers and mechanics of the Department of the Army producing military supplies or munitions are 8 hours a day or 40 hours a week. However, under regulations prescribed by

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[223] 21 U.S.C. § 341.
[224] See *Rice*, 4 Del. at 492.
[225] Id. at 491.
[226] Id. at 492.

the Secretary of the Army these hours may be exceeded."[227] The delegation here authorizes the Secretary to make rules only in the context of the Army's internal administration and relations with its employees, a subject over which the executive has independent power through the Commander-in-Chief clause, and whose regulation is incidental to executing the laws. The Secretary's rules are not general regulations governing society at large, but instead are the "mere details" inherent in executive management. Finally, as an example of a delegation that is permissible because it depends on a factual contingency, I would point to a statute providing that

> "[t]he Administrator [of the Federal Aviation Administration] shall issue an order revoking an airman certificate … if the Administrator finds that the individual knowingly carried out an activity punishable, under a law of the United States or a State related to a controlled substance (except a law related to simple possession of a controlled substance), by death or imprisonment for more than one year; an aircraft was used to carry out or facilitate the activity; and the individual served as an airman, or was on the aircraft, in connection with … the activity."[228]

B. POTENTIAL CRITICISMS

For starters, I anticipate that the distinction between regulations that go into effect based on a factual contingency and those that depend on an agent's policy judgment will be assailed as too indeterminate for courts to enforce. I disagree. The inquiry I would have courts conduct is this: does the statute call for an agent to act based on its opinion, or based on a fact? A court confronted with this question could apply the criteria currently used in defamation law to distinguish statements of fact from statements of pure opinion (the

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[227] 10 U.S.C. § 7375.
[228] 49 U.S.C. § 44710(b)(2)(A-C).

former, if false, may be actionable, while the latter are protected from liability by the First Amendment.[229]) "[A] subjective view, an interpretation, a theory, conjecture, or surmise" is treated as opinion, while a statement of fact is necessarily "objectively verifiable,"[230] meaning that it is "susceptible of being proved true or false" in a judicial proceeding.[231] If these standards are good enough in the defamation context, where fundamental First-Amendment freedoms are implicated, I see no reason why they would not be good enough as a means of identifying unconstitutional delegations of legislative power.

Another potential criticism of the test I have devised is that although it works well in sniffing out delegations that explicitly grant an agency the power to define the prohibited conduct, it fails to account for the fact that even when a statute does not *purport* to delegate, some statutory text is so "open-ended" that many "questions of judgment … arise in its interpretation and application, leading to formulation of subsidiary rules."[232] Consider the following imaginary statute: "No person shall drive a motor vehicle at an unreasonable rate of speed." If another provision of that law gave "the Secretary of Transportation the power to issue rules and regulations defining what constitutes, in his/her judgment, an unreasonable rate of speed," then we would have a clear, self-proclaimed delegation of legislative power. But isn't such a vague law an implicit invitation to the executive to formulate such rules and regulations, even without a rulemaking grant to the Secretary? And if so, wouldn't legislators be able to tiptoe around even a strong Nondelegation Doctrine by simply passing vague laws?

No. Perhaps Congress could use extreme vagueness to circumvent the Nondelegation Doctrine, but in doing so, they would run afoul of the void-for-vagueness principle rooted in the Due

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[229] 53 C.J.S. Libel and Slander; Injurious Falsehood § 23 (2018).
[230] *Haynes v. Alfred A. Knopf, Inc.*, 8 F.3d 1222, 1227 (7th Cir. 1993).
[231] *Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995).
[232] Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 728 (cited in note 16).

Process Clause. A penal law, whether criminal or civil in nature,[233] is unconstitutionally vague when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[234] If those charged with enforcing such a law attempt to prevent a vagueness challenge by issuing clarifying guidelines ahead of time, the courts should hold that this approach is precluded by the Nondelegation Doctrine—in the sense that the enforcer has taken a statutory command that was too vague on its own for individuals to know what was prohibited, and he or she has defined, based on pure policy judgment, what conduct was regulated or proscribed. Obviously, such clarifying guidelines, if issued in advance of enforcement, could successfully avert a Due Process challenge, but there is no doubt that, in so doing, they would constitute an exercise of legislative power.

There is also, in Harold Krent's view, a difficulty in "devising a test to distinguish rules of private conduct from those merely affecting or encouraging private conduct."[235] I argued earlier, for example, that officials may be delegated the power to make rules for the construction and upkeep of government buildings, facilities, and lands, because such things are not regulations of general societal conduct. But don't these matters affect private persons as much as most other rules governments make? Surely grants and public contracts have implications for society almost as important as those of coercive state regulation of private conduct. My response is that courts should distinguish between government acting as a regulator and government acting as a market participant or employer, distinctions familiar in the Dormant Commerce Clause[236] and free speech[237] contexts, respectively. When government acts as a market

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[233] See *Federal Communications Commission v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012).
[234] *United States v. Williams*, 553 U.S. 285, 304 (2008).
[235] Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 732 (cited in note 16).
[236] *Reeves, Inc. v. Stake*, 447 U.S. 429, 436-37 (1980).
[237] *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968).

participant, it no more "regulates" firms' conduct by choosing one of them to do business with than a private person "regulates" restaurants by picking which one to dine at. And the Court has long recognized an analogous distinction between government's public policies and its policies affecting terms and conditions of public employment. Still, it is possible that agencies could use distribution of resources as an indirect means of regulating conduct; an agency might, for example, condition the award of a public contract on the awardee's compliance with a policy that is entirely unrelated to performance of the contract, or condition public employees' employment on their compliance with a policy entirely unrelated to their job duties. That is permissible only if Congress has specified by statute the regulations that the agency is aiming to indirectly enforce. Otherwise, I think the agency would be effectively acting as a regulator and thereby unconstitutionally exercising legislative power. This is consistent with the Dormant Commerce Clause case law holding that states cannot use their own market participation as an indirect means of regulating activities "downstream" of the transaction that are otherwise immune from state regulation,[238] and with the freedom-of-speech case law holding that government cannot use "the threat of dismissal from public employment" as a "means of inhibiting speech" protected by the First Amendment that "[n]either impeded the [employee's] proper performance of his daily duties … or … interfered with the regular operation of the [government] generally."[239]

Finally, Krent argues that a thoroughgoing rule that "all rules of private conduct originate in Congress" could not be faithfully and consistently applied, because judges inevitably "fashion rules" when "fleshing out the statutory meaning" when the text is "unclear, or when unforeseen circumstances arise." [240] But when a judge

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[238] See *South-Central Timber Development, Inc. v. Wunnicke*, 467 U.S. 82 (1984).
[239] *Pickering*, 391 U.S. at 572-74.
[240] Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 728 (cited in note 16).

confronts statutory ambiguity or vagueness, it is her responsibility to discern the proper meaning by relying as much as possible on objective and widely accepted definitions, usages, or established common law meanings, and if the vague word or phrase cannot thereby be clarified, to strike it down as unconstitutionally vague.[241] Of course, as was discussed in Part I(c), the Due Process requirement of fair warning does not currently apply to adjudications that are merely declaratory and do not impose penalties. But, as was also discussed earlier, I would require courts to apply the specificity standards that currently apply only to penal adjudications to all adjudications in which private rights or obligations are at issue.

C. APPLYING THE TEST TO EARLY CONGRESSIONAL ENACTMENTS

Sunstein, Posner and Vermeule, Krent, Mashaw, and other Nondelegation Doctrine critics often cite a number of early congressional enactments that they claim undermine the Doctrine's historical pedigree. These laws, the argument goes, demonstrate that the Framing generation broadly acquiesced to Congress's delegation of legislative power. But when evaluated using the test I have

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[241] See *Skilling v. United States*, 561 U.S. 358, 402-13 (2010); *United States v. Sharp*, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) ("If we resort to definitions given by philologists, they are so multifarious, and so different, that I cannot avoid feeling a natural repugnance, to selecting from this mass of definitions, one, which may fix a crime upon these men, and that too of a capital nature; when, by making a different selection, it would be no crime at all… Laws which create crimes, ought to be so explicit in themselves, or by reference to some other standard, that all men, subject to their penalties, may know what acts it is their duty to avoid. For these reasons, the court will not recommend to the jury, to find the prisoners guilty … however strong the evidence may be."); *United States v. Smith*, 18 U.S. 153, 160, 162 (1820) ("When the act of 1790 declares, that any person who shall commit the crime of robbery, or murder, on the high seas, shall be deemed a pirate, the crime is not less clearly ascertained than it would be by using the definitions of these terms as they are found in our treatises of the common law …. [P]iracy, by the law of nations, is robbery upon the sea, and … it is sufficiently and constitutionally defined by … the act").

devised, it is clear, for the most part, that these statutes do no such thing. For example, Posner and Vermeule cite a 1789 statute authorizing the continuing payment of preexisting military pensions "under such regulations as the President ... may direct."[242] This is not a delegation of legislative power. For one, the amounts and persons to be paid were already set, and all the president was authorized to do was determine the details of how to disburse those sums to those individuals.[243] It does not delegate to the president the power to determine the rights or duties of citizens. Second, this statute allows for presidential regulation only of internal administration of the military, and does not delegate power to prescribe general rules of conduct for society at large.[244] Posner and Vermeule also point to a 1790 law authorizing the Treasury Secretary to "mitigate or remit" a fine "if in his opinion the same was incurred without wilful negligence or any intention of fraud, and to direct the prosecution … to cease and be discontinued, upon such terms or conditions as he may deem reasonable and just."[245] As Gary Lawson astutely observes, however, this law merely authorizes the Secretary to exercise a power functionally indistinguishable from prosecutorial

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[242] Act of September 29, 1789, 1 Stat. 95.

