

# FOREWORD

## Nondelegation Blues

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### ABSTRACT

*The nondelegation doctrine is in crisis. For approximately a century, it has been the Supreme Court's answer to questions about transfers of legislative power. But as became evident in *Gundy v. United States*, those answers are wearing thin. So, it is time for a new approach.*

*This Foreword goes beyond existing scholarship in showing how underlying principles, framing assumptions, constitutional text, and contemporary analysis are all aligned in barring transfers of power among the branches of government. Rarely in constitutional law does a conclusion about a highly contested question rest on such a powerful combination.*

*At the same time, the Foreword shows the refinement of the Constitution's approach. The Constitution's sophistication has not been much appreciated in the scholarly literature. It will be seen, however, that the Constitution was anything but crude in barring transfers of powers. For example, it adopted the separation of powers not in an absolute way but as a default principle. Although it precluded the transfer of legislative power, it left much room for executive rulemaking. Although its powers were externally exclusive, they were not always exclusive internally—that is, some of them could be subdelegated within the branches of government—and even externally, they permitted the exercise of much nonexclusive authority. Wherever one stands on delegation, these important distinctions qualify the larger point about the location of legislative power.*

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*Not narrowly an originalist or technical question, the problem here involves visceral social and political concerns. This Foreword therefore completes its historical analysis with contemporary considerations, showing that congressional transfers of legislative power rest on a legacy of prejudice and that, even today, they are mechanisms for discrimination, disenfranchisement, decision-making irrationality, and political conflict.*

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## INTRODUCTION

The nondelegation doctrine has long been a mainstay of the administrative state.<sup>1</sup> It explains how Congress can authorize agencies to make rules that might otherwise be considered executive exercises

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<sup>1</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 405–06 (1928).

of legislative power.<sup>2</sup> The nondelegation doctrine, however, is on its last legs. As revealed in *Gundy v. United States*,<sup>3</sup> much of the Supreme Court has lost confidence in the doctrine.<sup>4</sup> But the justices have not decided what will replace it. They, therefore, need to figure out what to do.

Recent scholarship confirms that the nondelegation doctrine is indefensible. Rather than endorse the doctrine, the scholarship scatters in other directions. According to some work, the Constitution places no obstacle on congressional delegation of legislative power.<sup>5</sup> Other scholarship argues that the Constitution limits or completely bars such delegation.<sup>6</sup> Yet other writing urges a middle ground—the compromise of confining important rules to Congress and leaving others to be delegated to agencies.<sup>7</sup> This Foreword is a further contribution to the debate, offering a broad account of the Constitution’s powers and the limits on transferring them.

At stake is not merely another judicial doctrine. The nondelegation doctrine is what justifies the shift of regulatory power from Congress to agencies.<sup>8</sup> It thus is a foundation stone of the administrative state. This Foreword argues that the Constitution bars any transfer of its tripartite powers among the legislative, judicial, and executive branches of government. At the same time, by distinguishing between the Constitution’s powers and the authority exercised under them, this Foreword explains how Congress can authorize agencies and courts to do some of what Congress could do by itself.

Put another way, the Constitution establishes its powers with more refinement than has been recognized. The literature on delegation—whether for it or against it—tends to miss much of the Constitution’s sophistication, and this is a pity, as it is difficult to have much confidence in a founding document that is so misunderstood as to seem crude and implausible.

Far from being simplistic, the Constitution differentiates its powers to avoid overlap. It adopts the separation of powers not in an absolute

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<sup>2</sup> *Id.* at 409.

<sup>3</sup> 139 S. Ct. 2116 (2019).

<sup>4</sup> *See id.* at 2130.

<sup>5</sup> Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–80 (2021).

<sup>6</sup> Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 90 (2020) [hereinafter Hamburger, *Delegating*]; Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 779–88 (2019); PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 377–402 (2014) [hereinafter HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?].

<sup>7</sup> Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1554–56 (2021); Gary Lawson, *Discretion as Delegation: The “Proper” Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 236, 265–67 (2005); DAVID SCHOENBROD, POWER WITHOUT RESPONSIBILITY 180–91 (1993).

<sup>8</sup> *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 408–09 (1928).

way but as a default principle.<sup>9</sup> It establishes its powers with external exclusivity but not always internal exclusivity.<sup>10</sup> Although its powers are externally exclusive, they permit much nonexclusive authority to be exercised under those powers.<sup>11</sup> It echoes old political theory barring the delegation of powers but speaks in terms of *vested* powers, and rather than simply vesting its powers, it carefully says its powers *shall be vested*.<sup>12</sup> Although it might seem necessary and proper to rearrange legislative or judicial power in the abstract, the Constitution authorizes Congress to enact what is necessary and proper only for carrying out the powers as vested by the Constitution.<sup>13</sup> These and other barriers to delegation—what the Supreme Court quaintly calls *nondelegation*—are relatively sophisticated—far more so than commentators have thus far understood.

### *Organization*

The nondelegation problem is the starting point for this inquiry. The Foreword then delves into the Constitution's analysis and closes with contemporary considerations.

*The Problem.* Parts I through III recognize the depth of the nondelegation problem. Part I explains that the collapse of the nondelegation doctrine has created a constitutional crisis. The nondelegation doctrine is fictional, lax, and of dubious constitutionality, and so has lost the confidence of the justices. The Court, therefore, needs to figure out its next step. Part II notes that one proposed solution is to embrace delegation. But this approach does not help the judges in sorting out cases, and it conflicts with the Constitution's underlying principles, its framing, and its text—a trifecta of unconstitutionality. Part III adds that some have hoped to “split the baby” along lines of importance—a solution that has much appeal in limiting without fully eliminating the administrative state. This baby splitting, however, conflicts with the Constitution, is not really supported by precedent in *Wayman v. Southard*,<sup>14</sup> and it would require judges to engage in political decisions about what is important or unimportant. Thus, both the delegation and the baby-splitting approaches fail to solve the nondelegation problem.

*Constitutional Analysis.* Parts IV through XI explore the Constitution's solution to the problem by working through layers of constitutional principles, both explicit and understated. Briefly enumerated,

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<sup>9</sup> See *infra* Part VI.

<sup>10</sup> See *infra* Part VII.

<sup>11</sup> See *infra* Part VIII.

<sup>12</sup> See *infra* Part X.

<sup>13</sup> See *infra* Part XI.

<sup>14</sup> 23 U.S. (10 Wheat.) 1 (1825).

they are consent, difference, separation, exclusivity, delegation, vesting, and necessary and proper.

Part IV notes that the fundamental principle underlying the American government is consent—to be precise, consent by an elected representative body. Without such consent, the law is without obligation or legitimacy. It therefore is worrisome that much legislative power, including binding legislative power, is delegated or otherwise shunted off to unelected agencies. Part V observes that the Constitution's tripartite powers are different—sufficiently different that they could be located in different branches. Part VI delves into the Constitution's separation of powers and how it allocates different powers to different branches of government. Rather than reciting separation as an abstract principle, the Constitution established it as a default rule.

These points about different and separated powers could be summed up as the exclusivity of the powers, so Part VII contrasts this exclusivity of the powers among the branches with the nonexclusivity of the powers within some of the branches. The internal nonexclusivity of the powers does not call into question their external exclusivity. Part VIII then distinguishes between authority and power. Although the Constitution's powers are exclusively in their respective branches, the authority exercised under these powers is not always exclusive. For example, both Congress and the courts can make rules of court, and both Congress and the executive can make rules on the distribution of benefits, but only by exercising their different powers.

The next question is delegation. Part IX shows that, contrary to some scholarly claims, the leading version of eighteenth-century delegation theory barred legislative subdelegation. It also explains delegation theory's enduring value in protecting the people's constitutional choices and their consensual representative government. The theory, in other words, protects both constitutional and legislative self-government. Far from being unfamiliar to the framers, nondelegation was a central question in 1787. At the start of the year, the New York legislature rejected any delegation of its legislative power to Congress, and during the summer, the Constitutional Convention in Philadelphia went even further by refusing to authorize any executive exercise of delegated powers.

As shown in Part X, the Constitution did not speak merely in terms of delegation; it more specifically “vested” its powers. Indeed, it said that they “shall be vested” in their different branches of government.<sup>15</sup> Article I thereby makes the location of legislative powers mandatory. Reinforcing this conclusion is the judicial vesting clause. Whereas Article III authorizes Congress to designate the location of much of the judicial power, Article I does not give Congress any such authority over

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<sup>15</sup> See, e.g., U.S. CONST. art. I, § 1.

legislative power. Yet another barrier to transfers of legislative power is Article II, as it vests the President with only executive power.

Part XI confirms that Congress cannot delegate its legislative powers by showing that the Necessary and Proper Clause was carefully written to avoid justifying any transfer of the vested powers. Indeed, the Necessary and Proper Clause offers another textual barrier to congressional delegation of legislative powers. It makes clear that carrying the legislative powers into execution is to be done through necessary and proper acts of Congress. The legislative powers therefore cannot be carried into execution through mere rules issued by agencies. The combination of the Necessary and Proper Clause with Articles I, II, and III reveals at least four textual obstacles to relocating legislative power.

*Contemporary Dangers.* Parts XII through XIV point out some contemporary risks of departing from the Constitution to allow transfers of legislative power. The nondelegation doctrine is too often analyzed in merely originalist or doctrinal terms—as if it were just a technical question about the Constitution’s or the Court’s distribution of powers. In fact, it is the fulcrum of a sobering crisis of governance and legitimacy. This Foreword therefore tops off its constitutional analysis by pointing to the dangers of disenfranchisement, irrational decision-making, and political conflict.

Part XII observes that dislocation of legislative power is discriminatory and disenfranchising. It dilutes voting rights and consensual representative government. It developed in the federal government in response to overtly racial and ethnic prejudice. And it was designed to limit the power of newly enfranchised but distrusted lower-class Americans. Although much of the distinctively racial and religious prejudice has abated, the transfer of legislative power under the guise of the nondelegation doctrine remains an instrument of discrimination and disenfranchisement along lines of class, politics, and religion.

Part XIII evaluates the transfer of legislative power in terms of the alleged rationality of administrative decision-making. The administrative process justifies itself on the basis of its rationality. But administrative power turns out to be structurally burdened with a series of decision-making biases. Part XIV adds that administrative lawmaking is destabilizing. It not only infantilizes Congress, inducing it to be irresponsible, but also tends to produce alienation and political conflict.

This Foreword ends with an appendix on early federal practices that are sometimes said to be instances of delegated legislative power. In fact, there appear to be no early federal instances of binding national domestic rulemaking. None. So while this Foreword mainly explores the conceptual objections to delegation, it is worth adding that delegation also has little support in early federal practices.

### *Practical Implications*

The practical implications of this Foreword can be put simply. The power to make binding rules cannot be moved out of Congress, and the power to make binding adjudications cannot be taken out of the courts. Although these consequences cut against the administrative state, they are not as severe as might be supposed.