[243] In relevant part, the law provided that "the military pensions which have been granted and paid by the states respectively, in pursuance of the acts of the United States in Congress assembled, to the invalids who were wounded and disabled during the late war, shall be continued and paid by the United States, from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct." Id.

[244] The same is true for other statutes cited by Posner and Vermeule: a 1790 enactment that authorized the president "to purchase, or accept such quantity of land on the eastern side of the [Potomac] River within [the designated] district" as he deems proper for government use, and to make plans for "provid[ing] suitable buildings for the accommodation of Congress, and of the President, and for the public Offices," Act of April 30, 1790, 1 Stat. 119, 121, and another 1790 statute empowering the president to "fix the pay" (within the "prescribed maxima") of wounded military personnel, a matter that is both internal to the executive branch and ancillary to the president's role as Commander-in-Chief of the Armed Forces. Act of April 30, 1790, 1 Stat 119, 121.

[245] Act of May 26, 1790, 1 Stat. 122, 123.

discretion,[246] something executive officials have always done.[247] I would add that remission of fines may also be viewed as incidental to the pardon power (as an 1829 treatise pointed out[248]), which the president may entrust to direct subordinates, such as the Secretary; this is the basis on which the Supreme Court upheld an almost identical federal statute in 1885.[249]

Nondelegation Doctrine critics also often point to the Indian Intercourse Act of 1790, which provided for the licensing of certain persons to trade with the Indian tribes "under such rules and regulations as the President may prescribe."[250] But the federal government, at that time, generally dealt with Indian tribes using the treaty power,[251] as they were considered sovereign entities in some respects, although their relationships with the United States were not exactly the same as that of a foreign nation.[252] "Congress's

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[246] Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. at 401 (cited in note 14).
[247] See *Heckler v. Chaney*, 470 U.S. 821, 832 (1985).
[248] See Rawle, *View of the Constitution* at 177 (cited in note 222) ("The remission of fines, penalties, and forfeitures, under the revenue laws, is included in [the pardon power]").
[249] *The Laura*, 114 U.S. 411 (1885).
[250] Act of July 22, 1790, 1 Stat. 137, 137.
[251] See *United States v. Cisna*, 25 F. Cas. 422, 424 (C.C.D. Ohio 1835) ("During the whole course of our connection with the Indian tribes, we have recognized in them a power to make treaties, and certain political relations exist growing out of treaties between the federal government and almost every distinct tribe of Indians within our national limits."); *Cherokee Nation v. Georgia*, 30 U.S. 1, 16 (1831) ("So much of the argument as was intended to prove the character of the Cherokees as a state, as a distinct political society, separated from others, capable of managing its own affairs and governing itself, has, in the opinion of a majority of the judges, been completely successful. They have been uniformly treated as a state …. The numerous treaties made with them … recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements, or for any aggression committed on the citizens of the United States by any individual of their community …. The acts of our government plainly recognize the Cherokee nation as a state").
[252] See *Cherokee Nation*, 30 U.S. at 16-17 ("Though the Indians … have an unquestionable, and, heretofore, unquestioned right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government; yet it may well be doubted whether those tribes which reside within the acknowledged

satisfaction with presidential administration with respect to Indian tribes may simply have mirrored its judgment concerning executive authority with respect to the War and State Departments. From the political perspective of the late eighteenth century, commerce with the Indian tribes may have seemed less like regulating interstate commerce than like some combination of the exercise of the war and foreign affairs powers."[253] As was explained earlier, the legislative power and the powers over the United States' relations with other sovereigns (such as the treaty power) were viewed as separate, though occasionally overlapping, spheres of authority, and so delegations to the president over a matter generally regulated by treaties were for that reason permissible. At least one commentator has concluded that the Indian Intercourse Act was indeed passed pursuant to the treaty power.[254] Language from an 1834 federal circuit court opinion seemingly validates that conclusion: "the power to regulate commerce with the Indian tribes [is] substantially the same power has been exercised in regulating commerce with foreign nations. All intercourse with a foreign nation, as before remarked, may be prohibited; or it may be admitted under a license or permit."[255]

Finally, Posner, Vermeule, and Krent cite a 1790 statute authorizing the "Secretary of State, the Secretary … of war, and the Attorney General, or any two of them" to issue letters patent if "they deem the [applicant's] invention or discovery sufficiently useful or important,"[256] letters that confer upon the applicant a fourteen-year patent if the AG determines that the application conforms to the Act. This is the closest Posner, Vermeule, or Krent come to identifying a

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boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations.").

[253] Mashaw, *Federalist Foundations*, 115 Yale L. J. at 1300 (cited in note 16).

[254] See Robert G. Natelson, *The Original Understanding of the Indian Commerce Clause*, 85 Denver U. L. Rev. 201, 252 (2007).

[255] *United States v. Bailey*, 24 F. Cas. 937, 937–39 (C.C.D. Tenn. 1834).

[256] Act of April 10, 1790, 1 Stat. 109, 110.

historical source that cuts against my account of the Constitution's original meaning with respect to the Nondelegation Doctrine—yet the events surrounding the enactment and operation of the 1790 patent law, if anything, actually undermine their position. First of all, one could characterize the 1790 statute as merely authorizing executive officers to apply general rules in particular cases, which, as I discussed earlier, is not a delegation of legislative power; still, the law confers discretion to make such decisions based on officials' own judgments of vague concepts like "importance," which might raise Due Process, if not nondelegation, concerns. At any rate, however, subsequent historical events undercut Posner's and Vermeule's reliance on the 1790 patent statute. The law was repealed after just three years and replaced with an act that closely mirrored the text of the previous law, but with the words "if they deem the invention or discovery sufficiently useful or important" omitted, a revision that one historian called "the most important" change effected by the 1793 Act.[257] The AG still had to decide if the patent application complied with statutory requirements, but the 1793 law painstakingly enumerated precise and objective standards for the AG to apply in determining whether to grant the patent.[258] And the drafting history of the 1793 law reveals that its passage was motivated in substantial part by concerns that the 1790 patent law vested too much discretion in the AG and the Secretaries of War and

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[257] *The Patent Act of 1793*, 18 J. Pat. Off. Soc'y 77, 81 (1936) (the 1793 Act "differed from the previous act in many respects, the most important … being the omission of the requirement, 'if they shall deem the invention or discovery sufficiently useful and important.' This omission … made the grant of a patent purely a clerical matter.").

[258] Act of Feb. 21, 1793, 2 Cong. ch. 7, §§ 1, 3, 2 Stat. 318-22; see also John Ruggles, Select Committee Report on the State and Condition of the Patent Office, S. Doc. No. 24-338 (1836) ("The act [of] 1793 … gives, according to the practical construction it has received, no power to the Secretary to refuse a patent for want of either novelty or usefulness. The only inquiry is whether the terms and forms prescribed are complied with. The granting of patents therefore is but a ministerial duty. Every one who makes application is entitled to receive a patent by paying the duty required, and making his application and specification in conformity with the law.").

State to make decisions based on their judgments of importance and utility. The bill that became the 1793 Act was drafted by then-Secretary of State Thomas Jefferson,[259] who later explained that his proposal was motivated by "the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not," a problem under the 1790 law; Jefferson remarked that,

> As a member of the patent board for several years, while the law authorized a board to grant or refuse patents, I saw with what slow progress a system of general rules could be matured …. But there were [an] abundance of cases which could not be brought under rule, … and these investigations occup[ied] more time of the members of the board than they could spare.[260]

In order to address these issues, the 1793 Act

> turned over [the matter] to the judiciary, to be matured into a system, under which every one might know when his actions were safe and lawful. Instead of refusing a patent in the first instance, as the board was authorized to do, the patent now issues of course, subject to be declared void on such principles as should be established by the courts of law.[261]

Likewise, during a January 1793 House debate, one lawmaker endorsed the bill that became the 1793 patent law on the grounds that "it was an imitation of the Patent System of Great Britain[, in] that the provisions were such as would circumscribe the duties of the

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[259] Kendall J. Dood, *Patent Models and the Patent Law: 1790-1880 (Part I)*, 65 J. Pat. Off. Soc'y 187, 216 (1983).
[260] *Letter from Thomas Jefferson to Isaac M'Pherson (Aug. 13, 1813)* in *Basic Writings of Thomas Jefferson* 708, 712-713 (Philip S. Foner ed., 1944).
[261] Id.

deciding officer within very narrow limits." [262] The 1790 patent statute is thus weak evidence against the Nondelegation Doctrine; the law may not have been an unconstitutional delegation in the first place, and the language supposedly delegating improper powers was quickly and deliberately repealed for the very reason that it vested too much discretion in those officers charged with executing the law.

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In light of the foregoing analysis, I do not agree with Justice Scalia that the "doctrine of unconstitutional delegation" is "not … readily enforceable by the courts," or that the courts are not "qualified to second-guess Congress regarding the permissible degree of policy judgment" that can be delegated.[263] The standards I propose for judicial administration of the Nondelegation Doctrine seem to me no more vague or indeterminate than any other "tests" the Court has used in constitutional adjudication; indeed, my proposal consists almost entirely of standards and criteria that are already used in other areas of law. If judges can tell what constitutes an "undue burden," [264] the "totality of the circumstances," [265] a "proportionate" punishment, [266] a "substantial effect" on commerce, [267] the "degree of reprehensibility" of a tort, [268] or a "rational basis,"[269] then they are more than competent to judge when delegation of legislative power has occurred. And just as the Rehnquist Court, in reviving limitations on the Commerce Clause,

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[262] * *Proceedings and Debates of the House of Representatives of the United States, at the Second Session of the Second Congress, begun at the City of Philadelphia, November 5, 1792*, 855 (1849 ed.) (statement of Rep. Williamson).
[263] *Mistretta*, 488 U.S. at 415-16 (Scalia dissenting).
[264] *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U. S. 833, 878 (1992).
[265] *Illinois v. Gates*, 462 U.S. 213, 230 (1983).
[266] *Solem v. Helm*, 463 U.S. 277, 284 (1983).
[267] *United States v. Lopez*, 514 U.S. 549, 557 (1995).
[268] *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 574 (1996).
[269] *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959).

began with the "easy" cases in order to extrapolate workable principles needed for the more difficult ones,[270] the Court could begin by invalidating obvious delegations of legislative power, gradually advancing to cases requiring more discerning judgment. And even if enforcing the Nondelegation Doctrine were an especially difficult task compared to others that judges do, it would not excuse them from doing it. As Madison told his House colleagues in 1791, "[h]owever difficult it may be to determine with precision the exact boundaries of the Legislative and Executive powers," the abdication of the duty to determine such boundaries will impermissibly result in "blending those powers so as to leave no line of separation whatever."[271] A Court that refuses to undertake judicial enforcement of the Nondelegation Doctrine for fear that not all conceivable applications of it will be obvious is like a contractor who arrives at the designated site with blueprints for a house, but refuses to break ground on the foundation because she does not yet know what color the drapes will be.

III. STRUCTURE AND POLICY

The Nondelegation Doctrine may be derived not only from the original meaning of the Constitution's text, but also from its structure and general principles, a mode of argument itself rooted in history. It was Chief Justice Marshall who said in 1819 that the Constitution's meaning "is not only to be inferred … from [its] language, but also "from the nature of the instrument"; even where "[t]here is no express provision" that speaks to the question at hand, the answer may be discovered among those "principle[s] which so entirely pervade[] the constitution, [are] so intermixed with the materials

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[270] *See United States v. Lopez*, 514 U.S. 549 (1995); *United States v. Morrison*, 529 U.S. 598 (2000).

[271] 3 *The Debates and Proceedings in the Congress of the United States* 238-39 (1849 ed.).

which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it."[272]

A. THE ARGUMENT

The problem with delegation of legislative power is that it subverts the constitutional mechanisms that ensure broad representation in the lawmaking process. The Constitution provides that, to become law, a proposal must pass both houses of Congress and then either earn the president's signature or acquiescence, or overcome his veto by a two-thirds vote of both houses.[273] In practical terms, a bill introduced in either house faces many more vetogates: it must undergo extensive review by committees and subcommittees (where it will be edited thoroughly, if not killed outright), and, in the Senate, must have the support of sixty members to be approved once it reaches the floor. Hence, of the 12,063 bills introduced in the 114th Congress, only 14% made it to the floor of either house for a vote; and of those, only 43% passed in both houses; and of those, only 50% became law[274]—figures that do not appropriately convey the extent to which eventually-approved bills were altered during the legislative process. Every one of these veto points is an opportunity for another societal faction to have its say in national lawmaking. When a statute delegates the power to issue legislative rules, however, the Framers' carefully designed legislative process is inverted, and its objectives of deliberation and representation subverted.[275] If Congress and the President at T_1 enact a statute

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[272] *McCulloch v. Maryland*, 17 U.S. 316, 407, 426 (1819).

[273] U.S. Const. art. I, § 7.

[274] GovTrack, Statistics and Historical Comparison (2018), archived at https://perma.cc/K4SH-YNR3.

[275] See James Kent, 1 *Commentaries on American Law* 208 (1826) ("The division of the [national] legislature into two separate and independent branches, is founded in such obvious principles of good policy, and is so strongly recommended by the unequivocal language of experience, that it has obtained the general approbation of the people of this country. The great object of this separation of the legislature into two houses,

delegating rulemaking authority, the recipient of that delegation may issue rules carrying the force of law. But at T_2, either Congress or the President may have experienced a change of heart (or, more likely, a change in membership) such that the recipient of the delegation is now issuing rules that would not survive the constitutionally prescribed legislative process.[276] If Congress wants to revoke the delegation of rulemaking authority, or even repeal a particular rule, it must affirmatively object by passing a statute. But the Constitution's procedure for enacting statutes, with its several veto points, is biased toward inaction—or, rather, toward action only where a fairly broad consensus supports it.[277] In this way, a statutory

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acting separately, and with co-ordinate powers, is to destroy the evil effects of sudden and strong excitement, and of precipitate measures springing from passion, caprice, prejudice, personal influence, and party intrigue, and which have been found, by sad experience, to exercise a potent and dangerous sway in single assemblies. A hasty decision is not so likely to arrive to the solemnities of a law, when it is to be arrested in its course, and made to undergo the deliberation, and probably the jealous and critical revision, of another and a rival body of men, sitting in a different place, and under better advantages to avoid the prepossessions and correct the errors of the other branch.").

[276] Although it might seem that "members of Congress have sufficient personal motivations and professional resources to protect Congress's institutional prerogatives from executive incursions," a "number of scholars have concluded … that such checking is not as consistent or robust as is often assumed, and that whether Congress curbs presidential power depends more often on partisan political considerations or situation-specific policy objections than on any systematic effort to protect institutional prerogatives." Curtis A. Bradley and Trevor W. Morrison, *Presidential Power, Historical Practice, and Legal Constraint*, 113 Colum. L. Rev. 1097, 1100–01 (2013).

[277] It is true that Congress may attempt to influence agency rulemaking through its power over the budgetary process. But appropriations bills, even though they are usually regarded as "must-pass" legislation, still must go through the legislative procedures required of any statute, and experience suggests that these laws are not always effective in influencing rulemaking. A 2008 study was unable to find any appropriation provision that was "designed to reverse agency rulemaking actions"; although Congress sometimes attempts to influence agency rulemaking through appropriations provisions, "such provisions are generally applicable only for the period of time and the agencies covered by the relevant appropriations bill. Also, to

delegation of rulemaking authority has the effect of inverting the decision-making process: a legislative rule will go into effect unless a sufficiently broad consensus *disapproves*, whereas in the absence of legislative delegation, such a rule would go into effect only if an equally broad consensus *approves*. Statutory delegations of lawmaking power to entities other than Congress thus tend to exclude voices from future legislative decisions. What is more, because most delegations of rulemaking authority are to executive agencies over which the president exercises effective control through the removal power, legislation repealing or limiting such delegation is likely to be vetoed, since the president is probably disinclined to support a proposal that diminishes his power by diminishing that of his subordinates.[278] And only rarely can Congress "obtain the two-thirds vote in each house necessary … to overturn a presidential [veto]."[279]

In addition, more is at stake in the delegation debate today than ever before. Since the 1930s, the Supreme Court has interpreted Congress's constitutional powers, especially those of "regulat[ing]

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the extent that agencies have independent sources of funding (e.g., user fees) or implement their regulations through state or local governments, some of the limitations may not be as restrictive as they seem." Curtis W. Copeland, *Congressional Influence on Rulemaking and Regulation Through Appropriations Restrictions* (Cong. Rsrch. Service, Aug. 5, 2008), archived at https://perma.cc/9A2V-M97M (emphasis omitted). Indeed, some very powerful regulatory bodies are wholly exempt from the normal appropriations process, including the Consumer Financial Protection Bureau, Federal Deposit Insurance Corporation, Federal Housing Finance Agency, Federal Reserve, National Credit Union Administration, and the Office of the Comptroller of the Currency; while the Securities and Exchange Commission is partially exempt. See Henry B. Hogue, et al., *Independence of Federal Financial Regulators: Structure, Funding, and Other Issues* 27 (Congressional Research Service, Feb. 28, 2017), archived at https://perma.cc/6KZC-GUZK.