It is often feared that a barrier to the delegation of legislative power would require Congress to make all rules and would bar any agency discretion. But nothing in the Constitution is so rigid. Instead, as argued here, the Constitution confines binding agency rules to Congress, and binding adjudications to the courts, while leaving room for a wide range of other agency rules and adjudications. Even as to binding rules, the Constitution would require little change in their framing or formulation. Agencies still could frame rules. The only difference would be that, whereas at present binding rules can be adopted by heads of agencies, a more constitutional approach would require agencies to send such rules to Congress to enact.

Put another way, the Constitution demarcates its own middle ground. As already hinted, scholars have attempted to find a compromise by distinguishing between important and unimportant rules—a suggestion that misreads language in the old case of *Wayman v. Southard*.<sup>16</sup> The Constitution's middle ground is different. It bars at least binding agency rules and adjudications while leaving room for a wide range of other agency rules and adjudications.

In sum, this Foreword goes beyond existing scholarship in showing how multiple principles, the drafting, the text, and contemporary concerns are all aligned in barring transfers of power among the branches of government. Rarely in constitutional law does a conclusion about a highly contested question rest on such a powerful combination.



Transfers of the Constitution's tripartite powers violate the principle of representative consent, ignore the differences among the powers, violate the separation of powers, undermine their exclusivity, conflict with principles barring subdelegation, violate the Constitution's command that the powers *shall be vested* and other textual barriers, and cannot be justified by the Necessary and Proper Clause. Such transfers, moreover, come with profound social and governmental dangers. Any one of these concerns should raise doubts about relocating the Constitution's tripartite powers. Taken together, they strongly suggest that the Constitution cannot be understood to permit such transfers.

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<sup>16</sup> *Wayman*, 23 U.S. (10 Wheat.) at 42–43; see Wurman, *supra* note 7, at 1493–94; Lawson, *supra* note 7, at 236.



## I. NONDELEGATION BLUES: CURRENT DOCTRINE

The nondelegation doctrine is in crisis. For approximately a century, it has been the answer to questions about transfers of legislative power.<sup>17</sup> But its internal contradictions and its laxity are an embarrassment. And its constitutional foundations are in question. So, as became apparent in *Gundy v. United States*, the Supreme Court is struggling to figure out what to do with it.<sup>18</sup>

### A. *Fictional and Lax*

As at least some justices began to recognize in *Gundy* and its aftermath, the nondelegation doctrine is collapsing under the weight of its own untruth and laxity.<sup>19</sup> The nondelegation doctrine purports to hold the line against congressional delegation but actually lets Congress delegate legislative power to agencies—as long as Congress provides them with an “intelligible principle.”<sup>20</sup> The theory is that when an agency carries out such a principle, it is merely executing the statute and so is not exercising legislative power.<sup>21</sup> In reality, however, the nondelegation doctrine serves as little more than an open gate for the delegation of legislative power—even if the sign above the gate declares the opposite.

In thus claiming to bar delegation while largely enabling it, the doctrine is fictional. The doctrine’s fictional quality has never been a secret. Even James Landis—the eminent advocate of administrative power—recognized that its claims were “[c]onfused.”<sup>22</sup> And in the past two decades, many scholars have described it as a “fiction.”<sup>23</sup>

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<sup>17</sup> See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>18</sup> See *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting).

<sup>19</sup> See *id.* at 2130–31 (Alito, J., concurring); *id.* at 2131–48 (Gorsuch, J., dissenting); Paul v. United States, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

<sup>20</sup> *J.W. Hampton*, 276 U.S. at 409.

<sup>21</sup> *Id.* at 409–11.

<sup>22</sup> JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 15 (1938) (“[T]he resort to the administrative process is not, as some suppose, simply an extension of executive power. Confused observers have sought to liken this development to a pervasive use of executive power.”). Landis echoed Elihu Root’s 1916 observation that “the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight.” *Id.* at 50 (quoting ELIHU ROOT, *ADDRESSES ON GOVERNMENT AND CITIZENSHIP* 535 (1916)).

<sup>23</sup> See Markham S. Chenoweth & Michael P. DeGrandis, *Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court’s Decision in Seila Law Makes CFPB’s Unlawful Structure Even Worse*, U. CHI. L. REV. ONLINE (Aug. 27, 2020), <https://lawreviewblog.uchicago.edu/2020/08/27/seila-chenoweth-degrandis/> [https://perma.cc/UF49-4B5R] (referring to the “intelligible principle fiction”); Travis H. Mallen, Note, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 432 (2005) (noting that the sole test for impermissible delegations—the “intelligible principle” test—“advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not

The doctrine is also utterly lax. It places no clear limit on who can be a delegate to exercise legislative power. So, it allows Congress to delegate its power even to centrally executive departments and officers, such as the Attorney General.<sup>24</sup> And because the President can issue executive orders directing executive agencies and officers, he can effectively control their delegated legislative power—as if he were an elective king, ruling if not by proclamations, then at least by executive orders. The doctrine thus shifts much legislative power to the President and his subordinates and leaves any veto to Congress, producing a strange inversion of constitutional structure. The nondelegation doctrine even lets Congress delegate its legislative power to nearly private bodies, such as Amtrak.<sup>25</sup>

The nondelegation doctrine also places no substantive limit on delegation. In letting Congress relocate its powers as long as it provides an “intelligible principle,” the doctrine merely requires a congressional process that is too easily satisfied.<sup>26</sup> Even when used to empower agencies, the doctrine is entirely lax about the substantive extent of permissible delegations. The intelligible principle required to be laid down by Congress is so indeterminate as to be almost unconfining. In some cases, the Supreme Court does not clearly require any intelligible principle.<sup>27</sup> This standard is so vague that its toothless application is perhaps inevitable. And the failure to enforce what little confining effect can be found in the doctrine only accentuates the contradiction between the doctrine’s claim of nondelegation and the reality of what it accomplishes. All in all, it is no exaggeration to say that the doctrine is both fictional and too permissive.