[278] While it is debatable how much the president actually controls executive agency rulemaking, it is undeniable that delegations of rulemaking authority to officers subject to at-will presidential removal increase presidential power. Consider Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245 (2001).

[279] Id. at 2350.

Commerce … among the several States" and of "mak[ing] all Laws … necessary and proper for carrying into Execution" its enumerated powers,[280] so broadly that the Court has, by its own admission, effectively "taken long steps down [the] road" of "convert[ing] congressional authority under the Commerce Clause to a general police power of the sort retained by the States … giving great deference to congressional action."[281] Given that the modern Court's conception of "interstate commerce embraces such activities as growing wheat for home consumption and local loan sharking, it is … difficult to imagine … what [Congress] would be precluded" from regulating.[282] And the more power Congress may exercise, the more it may delegate. It is unsettling enough that a federal statute, approved by both houses of Congress and (usually) the president, may dictate how much wheat a person may grow for home consumption; that a single agency administrator may do so by regulation is profoundly more disturbing. The Court, perhaps in recognition of this ominous implication, has adopted a rule of construction that, "[w]here an administrative interpretation of a statute invokes the outer limits of Congress' power, we expect a clear indication that Congress intended that result."[283] But this is a mere principle of statutory interpretation. It does not truly limit congressional power, as legislators remain free to adopt statutory language delegating to an agency the authority to regulate to the full extent of Congress's constitutional prerogative.

My argument, then, is that the Nondelegation Doctrine would make federal lawmaking more representative, or deliberative. Admittedly, delegations to executive officers that are removable at the will of the president might produce policies that better reflect

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[280] U.S. Const. art. I, § 8, cl. 3, 18.
[281] *United States v. Lopez*, 514 U.S. 549, 567 (1995).
[282] *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 261 (1987) (Scalia concurring in part and dissenting in part).
[283] *Solid Waste Agency of North Cook County. v. United States Army Corps of Engineers*, 531 U.S. 159, 172 (2001).

democratic will than does lawmaking by Congress, in that the president has a national constituency and faces fewer veto points obstructing her decisionmaking; we therefore might expect rulemaking by her subordinates to be least slightly more likely to suit the preferences of 51% of the electorate.[284] But this does not undermine the critique of delegation. First, not all agency heads are wholly answerable to the president; a significant number of federal departments are so-called "independent" agencies, whose heads are subject to presidential removal only "for cause" and cannot be trusted to follow the popular will—indeed, they were deliberately designed to be immune to political pressure.[285] Second, even those delegations of legislative power that are ultimately subject to the control of the president are, at best, more majoritarian than Congress's lawmaking, but not more representative. Our carefully crafted constitutional system reflects an emphatic rejection of the idea that a coalition representing a majority of the electorate can steamroll any opposition (no matter how substantial) in order to impose its preferred policy on the entire country. A deliberative, bicameral Congress seeks to avoid such a thing by affording interested factions opportunities for representation throughout the legislative process.[286] To be sure, requiring all decisions that are legislative in nature to clear the hurdles of bicameralism and presentment may very well result in less legislative activity. But I do not think this undermines the earlier point regarding representation; on the contrary, one would expect greater representation in the

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[284] See Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. at 323 (cited in note 14) (democratic arguments against delegation "are highly ambiguous," since "[a]gencies are themselves democratically accountable via the President").

[285] See *Humphrey's Executor v. United States*, 295 U.S. 602 (1935).

[286] See Kagan, *Presidential Administration*, 114 Harv. L. Rev. at 2313 (cited in note 278) (Clinton's "directives [to agencies] functioned as an end run around Congress …. [A]s a less restrained advisor remarked, in comparing executive directives to legislative initiatives: 'Stroke of the pen, law of the land. Kind of cool.'").

policymaking process to manifest itself as a reduction in overall legislating.

I do not mean to suggest that the process by which agencies make rules and regulations does not involve any form of representation of various societal interests. The 1946 Administrative Procedures Act requires a period of public "notice and comment" on proposed substantive rule changes, in which any person may submit his or her input on the agency's proposition.[287] In addition, many statutes that delegate rulemaking authority contain a list of factors that agencies are obligated to consider in issuing regulations, or require the agency to give interested parties an opportunity to present their views on a proposed rule in an administrative hearing.[288] These procedural constraints on agency rulemaking, modest as they are, have led some to conclude that administrative rulemaking satisfies the values of representation and deliberation as well as (if not better than) ordinary lawmaking by Congress does: "civic republicanism is consistent with broad delegations of decisionmaking authority to officials with greater expertise and fewer immediate political pressures than directly elected officials or legislators"; in fact, agency rulemaking is "the best hope implementing … deliberative decisionmaking informed by the values of the entire polity."[289] With regards to the assertion that agencies have "fewer immediate political pressures" than does Congress, I am hard pressed to understand how fewer pressures will lead to policies that better reflect the values of the entire polity. At any rate, this is neither here

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[287] 5 U.S.C.A. § 553 (West).

[288] See 15 U.S.C. § 2058(d)(2)-(f)(1) "Prior to promulgating a consumer product safety rule, the Commission shall consider, and shall make appropriate findings … with respect to—(A) the degree and nature of the risk of injury the rule is designed to eliminate or reduce; (B) the approximate number of consumer products …subject to such rule," and "shall give interested persons … an opportunity to make written submissions.").

[289] Mark Seidenfeld, *A Civic Republican Justification for the Bureaucratic State*, 105 Harv. L. Rev. 1511, 1515 (1992); see also Jon D. Michaels, *An Enduring, Evolving Separation of Powers*, 115 Colum. L. Rev. 515 (2015).

nor there. Whether a process is representative and deliberative depends less on how many political pressures it faces than it does on whether each faction has some mechanism for protecting its interests against the excesses of the others. In the constitutional lawmaking process, such mechanisms abound in the form of bicameralism, subcommittees, committees, the filibusters, and the presidential veto. But the modest procedural requirements that apply to agency rulemaking are simply not comparable to the safeguards that Congress affords to affected societal interests. Agencies may be required to consider the views of various interested parties, but they need not make any changes to their proposed regulations as a result of those parties' input. In other words, the deliberation is little more than consultation.[290] The type of procedures delineated in the APA "merely slow down agency lawmaking and do not necessarily weed out laws that violate liberty or lack an important public purpose."[291] The FCC's notice-and-comment processes, for example, have been described as "meaningless precursor[s] to the 'real' discussion that occurs during [an] ex parte process," a practice that, "[t]echnically speaking, … does not violate the Administrative Procedure Act," but, "[p]ractically speaking, … undermines the opportunity for meaningful participation and effective deliberation."[292]

B. COUNTERARGUMENTS

Posner and Vermeule downplay the structural effects of legislative delegation by pointing out that delegation occurs all the

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[290] See, for example, Jerry L. Mashaw, et al., *Administrative Law: The American Public Law System: Cases and Materials* 596 (7th ed. 2014) ("Most notable are the steps that are not required [in the usual rulemaking process]: there need be no opportunity for any 'hearing' in the sense of oral presentation or live testimony; material need not be submitted in testimonial form or under oath; and no opportunity for cross-examination or rebuttal is mandated.").

[291] Nadine Strossen, *Delegation as a Danger to Liberty*, 20 Cardozo L. Rev. 861, 864 (1999).

[292] Philip J. Weiser, *Institutional Design, FCC Reform, and the Hidden Side of the Administrative State*, 61 Admin. L. Rev. 675, 698 (2009).

time in other aspects of life without disastrous consequences; no one would seriously argue, for example, that "the owner of a corporation should design the corporation's products rather than hiring engineers and marketing experts," or that mayors should try to conduct all city business without any help from subordinates.[293] But the analogy between such examples and Congress's legislative delegations is facile. A better parallel in the corporate governance context would be something like the following: suppose a corporation's charter established that management decisions would be made only with the approval of two-thirds of a board of directors. Now, suppose that, by a two-thirds vote, the board established a new management position with the power to make management decisions of the same type that the board makes. This individual's decrees could be overridden (or her position eliminated) by a two-thirds vote of the board, but the rules she issues otherwise go into effect upon being issued, and the board does not vote on them. At this point, the problem should be clear: if, in a few years time, the board finds itself unhappy with the management official's rules or decisions (whether due to personnel changes or shifting preferences), it now needs a vote of two-thirds of its members to *prevent* her rules from going into effect, whereas in the absence of delegation to the official, such rules would be voted on individually, and each could be prevented with just over a third of members opposing the rule or decision. The corporation's shareholders have every right to cry foul at the board's delegation of its powers, a delegation that will substantially affect company policy in a way that an individual principal's delegation to a direct subordinate would not. Replace "board of directors" with "Congress and the president," "charter" with "Constitution," and "management official" with "administrative agency," and the weakness of Posner's and Vermeule's structural criticism of the Nondelegation Doctrine becomes apparent: where an individual principal delegates to an

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[293] Posner and Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. at 1735 (cited in note 16).

agent, the principal can later revoke the delegated power just as easily as he or she gave it away. But where the principal is a multi-member body whose procedures make it easier to kill a proposal than to pass it, a delegation to an external agent will have the effect of inverting the decision-making process.