Nonetheless, for nearly a century, the doctrine remained respectable.<sup>28</sup> It reconciled administrative power with the Constitution, and

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involve too much discretion”); Linda D. Jellum, *The Impact of the Rise and Fall of Chevron on the Executive’s Power to Make and Interpret Law*, 44 *LOY. U. CHI. L.J.* 141, 157 (2012) (“It is, perhaps, a fiction to say that agencies are enforcing congressionally made law.”); Note, *Judicial Review of Congressional Factfinding*, 122 *HARV. L. REV.* 767, 774 n.57 (2008) (noting that the Court has “fictionalized Congress’s grants of authority as something other than legislative power in order to maintain that they do not violate separation of powers”); Kathryn A. Watts, *Rulemaking as Legislating*, 103 *GEO. L.J.* 1003, 1052–53, 1060 (2015) (referring to the doctrine as a “doctrinal fiction”). Justice White observed that in practice “restrictions on the scope of the power that could be delegated diminished and all but disappeared.” *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting).

<sup>24</sup> See *Gundy*, 139 S. Ct. at 2128–29.

<sup>25</sup> *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 53–54 (2015). As the Court noted, Congress by statute has declared that Amtrak “is not a department, agency, or instrumentality of the United States Government.” *Id.* at 50.

<sup>26</sup> See *J.W. Hampton*, 276 U.S. at 409.

<sup>27</sup> See *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting). In his dissent, Justice Gorsuch writes that the underlying statute “gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders.” *Id.* at 2143.

<sup>28</sup> See *J.W. Hampton*, 276 U.S. 394; *Gundy*, 139 S. Ct. 2116.

therefore had great appeal as a sort of useful doublespeak. All that was required was for the justices to shut their eyes to the reality that “non-delegation” doctrine permits what it claims to forbid. In a free society, however, power cannot long be sustained with untruth. And the growing amount of delegated power has revealed the doctrine’s falsity for all to see. Whatever could have been said with a straight face in the middle of the twentieth century, the “nondelegation doctrine” now clearly is a delegation doctrine.<sup>29</sup>

The flood of delegated legislative power has brought some justices around to recognizing that the doctrine may be too permissive.<sup>30</sup> The doctrine long seemed acceptable while the shift of legislative and judicial powers to the executive was moderated by political restraint. Now that such restraint has been thrown to the winds, the Supreme Court is beginning to see that if the doctrine stands in its current form, little will remain of the separation of powers and representative lawmaking.<sup>31</sup> And even if the principles of equality and consent that require representative lawmaking have lost much of their currency, it is difficult for justices to avoid noticing the simmering discontent provoked by the deliberate exclusion of the public from much of the lawmaking process.

The doctrine reduces the Constitution’s allocation of powers to an initial distribution of cards, with no lasting effect on the ensuing game. In the resulting redistribution, legislative power is exercised by the unelected, and judicial power is exercised by the politically accountable. Little could do more to undermine public confidence in the system.

At a more mundane level, the nondelegation doctrine does not adequately help judges sort out their cases. Administrative power requires a relaxation of the Constitution’s allocation of legislative powers to Congress and judicial power to the courts.<sup>32</sup> But the development of the administrative state does not mean that anything goes. For example, it does not mean that Congress can delegate any and all legislative power to agencies.<sup>33</sup> Thus, even if there is to be some administrative power, there needs to be a gatekeeping principle. So, wherever judges stand on the administrative state, they need a working measure of when to permit an agency’s exercise of legislative or judicial power. But that

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<sup>29</sup> Hence, the shift to defending administrative regulation in such terms. See Mortenson & Bagley, *supra* note 5.

<sup>30</sup> See *Gundy*, 139 S. Ct. at 2139–40 (Gorsuch, J., dissenting); *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (statement of Kavanaugh, J., respecting the denial of certiorari).

<sup>31</sup> See cases cited *supra* note 30. The nondelegation doctrine is only one of many highly permissive judicial doctrines that initially seemed plausible in a period of some political restraint, but eventually revealed themselves to be dangerously unrestrictive. Consider, for example, the judicial doctrines on commerce power and necessary and proper.

<sup>32</sup> For the “anything goes” approach, see generally Mortenson & Bagley, *supra* note 5.

<sup>33</sup> See *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

is exactly what the nondelegation doctrine does not provide. It is so lax that it no longer can be understood to serve the gatekeeping function.

The doctrine's falsity and laxity are thus devastating. And that's even before one gets to questions about what the Constitution requires.

### B. *Unconstitutional?*

Adding to the unease about the nondelegation doctrine are the constitutional doubts. The court in *Gundy* left such questions for another day, but a constitutional reckoning cannot be put off indefinitely.<sup>34</sup> One difficulty is that the nondelegation doctrine seems to lack any clear foundation in the Constitution. There does not seem to be a constitutional hook on which to hang so heavy a hat. As Professor Cass Sunstein observes, "The Constitution . . . does not in terms forbid delegations of that power."<sup>35</sup> But the Constitution is rarely beyond dispute, and it reveals itself in many inexplicit ways, including its structure and its understated assumptions. What is more, in a government of enumerated powers, the question is whether the Constitution gives Congress the power to delegate, not whether it bars delegation.<sup>36</sup>

Still, there is some merit to Professor Sunstein's point. The nondelegation doctrine has been presented merely as a judicial doctrine, not as a constitutional provision.<sup>37</sup> And exactly how it is founded in the Constitution has not always been clear. Far from offering a textual hook, the Constitution does not seem to provide even a rusty old nail.