Another structural argument sometimes put forth against the Nondelegation Doctrine is that its revival would be pointless, since any protections against legislative delegation "implicit in Article I are lost whenever rules are formulated outside of Congress … by enforcement agencies determining priorities and establishing safe harbors."[294] The claim seems to be that even with a reinvigorated Nondelegation Doctrine, executive officials enforcing statutory prohibitions may still fashion rules in exercising their prosecutorial discretion, and that their power to do so is functionally no different from a delegated power to formulate and issue regulations carrying the force of law. For example, the Securities and Exchange Commission has statutory authority to promulgate regulations of the securities trade,[295] which it has done frequently. But if the Nondelegation Doctrine were fully resurrected, couldn't the same result be achieved if Congress passed a law banning all trading of securities and the SEC reissued its prior regulations as prosecutorial discretion guidelines?

Putting aside the implausibility of Congress passing a law banning such an important and benign activity in the mere hope that its harshness will be mitigated by prosecutorial discretion, the answer is still "no," because executive officials' decisions not to enforce the law against some violations do not make that conduct

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[294] Krent, *Delegation and Its Discontents*, 94 Colum. L. Rev. at 728 (cited in note 16).

[295] For example, 15 U.S.C. § 78i(c) ("It shall be unlawful for any broker, dealer, or member of a national securities exchange directly or indirectly to endorse or guarantee the performance of any put, call, straddle, option, or privilege in relation to any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

legal. This is, in several ways, a significant difference between under-enforcement and the power to issue rules with the force of law. First, where executive officials exercise enforcement discretion, the illegal conduct they decline to prosecute may still be prosecuted by subsequent administrations[296] (and the pardon power often cannot change this fact, since many regulatory prohibitions are civil in nature and therefore not pardonable[297]). Second, many statutory prohibitions[298] and agency regulations[299] give rise to private rights of

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[296] Justice Paterson, riding circuit in 1806, recognized as much when he refused to dismiss criminal charges against a defendant who claimed that presidential permission excused the illegal conduct: "The president," Paterson declared, "cannot control the statute, nor dispense with its execution, and still less can he authorize a person to do what the law forbids …. True, a nolle prosequi may be entered, a pardon may be granted; but these presume criminality, presume guilt, presume amenability to judicial investigation and punishment, which are very different from a power to dispense with the law." *United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806).

[297] See *United States v. Wilson*, 32 U.S. 150, 160 (1833) ("A pardon is an act ... which exempts the individual ... from the punishment the law inflicts for a *crime*") (emphasis added)); *Young v. United States*, 97 U.S. 39, 66 (1877) ("He was no offender, in a criminal sense. He had committed no crime against the laws of the United States … and consequently he was not, and could not be, included in the pardon granted by the President"); Robert J. Delahunty and John C. Yoo, *Dream on: The Obama Administration's Nonenforcement of Immigration Laws, the Dream Act, and the Take Care Clause*, 91 Tex. L. Rev. 781, 842 (2013) ("the Pardon Clause...concerns crimes, not civil violations"); Noah A. Messing, *A New Power?: Civil Offenses and Presidential Clemency*, 64 Buff. L. Rev. 661, 663 (2016) ("[M]ore than 180 years of dicta sugges[t] that the pardon power extends only to criminal offenses.").

[298] See, for example, *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990); *Superintendent of Insurance of New York v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971).

[299] See, for example, 49 U.S.C.A. § 32710 (West) ("A person that violates … a regulation prescribed … under this chapter … is liable …. [in] a civil action."); 15 U.S.C.A. § 6104 (West) ("Any person adversely affected by any … practice … which violates any rule of the Commission under section 6102 of this title … may … bring a civil action"); 15 U.S.C.A. § 2072 (West) ("Any person who shall sustain injury by reason of any … violation of a consumer product safety rule … issued by the Commission may sue any person who … violated any such rule"); 47 U.S.C.A. § 227 (West) ("A person or entity may … bring in an appropriate court of [a] State an action based on a violation … the regulations prescribed under this subsection to enjoin such violation"); see also *Ability*

action, and so executive officials' non-enforcement of such restrictions does not mean violators incur no penalty. Finally, to return to the SEC example, even if Congress passed a law banning all trading of securities and the SEC reissued its prior regulations as prosecutorial discretion, it would be cold comfort to those wishing to engage in the securities trading that the agency was declining to prosecute, since all contracts concerning any sort of securities trading would be void for illegality,[300] regardless of the SEC's enforcement priorities.

It has also been suggested that the executive's constitutional obligation to "take Care that the Laws be faithfully executed"[301] imposes some limitations on prosecutorial discretion that would perhaps prevent using that discretion in a manner that too closely resembled rulemaking. Most commentators at least "agree that the President cannot decline to enforce altogether a law that is constitutional."[302] But some go further, asserting that, "[w]ithout congressional action expanding executive discretion, … nonenforcement authority extends neither to prospective licensing of prohibited conduct nor to policy-based nonenforcement of federal laws for entire categories of offenders."[303] Although I tend to agree with the view that such claims are "misguided as a matter of both law and theory"[304] (especially, I might add, in the criminal context, where the pardon power *already* permits the executive to excuse

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Center of Greater Toledo v. City of Sandusky, 385 F.3d 901 (6th Cir. 2004); *Lucien v. Federal National Mortgage Association*, 21 F. Supp. 3d 1379, 1385 (S.D. Fla. 2014).

[300] See 17A C.J.S. *Contracts* § 252 (2018).

[301] U.S. Const. art. II, § 3.

[302] Adam B. Cox and Cristina M. Rodríguez, *The President and Immigration Law Redux*, 125 Yale L. J. 104, 142–43 (2015).

[303] Zachary S. Price, *Enforcement Discretion and Executive Duty*, 67 Vand. L. Rev. 671, 675 (2014).

[304] Cox and Rodriguez, *The President and Immigration Law* Redux, 125 Yale L. J. at 174 (cited in note 302).

unlawful acts by entire categories of offenders[305]), they would, if correct, provide yet another basis for distinguishing the power of prosecutorial discretion from that of promulgating rules that carry the force of law.

C. POLICY CONSIDERATIONS & DELEGATION OF LEGISLATIVE POWER

The most common justification for delegation of legislative power is that, "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives," [306] as it "has neither the time nor the expertise to determine the tens of thousands of rules promulgated by the administrative state that give meaning and content to broad regulatory statutes." [307] If the abandonment of the Constitution's fundamental structural principles need only be justified at such a high level of generality, then the Bill of Rights is not long for this world, as its guarantees have certainly frustrated government attempts to address our "ever changing" society in the past.[308] At any rate, I find the time-and-expertise argument puzzling, for it does not justify delegating to agencies the power to issue rules *with the force of law*. If lack of time and expertise is the problem, it seems to me that Congress could address it by using its Necessary and Proper Clause authority to create departments and agencies that, in addition to

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[305] See *United States v. Padelford*, 76 U.S. 531, 542 (1869) ("That the President had power, if not otherwise yet with the sanction of Congress, to grant a *general* conditional pardon, has not been seriously questioned.") (emphasis added)); *Armstrong v. United States*, 80 U.S. 154 (1871) (upholding pardon of all persons involved in rebellion against the United States during the Civil War).

[306] *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

[307] Michael D. Sant'Ambrogio, *Agency Delays: How A Principal-Agent Approach Can Inform Judicial and Executive Branch Review of Agency Foot-Dragging*, 79 Geo. Wash. L. Rev. 1381, 1391 (2011).

[308] See, for example, *City of Los Angeles v. Patel*, 135 S. Ct. 2443 (2015).

executing the laws, promulgate rules and regulations in the form of recommendations to the legislature (indeed, many agencies already do exactly this.[309]). Lawmakers would benefit from the specialized knowledge of the bureaucrats that wrote the proposals, but would retain their power to guard against agency officials' abuses through the natural slowness of the legislative process, with all its veto points. If this alternative sounds unsatisfying, it might be because the real reason for legislative delegation is not Congress's lack of time or expertise, but rather the desire to effect changes in the law that could not have occurred through the ordinary, constitutionally-prescribed legislative process—which some might say overvalues representation and deliberation, and undervalues regulatory flexibility and technocracy. But this logic only serves to underscore the structural argument for legislative delegation's unconstitutionality, in that it essentially admits that legislative delegation meaningfully circumvents constitutional principles.