A key question, therefore, has been what the Constitution says about delegation. Some of the justices in *Gundy* focused on this problem.<sup>38</sup> Since then, scholars have responded by exploring the

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<sup>34</sup> See *id.* at 2131.

<sup>35</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); see also Kurt Eggert, *Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 716, 718 (2021) (noting absence of nondelegation doctrine in Constitution's text); Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 89 (2010) ("The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers."); Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323, 2325 (2022) ("[T]he Constitution's text does not directly address legislative delegations . . ."); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1762 (2002) ("[N]othing in the language or structure of the Constitution supports [nondelegation] . . .").

<sup>36</sup> Indeed, John Locke already wrote that a legislature's delegation of its legislative power cannot rest simply on its legislative power, but needs to rest on a distinct grant of power to the legislature to make new legislators. See *infra* Part IX.B.

<sup>37</sup> Sunstein, *supra* note 35, at 316–17; see also Posner & Vermeule, *supra* note 35, at 1722–23 (referring to nondelegation doctrine as having "constitutional pretensions").

<sup>38</sup> See *Gundy*, 139 S. Ct. at 2123–24 (plurality opinion) (explaining that nondelegation is a judge-made doctrine); see also *id.* at 2133–42 (Gorsuch, J., dissenting) (criticizing "intelligible principle misadventure").

Constitution's history. Professors Julian Mortenson and Nicholas Bagley argue that the Constitution places no limit at all on congressional delegation of legislative power—a bold view that has provoked serious concerns about the underlying evidence.<sup>39</sup> Professor Ilan Wurman looks for a middle ground in *Wayman v. Southard*, relying on Marshall's opinion to suggest that Congress can delegate some legislative power, but not what is “important.”<sup>40</sup> Professor Jed Shugerman traces dictionary uses of the word *vested* in the eighteenth century and concludes that it did not imply any limit on divesting; but for other reasons, he doubts the Constitution permitted any delegation of legislative power.<sup>41</sup> Yet other scholars—including David Schoenbrod, Aaron Gordon, and this Author—argue that the Constitution bars Congress from delegating any legislative power.<sup>42</sup>

Tellingly, the nondelegation doctrine and its intelligible principle standard have not been saliently defended in the current scholarly debate. Professors Mortenson and Bagley say there was no nondelegation doctrine at the founding.<sup>43</sup> Certainly the current nondelegation doctrine has no originalist foundation.<sup>44</sup>

But there remains the question of whether the Constitution reveals a more serious nondelegation principle or another barrier to transferring powers. This question is crucial, and it inevitably will soon come before the Court.<sup>45</sup>



The nondelegation doctrine is a debacle. It is utterly fictional, claiming to bar delegation while actually permitting it. It places no substantive limit on delegation, thus permitting a substantial abandonment of representative lawmaking and independent judging. And it is of questionable constitutionality. No wonder the justices are debating it. Their difficulty is figuring out where to go next.

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<sup>39</sup> See generally Mortenson & Bagley, *supra* note 5. For some of the evidentiary errors in their account, see Hamburger, *Delegating*, *supra* note 6, at 88 (“[T]he article’s most central historical claims are mistaken. For example, when quoting key eighteenth-century authors, the article makes errors of omission and commission—leaving out passages that contradict its position and misunderstanding the passages it recites.”); Wurman, *supra* note 7, at 1493–94 (“Mortenson and Bagley have not come close to demonstrating their claim that there was no nondelegation doctrine at the Founding. Although the history is messy, there is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little evidence that clearly supports the proposition that the Founding generation believed that Congress could freely delegate its legislative power.”). For further evidentiary problems, see *infra* notes 105, 165 and accompanying text.

<sup>40</sup> Wurman, *supra* note 7, at 1516–17.

<sup>41</sup> Jed Handelsman Shugerman, *Vesting*, 74 *STAN. L. REV.* 1479, 1558 (2022).

<sup>42</sup> SCHOENBROD, *supra* note 7, at 155–56; Gordon, *supra* note 6, at 722; Hamburger, *Delegating*, *supra* note 6, at 88.

<sup>43</sup> Mortenson & Bagley, *supra* note 5, at 277.

<sup>44</sup> See Sunstein, *supra* note 35, at 322.

<sup>45</sup> See *supra* notes 17–18 and accompanying text.

## II. THE DIFFICULTY OF GOING DEEP ON DELEGATION

A much-touted alternative to the nondelegation doctrine is to abandon the pretense of limits and embrace delegation.<sup>46</sup> From such a perspective, the Constitution lets Congress delegate its legislative power to the executive.<sup>47</sup>

This approach, however, runs into difficulties, which will become apparent throughout this Foreword. Going deep on delegation turns out to be wrong as a matter of underlying principles, constitutional text, early federal precedents, and contemporary considerations. And already here in Part II, it is important to begin with some methodological concerns.

### A. *Text-Free Originalism*

An initial problem with the delegationist theory is its combination of originalism and an astonishing disregard for the Constitution's text. The delegationist scholarship is self-consciously originalist.<sup>48</sup> But it is a strange originalism, which does not engage with the Constitution as written.

The Constitution's relevant texts—that's right, *texts* in the plural—are not analyzed in the delegationist scholarship. Two of the significant texts are quoted in passing but not discussed.<sup>49</sup> The other two are not even quoted.<sup>50</sup> It is bad enough for allegedly originalist scholarship to declare, "Look, Ma! No text!"<sup>51</sup> It is even worse when, in fact, there are at least four relevant constitutional provisions—as will be explained in Parts X and XI.

### B. *Excluding Antidelegation Evidence*

Rather than examine the text, the delegationist scholarship focuses on eighteenth-century ideas of delegation. Yet it brazenly omits crucial

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<sup>46</sup> See, e.g., Mortenson & Bagley, *supra* note 5, at 293–313.

<sup>47</sup> See *id.* at 293–313.

<sup>48</sup> See generally *id.*

<sup>49</sup> Mortenson & Bagley, *supra* note 35, at 2325 (quoting legislative Vesting Clause); *id.* at 2329 n.29 (quoting legislative and executive Vesting Clauses).

<sup>50</sup> See Mortenson & Bagley, *supra* note 5; Mortenson & Bagley, *supra* note 35 (not analyzing or even quoting the judicial Vesting Clause or the Necessary and Proper Clause).

<sup>51</sup> Instead of using eighteenth-century ideas to try to understand the Constitution's text, the Mortenson and Bagley article demands proof of an eighteenth-century consensus favoring nondelegation. See Mortenson & Bagley, *supra* note 5, at 280. Constitutional thought, however, has always been a matter of controversy and debate, and it therefore cannot fit within a "consensus." Moreover, what matters is not the generic thought of eighteenth-century Americans but which ideas prevailed in the drafting and ratification of the Constitution. So, the text matters, and it is a mistake to attempt to discern an illusory consensus.

evidence. For example, although it speaks of “the Founders’ deafening silence” about limits on delegation, it sustains this impression only by omitting the notable delegation debates in New York and Philadelphia in 1787.<sup>52</sup> Those debates are simply unmentioned!

Indeed, delegation was forcefully rejected in those debates, and this too is conveniently suppressed. It will be seen below that when the New York legislature in early 1787 considered delegating power to Congress, it repudiated such delegation.<sup>53</sup> The state’s constitution provided that its legislative power “shall be vested” in its legislature—the same phrase as in the U.S. Constitution—and this was understood to preclude delegation.<sup>54</sup> It also will be seen that when the framers of the federal Constitution debated executive power in the summer of 1787, they assumed that the executive needed a specific grant of power to exercise congressionally delegated powers, and they rejected such authorization.<sup>55</sup>

One might have thought these debates and decisions against delegation would count as evidence of eighteenth-century ideas on delegation—indeed, as especially important evidence for understanding the Constitution. But they do not merit even a footnote by Mortenson and Bagley.<sup>56</sup> Really, not one. Instead, readers are repeatedly told about the Founders’ “deafening silence” about limits on delegation.<sup>57</sup> With that pronouncement, the constitutional texts and the framing debates and decisions against delegation conveniently just disappear. Go figure.

### C. *Not Conceptually Layered*

In addition to omitting the Constitution’s text and the decisions against delegation, the delegationist scholarship omits a range of important underlying principles. It may initially seem to make sense to focus nearly exclusively on the single idea of delegation. Certainly, Supreme Court doctrine frames the question as a matter of nondelegation.<sup>58</sup> There is, however, more to be considered.

No principle is an island. The idea of delegation interacted with other concepts, and eighteenth-century commentators relied on a range

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<sup>52</sup> See Mortenson & Bagley, *supra* note 35, at 2334.

<sup>53</sup> See *infra* Section IX.C.

<sup>54</sup> See *infra* Section X.C.

<sup>55</sup> See *infra* Section X.D.

<sup>56</sup> See generally Mortenson & Bagley, *supra* note 5; Mortenson & Bagley, *supra* note 35. Although it is disputed whether the framing debates are authoritative indicia of the Constitution’s meaning, they clearly are important evidence of the ideas circulating at the time and, in particular, of the ideas that informed the Constitution. So, there is no excuse for leaving them unmentioned.

<sup>57</sup> Mortenson & Bagley, *supra* note 35, at 2334; see also *id.* at 2336 (“historical silence”).

<sup>58</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019).

of different principles to explain their views.<sup>59</sup> So, rather than focus exclusively on delegation, this Foreword explores the layers of underlying principles.

One such principle is that of representative consent. Americans fought for representative lawmaking against the British from 1776 until 1783, and established representative lawmaking in 1787 and 1788. How probable is it that they simultaneously left much lawmaking to be done by persons they did not elect? This question of consent will be examined beginning in Part IV.

Another principle is the separation of powers. How probable is it that the Constitution establishes merely an initial separation of powers, leaving Congress to rearrange the powers as it wishes? This separation of powers problem will be pursued beginning in Part VI and elsewhere.

When scholarship focuses on the single principle of nondelegation—let alone when it omits crucial evidence about that principle—it cannot recognize the weight of other principles. In contrast, the layered approach adopted here allows one to see the problem in the round—in its full dimensionality—with all of its conceptual richness.



The prodelegation approach is untenable for multiple reasons. It ignores the Constitution's text. It ignores the framing debates and decisions rejecting delegation. And it ignores other relevant principles, such as representative consent and separation of powers. To omit such things is not compatible with originalism, historical scholarship, or candid constitutional debate.

### III. THE UNIMPORTANCE OF IMPORTANCE

The impending collapse of the nondelegation doctrine has provoked interest in finding a middle ground—a standard not as meaningless as current doctrine but not so strong as to completely unravel the administrative state.<sup>60</sup> Such a standard would have to be substantive, not merely a matter of congressional process. And the primary candidate for this middling position centers on importance.<sup>61</sup> Under this theory, Congress would have to enact important rules but could leave agencies to make those that are unimportant.<sup>62</sup>

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<sup>59</sup> See generally 1 JAMES BURGH, *POLITICAL DISQUISITIONS* 3 (London 1774); GRANVILLE SHARP, *A DECLARATION OF THE PEOPLE'S NATURAL RIGHT TO A SHARE IN THE LEGISLATURE* 4 (London 1774).