Of course, full exploration of the public-policy side of the nondelegation debate would be too ambitious an undertaking for this paper. But I think a few more brief observations are in order on this subject, the first of which is that proponents of broad delegations of power seem to think that in the absence of administrative rulemaking, our complex society would suffer from a shortage of regulation—a concern that strikes me as greatly overstated. There are, to put it simply, a lot of laws. In 1940, then-Attorney General Robert Jackson lamented that "[w]ith the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone,"[310] an observation that has become exponentially more true in the years since. Despite repeated attempts, "no exact count of the

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[309] Consider Christopher J. Walker, *Federal Agencies in the Legislative Process: Technical Assistance in Statutory Drafting* (Report to the Administrative Conference of the United States, Nov. 2015).

[310] The Federal Prosecutor, Address Delivered at the Second Annual Conference of U.S. Attorneys (Apr. 1, 1940).

number of federal statutes that impose criminal sanctions has ever been given, but estimates from the last fifteen years range from 3,600 to approximately 4,500,"[311] while the "number of criminally-enforceable, administratively-generated rules" has recently been "estimated at between 10,000 and 300,000."[312] And all this in addition to criminal law at the state level! When the situation is assessed in light of the familiar principle that, in construing criminal statutes, it is presumptively "not a defense that an accused is honestly mistaken in believing that certain conduct is not an offense, does not know that the conduct is criminal, had a certain belief concerning the existence of a particular legal status, or believed in good faith that he or she was acting lawfully"[313]; and of the fact that many modern criminal offenses are not *malum in se*, such that an ordinary person would intuitively know not to engage in the prohibited conduct[314]; a recent finding that the average American professional commits three felonies a day is hardly a shock.[315] And, in addition to all the foregoing criminal prohibitions, there is, of course, a regime of regulation backed by civil penalties, the prolixity of which makes the body of criminal law look like cliff notes. Between 1975 and 2016, the Code of Federal Regulations' page count has grown nearly every year, from less than 75,000 to over 175,000, and its word count now exceeds 103 million.[316] The count of "restrictive" words in the CFR (measured by the prevalence of "shall," "must," "may not," "required," and "prohibited") has increased at a similar rate over the

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[311] Michael Cottone, *Rethinking Presumed Knowledge of the Law in the Regulatory Age*, 82 Tenn. L. Rev. 137, 141 (2014).

[312] Ronald A. Cass, *Overcriminalization: Administrative Regulation, Prosecutorial Discretion, and the Rule of Law*, 15 Engage 14, 19 (2014).

[313] 22 C.J.S. Criminal Law: Substantive Principles § 112 (2018).

[314] It is, for example, a federal crime to leave North or South Carolina with a used burlap bag. 7 U.S.C.A. § 7734(a)(1)(B) (West); 7 C.F.R. §301.80(b)(18).

[315] Consider Harvey Silverglate, *Three Felonies A Day: How the Feds Target the Innocent* (2011).

[316] McLaughlin, *The Code of Federal Regulations* (cited in note 9).

same period, from about 500,000 to almost 1.1 million.[317] Nor can we forget the additional 22 million words of federal statutory law or state regulatory regimes.[318] The allegation that Congress has become increasingly "gridlocked," or "do-nothing" in recent years (a complaint uncritically trotted out ad nauseam by all manner of high-profile observers[319]) is simply false; while increasingly fewer laws are enacted annually, the number of pages of public law enacted each year has grown fairly steadily since World War II.[320] A 2013 study of product market regulation in thirty-five OECD countries found that the United States was the ninth most regulated nation; the Netherlands, the United Kingdom, Austria, Denmark, New Zealand, Australia, Germany, Finland, Belgium, Japan, Canada, Ireland, Luxembourg, Norway, France, Iceland, Switzerland, and Sweden, among others, all had less severe regulatory burdens[321]; as of 2017, many of those countries outranked the United States in the ease-of-doing-business index,[322] as well as other comprehensive measures of economic freedom.[323] Since 1980 (a moment immediately followed

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[317] Council of Economic Advisors, *The Growth Potential of Deregulation* 4-5 (Oct. 2, 2017), archived at https://perma.cc/MQF5-J5E6.

[318] Bommarito and Katz, *Mathematical Approach* (cited in note 8). Some statutory law and some state regulation might be redundant with federal regulations, but I think the point still holds.

[319] See, for example, Derek Willis, *A Do-Nothing Congress? Well, Pretty Close* (N.Y. Times, May 28, 2014), archived at https://perma.cc/6C7B-8XPL; Christopher Ingraham, *Congressional gridlock has doubled since the 1950s* (Wash. Post, May 28, 2014), archived at https://perma.cc/Z7JA-TTTH; Dan Roberts, *Gridlocked Congress on track for least productive year in history* (Guardian, Dec. 3, 2013), archived at https://perma.cc/2NJB-36RT.

[320] *Vital Statistics on Congress*, *Table 6-4 (Brookings Inst., Mar. 2019), archived at https://perma.cc/Q79D-F7XY.

[321] Council of Economic Advisors, *Growth Potential* at 2 (cited in note 317); see also *Product Market Regulation 2013*, OECD.Stat, archived at https://perma.cc/S58S-S7HM.

[322] World Bank, *Doing Business 2017: Equal Opportunity for All* *7, archived at https://perma.cc/RK49-2WMU (ranking U.S. 8th behind New Zealand, Singapore, Denmark, Hong Kong, S. Korea, Norway, & U.K.).

[323] See, for example, *Economic Freedom of the World: 2017 Annual Report* (Fraser Inst. 2017), archived at https://perma.cc/YPJ7-V8ZW (ranking U.S. 11th behind Hong

by a period of what some deride as *de*regulation run amok), the cumulative effects of regulation have slowed U.S. GDP growth by 0.8% annually, according to one 2016 study.[324] True, some of these trends have slowed in the past two years. But the country is by no means suffering from a scarcity of rules governing private conduct.

That said, I would like to call into question the prevailing narrative that my views on the nondelegation issue ought to be associated with a "deregulatory," conservative, or "neoliberal" political philosophy,[325] an association stemming from the apparent premise that a more robust Nondelegation Doctrine would have a deregulatory bias. Although the two preceding pages of this paper would admittedly seem to justify this narrative, I think that, in fact, the magnitude of a revived or partially revived Nondelegation Doctrine's deregulatory effects is perhaps somewhat overestimated. I would expect a more formidable Nondelegation Doctrine to result in *less legislative activity, but not necessarily less law*; if Congress's power to delegate were curtailed or revoked, it is fair to assume that lawmakers would put greater care into codifying important regulations in statutory text, the result of which would be a scheme of regulation more difficult to undo through unilateral

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Kong, Singapore, New Zealand, Switzerland, Ireland, U.K., Mauritius, Georgia, Australia, and Estonia); Terry Miller, et al., *Highlights of the 2017 Index of Economic Freedom* (Heritage Found. 2017), archived at https://perma.cc/J7U7-2XW8 (ranking U.S. 17th behind numerous developed countries).

[324] Bentley Coffey, et al., *The Cumulative Cost of Regulations* (Mercatus Ctr., George Mason U. Working Paper, Apr. 2016), archived at https://perma.cc/F8S6-USYD; see also Alberto Alesina, et al., *Regulation and Investment*, 3 J. Eur. Econ. Ass'n 791 (2005); Antonio Ciccone and Elias Papaioannou, *Red Tape and Delayed Entry*, 5 J. Eur. Econ. Ass'n 444 (2007); Guglielmo Barone and Federico Cingano, *Service Regulation and Growth: Evidence from OECD Countries*, 121 Econ. J. 931 (2011); Giuseppe Nicoletti and Stefano Scarpetta, *Regulation, Productivity and Growth: OECD Evidence*, 18 Econ. Policy 9 (2003).

[325] See, for example, Whittington and Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Penn. L. Rev. at 387 (cited in note 16) ("In recent decades, many conservative scholars and lawyers have called for a revival of the nondelegation doctrine that they see as having been cast aside in … the early twentieth century.").

administrative action.[326] So during periods in which the executive displays a strong deregulatory zeal (as it currently does[327]), a Congress legislating in the shadow of a strengthened Nondelegation Doctrine may be as likely to entrench active government as it would to entrench limited government. I am not sure that these two potential effects of decreased legislative activity would cancel each other out, and indeed I admit that an increased specificity requirement for lawmaking would likely make congressional compromise more difficult and, on balance, move policy in a libertarian direction—but I expect that there would also be a force working to counteract any deregulatory tendency worked by a heartier nondelegation rule.