<sup>60</sup> See, e.g., Wurman, *supra* note 7, at 1494, 1497–98.

<sup>61</sup> See *id.* at 1497.

<sup>62</sup> *Id.*



### A. *Not in the Constitution but Perhaps in Precedent?*

The Constitution does not obviously lend itself to the endeavor of distinguishing between important and unimportant rulemaking.<sup>63</sup> Nor should this be a surprise. The proposal to use importance as a measure of permissible delegation often seems more about political compromise than constitutional principle.<sup>64</sup>

The problem is that the Constitution enumerates its legislative powers by subject matter, and vests these powers in Congress, without saying anything about differentiating important and unimportant legislation.<sup>65</sup> So any attempt to find such a division must depend on something that, at least thus far, is very elusive. Whatever the constitutional foundation of the importance-unimportance distinction, it does not meet Professor Sunstein's expectation of an express constitutional provision;<sup>66</sup> nor is it discernable on more temperate interpretative assumptions. In fact, it seems directly opposed to the Constitution's statement that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."<sup>67</sup> If *all* such powers are in Congress, how can Congress delegate some but not others?

The importance test thus must rest on precedent rather than the Constitution. Hence, the current interest in Marshall's opinion in *Wayman v. Southard*—notably from Gary Lawson and Ilan Wurman.<sup>68</sup>

But *Wayman* is not much of a precedent for delegation, even a moderate version of it. Marshall emphasized that his ideas were merely dicta.<sup>69</sup> And whatever he thought, contemporaries did not think he was legitimizing any delegation. In the margin where Marshall began to discuss delegation, the reporter Henry Wheaton summarized that the Process Act "is not a delegation of legislative authority, and is conformable to the constitution."<sup>70</sup> So it is no surprise that the leading judicial explorations of an importance test have not bothered with *Wayman*. Justice Kavanaugh did not even mention it when he hinted in *Paul v. United*

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<sup>63</sup> See U.S. CONST. art. I, § 8.

<sup>64</sup> See Wurman, *supra* note 7, at 1555.

<sup>65</sup> U.S. CONST. art. I, § 8.

<sup>66</sup> See Sunstein, *supra* note 35, at 322.

<sup>67</sup> U.S. CONST. art. I, § 1.

<sup>68</sup> Wurman, *supra* note 7, at 1516–17; Lawson, *supra* note 7, at 236.

<sup>69</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43, 46, 48–49 (1825) (“[T]he precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily. . . . But the question respecting the right of the Courts to alter the modes of proceeding in suits at common law, established in the Process Act, does not arise in this case. That is not the point on which the Judges at the circuit were divided, and which they have adjourned to this Court.”).

<sup>70</sup> *Id.* at 2 (Henry Wheaton's notes accompanying the decision).

*States*<sup>71</sup> that Congress could not delegate “major policy questions.”<sup>72</sup> And Chief Justice Roberts did not allude to *Wayman* when elevating major questions from the logic of interpretation to a clear statement doctrine.<sup>73</sup> As these justices understand, *Wayman* does not do what scholars sometimes attribute to it.

### B. *Importance Not the Measure in Wayman*

Even if *Wayman* could be relied upon, Marshall’s opinion did not actually propose that importance should be used as a standard for distinguishing exclusive and nonexclusive powers. On the contrary, the Chief Justice merely observed the importance of powers that were exclusively legislative.

*Wayman* was a Kentucky challenge to a federal rule of court.<sup>74</sup> If it had been an ordinary rule of court, which involved “the regulation of the conduct of the officer of the Court in giving effect to its judgments,” Marshall could have simply concluded that a “general superintendence over this subject seems to be properly within the judicial province, and has been always so considered.”<sup>75</sup> But rather than involve rules of court in general, *Wayman* involved an execution on a judgment, and the federal rules on such process could be understood to bind members of the public.<sup>76</sup> So although Marshall did not want a narrow, Kentucky rule to displace any federal rule, he faced a real difficulty.<sup>77</sup> The federal courts were authorized by Congress to make the rules,<sup>78</sup> but there was a danger that these rules moved from what “that which may be done by the

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<sup>71</sup> 140 S. Ct. 342 (2019).

<sup>72</sup> *Id.* at 342 (statement of Kavanaugh, J., respecting the denial of certiorari) (expressing skepticism about “congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority”). So limited are the traditional sources for a major questions delegation doctrine that he could only cite a recent case on *Chevron* deference. *Id.* (drawing on, inter alia, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). Justice Thomas has written:

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.”

*Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

<sup>73</sup> See *West Virginia v. EPA*, 142 S. Ct. 2587, 2610–14 (2022).

<sup>74</sup> *Wayman*, 23 U.S. (10 Wheat.) at 3.

<sup>75</sup> *Id.* at 45.

<sup>76</sup> *Id.* at 44.

<sup>77</sup> *Id.* at 48–49.

<sup>78</sup> The 1789 Judiciary Act authorized federal courts “to make and establish all necessary rules for the orderly conducting business in the said courts.” Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83. Expanding upon this, the 1792 Process Act provided that federal courts could alter or add to “the forms of writs, executions and other process” and “the forms and modes of proceeding.” Process Act of 1792, ch. 36, § 2, 1 Stat. 275, 276.

judiciary, under the authority of the legislature” toward “that for which the legislature must expressly and directly provide.”<sup>79</sup>

When the federal rules on execution were challenged in *Wayman* as unconstitutionally delegated legislative power, Marshall argued that, although Congress itself could establish such rules, it also could authorize the courts to do so: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>80</sup> Nonetheless, there were instances in which “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”<sup>81</sup>

Rather than elaborate the distinction between exclusive and non-exclusive legislative powers, Marshall merely observed:

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 a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>82</sup>

This is the slender reed on which commentators base their suggestion that importance is the measure of what is exclusive and what is not.