IV. SOME MODEST PROPOSALS

Though I have expressed doubt that the Nondelegation Doctrine would undermine effective governance to the extent that the its critics have claimed, I recognize that there is a difference between building an effective government in compliance with the Nondelegation Doctrine and bringing an entrenched system of administration into compliance with the Nondelegation Doctrine—especially because the Court would be constitutionally prohibited from bringing back the Doctrine and applying it only to future congressional enactments.[328] Resurrecting the Nondelegation Doctrine may require a major reworking of the modern administrative state, and even if the transition is feasible, many may

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[326] Deregulation-inclined administrators might attempt to effectively shrink government by soft-pedaling enforcement of existing law, but this is, as I explained in Part III(B), a poor substitute for actual repeal of regulation.

[327] Joe Johnson, *The Trump Administration's Historic Year in Deregulation* (United States Chamber of Commerce, Dec. 8, 2017), archived at https://perma.cc/2ZCB-CMMS.

[328] *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) ("When this Court applies a rule of federal law to the parties before it, that rule … must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.").

be unwilling to the take the risk. In addition to practical concerns, there may be principles rooted in the Constitution's original meaning that counsel against judicially upending over eighty years of precedent on which there has been substantial societal reliance.[329] Hamilton explained in *The Federalist* in 1788 that "[t]o avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." [330] Some have accordingly argued that a presumption of precedent's correctness is inherent in the concept of the "judicial Power," or the power to hear cases "in Law and Equity," that the Constitution vests in the federal courts.[331] Thus, in recognition of the potential disruption a revived Nondelegation Doctrine would present for our system of government, I review a few compromise approaches in which courts would enforce a more limited form of the Nondelegation Doctrine without a total upheaval of the modern administrative state, and discuss the potential implications of each.

A. CRIMINAL PENALTIES

One proposal is to revive the robust form of the Nondelegation Doctrine only in the criminal context. Justice Gorsuch has spoken favorably about such an approach, remarking that it is "easy enough to see why a stricter [nondelegation] rule would apply in the criminal arena. The criminal conviction and sentence represent the ultimate intrusions on personal liberty and carry with them the stigma of the community's collective condemnation—something quite different than holding someone liable for a money judgment because he turns

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[329] Although, if push came to shove, I suppose lawmakers could always enact a statute adopting the entire Code of Federal Regulations as law.
[330] Federalist 78 at 529 (cited in note 63).
[331] See Amar, *America's Unwritten Constitution* 238-41 (cited in note 70).

out to be the lowest cost avoider."[332] This proposal is not without historical support. Madison's 1799 committee report on the Alien Act seemed especially concerned about delegations of the power to issue rules backed by criminal penalties: "the powers referred to [the executive] department[] may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law; and, *on criminal subjects*, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law."[333] The Supreme Court has explicitly left open the question of whether Congress has less latitude to delegate powers in the criminal context.[334] And at least two states' judiciaries hold that their state constitutions impose greater restrictions on delegations of power to define crimes.[335] However, in some ways, resurrecting a strong Nondelegation Doctrine for criminal matters actually makes little sense. The best explanation of why comes, ironically, from Justice Gorsuch:

> Today's civil laws regularly impose penalties far more severe than those found in many criminal statutes[.] Ours is a world filled with more and more civil laws bearing more and more extravagant punishments …. Some of these penalties are routinely imposed and are routinely graver than those associated with misdemeanor crimes—and often harsher than the punishment for felonies. And not only are "punitive civil sanctions ... rapidly expanding," they are

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[332] *United States v. Nichols*, 784 F.3d 666, 672-73 (10th Cir. 2015) (Gorsuch dissenting from denial of rehearing en banc).
[333] Madison, *Report of the Committee* (cited in note 101).
[334] *Touby v. United States*, 500 U.S. 160, 166 (1991).
[335] See *State v. Miller*, 2003-0206 (La. 10/21/03), 857 So. 2d 423, 427; *B.H. v. State*, 645 S.2d 987 (Fla. 1994).

> "sometimes more severely punitive than the parallel criminal sanctions for the same conduct."[336]

In sum, I think a Nondelegation Doctrine limited to the criminal context would be easy to administer and historically justifiable, but perhaps not entirely logical, given that many civil penalties are arguably more severe than many criminal penalties.

B. ELIMINATING CHEVRON DEFERENCE

Another proposal for reinvigorating nondelegation values is to eliminate *Chevron* deference,[337] a principle of statutory interpretation holding that when Congress authorizes an agency to administer a statute and has not "directly spoken to the precise question at issue," a reviewing court infers from the fact that the "statute is silent or ambiguous with respect to the … issue" that it should defer to an "agency's … permissible construction of the statute [and] may not substitute its own construction of a statutory provision for a reasonable interpretation made by … an agency"[338] But as a means of keeping the spirit of the Nondelegation Doctrine alive, eliminating *Chevron* deference is weak tea. Congress could easily sidestep this maneuver by putting language in every agency-administered statute that made explicit what *Chevron* assumed to be implicit: that the agency charged with administering the law had discretion in resolving statutory ambiguity or vagueness. Indeed, this is probably exactly what would happen. Empirical research indicates that legislative drafters are generally familiar with *Chevron* and agree

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[336] *Sessions v. Dimaya*, 138 S. Ct. 1204, 1229 (2018) (Gorsuch concurring in part and concurring in judgment) (quoting Kenneth Mann, *Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law*, 101 Yale L. J. 1795, 1798 (1992)).

[337] See *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch concurring).

[338] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984).

with its underlying assumptions[339]; the fact that they continue to write statutes in the way they do indicates their general acquiescence to *Chevron* deference, and if it was eliminated, it is reasonable to assume that they would maintain the status quo by simply adding to future laws a provision stating that the agency charged with administering the law had discretion in resolving statutory ambiguity.

C. DELEGATIONS TO PRIVATE ENTITIES

One particularly intriguing proposal for a watered-down Nondelegation Doctrine revival is to apply the strong version of the principle only when legislative power is delegated to a private entity, an approach that some states' judiciaries have taken in interpreting their constitutions. [340] There are three principal reasons why delegations of legislative power to private entities might be especially objectionable. First, private entities are not part of the executive branch and typically have no special authority to execute or enforce the laws.[341] Therefore, at least at the federal level, they

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[339] Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside-an Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 994 (2013) (Chevron "is more rooted in our respondents' drafting practice than any other canon in our study … With respect to some … assumptions underlying Chevron, 93% reported that the technical or complex nature of the issue, 99% reported the need for consensus, and 77% reported lack of knowledge about the best answer results in ambiguities.").

[340] See, for example, *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997); *New Jersey State Firemen's Mutual Benevolent Association v. North Hudson Regional Fire & Rescue*, 340 N.J. Super. 577, 595 (App. Div. 2001); *Bulova Watch Co. v. Brand Distributors of North Wilkesboro, Inc.*, 285 N.C. 467 (1974).

[341] And if private entities were empowered by statute to exercise some executive power, the result may well be unconstitutional if the president (in whom the Constitution vests "[t]he executive Power") and any officials subject to his supervision lack meaningful control over the private entities' execution of the laws. See *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225, 1239 (2015) (Alito concurring); *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477 (2010).

would be unconstitutional because the Court's typical justification for delegation of rulemaking authority—that such delegations "merely confer[] upon [the agent] an authority and discretion, to be exercised in the execution of the law"[342]—does not apply; delegations to private entities are "unsupported by any legitimating theory to explain why [they were] not … delegation[s] of legislative power."[343] Though the Court has rejected precisely this argument with respect to the Federal Sentencing Commission[344] (wrongly, in my view), that decision could be overruled, or at least its holding could be cabined to the particular facts. Second, a reason for closer scrutiny of delegating to private entities the power to regulate their *own* industries is that, as the Court observed in *Carter*, "it is not … delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be … adverse to the interests of others in the same business."[345] While any legislator might have interests adverse to those of some class of individuals, lawmakers are generally democratically accountable, whereas private entities are not. Finally, delegations to private entities might raise greater concern because they are usually neither appointed nor removable by the president or other executive branch officer, nor are they subject to congressional oversight through the appropriations process.

A revived Nondelegation Doctrine applicable only to private delegations would be unlikely to have much practical effect at the federal level, as I can think of no current federal statute that delegates legislative power to a private entity. But if the revived Nondelegation Doctrine for private delegations was grounded in the Due Process clause (as it was in *Carter*), state legislatures would also be prohibited from delegating legislative power to private entities, since states, no

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[342] *J.W. Hampton*, 276 U.S. at 408-09 (quoting *State v. Chicago, M. & St. P. Ry. Co.*, 38 Minn. 281, 298 (1888)).
[343] *Mistretta*, 488 U.S. at 421 (Scalia dissenting).
[344] Id. at 361.
[345] 298 U.S. at 311.

less than the federal government, are bound by the dictates of Due Process. Yet *most* states delegate the power to regulate certain professions to boards composed of members of that profession.[346] A Nondelegation Doctrine applicable to private delegations at the state level would place the constitutionality of many such bodies in doubt. It is debatable in some cases whether these entities are "private" actors, although in many cases they are, as the Supreme Court recently concluded with respect to a state dentistry regulation board composed of dentists.[347] The Court has developed criteria in its antitrust jurisprudence for distinguishing private entities from public ones: a board or other regulatory body that is "controlled by active market participants" is a private actor unless it acts according to "clearly articulated and affirmatively expressed … state policy" and is "actively supervised by the State."[348] Perhaps this test could be applied in the Nondelegation context to distinguish public from private actors. One might then argue that the impact of this revived form of the Nondelegation Doctrine would be small, as it would be largely redundant with antitrust law. But this is not entirely true; a rule against private delegation would make such boards categorically illegal, whereas, under the Sherman Act, a plaintiff has the burden of proving, in each case, that "more than its own business suffered to support a claim; it must ultimately show that the

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[346] See *Simon v. Cameron*, 337 F. Supp. 1380, 1383 (C.D. Cal. 1970) ("State statutes are legion in which delegation of rule making authority and adjudicatory functions are made to private bodies. For example, in many states, only graduates of medical schools approved by the Council on Medical Education can be licensed as doctors by the state …. Moreover, the delegation is predicated upon a similar judgment on the part of the legislature, for the legislature in all of these instances has chosen to entrust a private body with law making functions in order to take advantage of a body with expertise … in a particular area requiring the exercise of professional judgment and specialized skills.").

[347] *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 135 S. Ct. 1101 (2015).

[348] Id. at 1110 (quoting *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013)).

challenged action harmed consumers, having a demonstrable, anticompetitive impact …. The Act does not outlaw an industry structure simply because it prevents competitors from achieving immediate parity."[349]

D. CONSTITUTIONALIZE MAJOR-QUESTIONS DOCTRINE

Another canon of administrative law is the "major questions" doctrine, an exception to *Chevron* deference. The major questions doctrine holds that, with respect to "question[s] of deep economic and political significance that [are] central to [a] statutory scheme,"[350] courts will depart from *Chevron*'s presumption "that Congress … intended … an implicit delegation" to the agency charged with administering the statute, on the theory that, "had Congress wished to assign [such a] question to an agency, it surely would have done so expressly."[351] A moderate form of the Nondelegation Doctrine might constitutionalize this rule of statutory interpretation. In other words, once a court concludes that a certain issue is a "major question," it should hold not that Congress must explicitly delegate to an agency the power to decide the issue, but rather that Congress is *constitutionally prohibited* from delegating such a decision, even if it makes its intent to do so explicit. This watered-down form of the Nondelegation Doctrine ends up looking a lot like Gary Lawson's proposed test for determining whether an unconstitutional delegation of power has occurred. The most obvious criticism of this proposal is that the standards it asks courts to apply are too indeterminate. The most obvious reply is that courts already apply these standards for identifying major questions in the field of statutory interpretation, and so there is no reason to think they are

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[349] 58 C.J.S. *Monopolies* § 10 (2018).
[350] *King v. Burwell*, 135 S. Ct. 2480, 2488-89 (2015) (quotations omitted) (quoting *Utility Air Regulatory Group v. Environmental Protection Agency*, 134 S. Ct. 2427, 2444 (2014)).
[351] Id. (quoting *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

too vague to use as a means of identifying unconstitutional delegations.

E. ALLOW LEGISLATIVE VETO OF ADMINISTRATIVE RULEMAKING

Finally, the Court could resurrect a qualified form of the Nondelegation Doctrine by allowing Congress to establish legislative veto procedures for administrative regulations. In *INS v. Chadha*, the Supreme Court declared unconstitutional a statutory provision providing that one house of Congress could vote to override a decision of the Attorney General not to deport a removable alien, reasoning that such a choice "involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President," as is prescribed by the Constitution.[352] The Court also made clear that even though some "Executive action under legislatively delegated authority … might resemble 'legislative' action in some respects," it is still formally an exercise of executive power, and so "Congress' authority to delegate portions of its power to administrative agencies provides no support for the argument that Congress can constitutionally control administration of the laws by way of a Congressional veto."[353] As I hope to have demonstrated in this paper, however, administrative regulation is in fact a form of legislation. That being so, it seems to me that a legislative veto procedure falling short of what is required by Article I for ordinary lawmaking should be allowed for administrative decisions that are essentially legislative in nature; if a rule is disapproved by both houses, or either of them, then we can be certain that it could not have been passed through the normal legislative process. In this way, "[p]ermitting the legislative veto at least under some circumstance[s] [is] arguably … truer to the original

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[352] 462 U.S. 919, 954-55 (1983).
[353] Id. at 954 n.16.

Constitution vision of separation of powers, by restoring final authority over lawmaking to Congress in some instances."[354]

V. CONCLUSION

I have no strong preference for any one of, or any combination of, the "compromise" approaches to reviving the Nondelegation Doctrine that I have presented here, each of which seems to have its advantages and drawbacks. But I hope to have at least established, through the preceding one hundred and fifty-odd pages of historical and structural argument, that any jurisprudential shift, even a slight one, away from the status quo and toward the originalist constitutional ideal of the Nondelegation Doctrine envisioned in Part II would be a welcome improvement.

Critical readers might take issue with the fact that I have given considerably more attention to the historical issue than to than to public-policy concerns. The reason for this, in addition to the practical need to keep the paper topic within a manageable scope, is that I believe that if a written constitution is going to serve any purpose at all, consideration of what the document means should precede consideration of whether the things it commands are good policy, and that if we are ever going to disregard the former in favor of our judgment about the latter, the burden should be on those advocating a departure from constitutional principle to demonstrate by extremely clear and convincing evidence that compliance with the basic law will produce bad outcomes. There is scarcely a commentator today who condemns the Twentieth-Century Supreme Court for its application of federal constitutional rights against subnational governments, even though this monumental change in constitutional doctrine (though plainly warranted based on a

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[354] David Bernstein, *Precedent and Other Threats to Originalism* (Wash. Post, Jan. 22, 2014), archived at https://perma.cc/9TEE-AECR.

historical reading of the Fourteenth Amendment[355]) clearly had serious public policy implications; the Court offered little in the way of empirical justification for what it was doing, instead preferring to base its decisions on pithy philosophical, and sometimes historical, insights about the importance of individual rights.[356] If this is the standard by which calls for fundamental shifts in constitutional jurisprudence are judged, I think I have more than carried my burden of persuasion here. I can, after all, point to the many states whose judiciaries continue to enforce some meaningful limits on the delegation of legislative power imposed by their respective constitutions[357]—all without crippling effective governance at the state level.

In sum, I hope to have adequately explained the basis of my disagreement with those legal academics who, after superficial structural and historical analysis of this issue, self-assuredly defend the vestigial condition the Nondelegation Doctrine, sometimes sarcastically lampooning the strawman contrary view (ostensibly meant to represent my position) that "extensive delegations" of regulatory power to administrative agencies have "left us serfs without a direct say in governance."[358] Such hyperbole ought not to obscure the central points I hope to have made in this paper: that the text and structure of our Constitution, as originally understood, suggest a more robust rule against Congress's delegation of legislative power than the one currently taken by the Supreme

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[355] See *Adamson v. California*, 332 U.S. 46, 71-72 (1947) (Black dissenting) ("My study of the historical events that culminated in the Fourteenth Amendment, and the expressions of those who sponsored and favored, as well as those who opposed its submission and passage, persuades me that one of the chief objects that the provisions of the Amendment's first section, separately, and as a whole, were intended to accomplish was to make the Bill of Rights, applicable to the states.").

[356] See, for example, *Gitlow v. New York*, 268 U.S. 652, 666 (1925); *Powell v. Alabama*, 287 U.S. 45, 67 (1932); *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Wolf v. Colorado*, 338 U.S. 25, 27 (1949); *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963); *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

[357] See note 200.

[358] Krent, *Delegation and Its Discontents,* 94 Colum. L. Rev. at 710 (cited in note 16).

Court—and that we have insufficiently heeded a key admonition that George Washington gave the country in his 1796 farewell address:

> It is important … that … those entrusted with … administration … confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another …. The necessity of reciprocal checks in the exercise of political power, by dividing and distributing it into different depositaries … has been evinced by experiments ancient and modern …. To preserve them must be as necessary as to institute them. If, in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit, which the use can at any time yield.[359]

Quite so. I get the sense that our first President, much like John Locke, James Madison, George Tucker, and Joseph Story, would have found unpersuasive—and perhaps even appalling—the contention that Congress's interest in administrative convenience excuses it from having to comply with the constitutional prohibition on delegating its legislative power. In disagreeing with this proposition, I am thus quite proud of the company I keep, and until our team counts among its members a majority of the U.S. Supreme Court, I will continue to dissent.

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[359] Reprinted in Joseph Story, *Familiar Exposition of the Constitution of the United States* 318 (1840).