Marshall made abundantly clear that he was not stating a legal standard for what must be exclusively regulated by Congress. His point was that “[t]he line has not been exactly drawn.”<sup>83</sup> And because he was merely offering dicta, the line had to remain unexplored: “the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”<sup>84</sup>

So, in speaking about “those important subjects, which must be entirely regulated by the legislature itself,”<sup>85</sup> he was merely alluding to the significance of the subjects on the congressional side of the line, not delineating or offering a measure of that line. His opinion in *Wayman* does not support using the notion of importance to define what must be left for Congress and what it can leave to others. Nonetheless, some academics look to *Wayman* to justify relying on importance as a measure of exclusively legislative powers.<sup>86</sup> This approach seems appealing

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<sup>79</sup> *Wayman*, 23 U.S. (10 Wheat.) at 46.

<sup>80</sup> *Id.* at 42–43.

<sup>81</sup> *Id.* at 43.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 46.

<sup>85</sup> *See id.* at 43.

<sup>86</sup> *See* Wurman, *supra* note 7, at 1516–17; Lawson, *supra* note 7, at 236, 265. Justice Gorsuch alludes to the importance distinction without quite making clear where he stands on it. *Gundy v. United States*, 139 S. Ct. 2116, 2136, 2145, 2147 (2019) (Gorsuch, J., dissenting).

precisely because it splits the baby—because it places some limits on delegation while continuing to permit much administrative power.

The difficulties, however, remain. Recall that the Constitution enumerates legislative powers by subject-matter and vests *all* of them, without any qualification, in Congress.<sup>87</sup> So the Constitution seems an inhospitable nursery for the birth and nurturing of a newly important importance test. The situation is no better when one turns to early precedent. *Wayman*—offering mere dicta, which was not understood as justifying any delegation—stands alone as the alleged judicial foundation of the importance test.<sup>88</sup> And that test cannot really be found in *Wayman* without some indifference to what Marshall actually said.

### C. *The Importance of Not Relying on Importance*

Moderate as it seems to slice the baby down the middle, this may be as objectionable as in King Solomon's time. The problem is not merely that it conflicts with the Constitution and misreads *Wayman*; it also is untenable and even repugnant.

For starters, the importance standard would bar much executive rulemaking on privileges that has always been considered entirely constitutional. Throughout the existence of the United States, from the Founding to the present, it has been widely accepted that Congress can authorize the executive to make many important and lawful rules—for example, on the duties of executive officers,<sup>89</sup> on the treatment of enemy aliens and aliens in amity,<sup>90</sup> on the distribution of pensions,<sup>91</sup> on the distribution of federal lands,<sup>92</sup> and on other privileges. The resulting rules have always been viewed as important. Very important. Yet it has almost always been understood that, when acting with statutory authorization, the executive can make such rules.<sup>93</sup> On this, there is little if any disagreement between the defenders and the critics of administrative

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<sup>87</sup> U.S. CONST. art. I, § 1.

<sup>88</sup> See *Wayman*, 23 U.S. (10 Wheat.) at 42, 48.

<sup>89</sup> See, e.g., Act of July 27, 1789, ch. 4, § 1, 1 Stat. 28, 28–29 (amended 1789) (authorizing the principal officer of the Department of Foreign Affairs to “conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct”).

<sup>90</sup> For regulation of aliens in amity, see Philip Hamburger, *Beyond Protection*, 109 COLUM. L. REV. 1823, 1896–97 (2009).

<sup>91</sup> See, e.g., Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121 (repealed 1795) (providing pension for the wounded soldiers and that invalids “shall be placed on the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President of the United States”).

<sup>92</sup> See, e.g., OFF. OF INDIAN AFFS., NO. 115, REGULATIONS AND FORMS FOR APPLICATIONS, AND THE AUTHENTICATION OF THE SAME, TO BE OBSERVED BY INDIANS APPLYING FOR THE BENEFIT OF THE BOUNTY-LAND LAWS (1855), in 1 S. EXEC. DOC. NO. 34-1, pt. 1, at 553–54 (1855).

<sup>93</sup> See *supra* notes 89–92 and accompanying text.

power.<sup>94</sup> The importance standard thus conflicts with otherwise undisputed assumptions about lawful executive rulemaking.

This awkwardness—that all sorts of executive rules on privileges are important—could be dexterously avoided. For example, one could use importance as a measure of lawful delegation only when examining legally binding rules. This way, important executive rules on privileges could pass muster. But just as there is no reason to think that the Constitution permits delegation of unimportant lawmaking, so there is no reason to think that it imposes this test only outside the realm of privileges.

Another difficulty is that the importance test is not determinate or predictive. It cannot help judges or anyone else sort out cases. So, the adoption of a concocted importance test would only be the beginning of the inquiry. Judges would still have to develop some metric for determining which rules are important and which are not.

It is at this point that the importance test becomes especially dangerous. One risk is that importance is apt to be measured narrowly and insensitively in terms of money. A financial measure of importance offers a pleasant sense of objectivity, but at what cost? Consider, for example, a mundane agency rule with a financially “trivial” burden on a small group of ordinary individuals. Although an economist at the Office of Management and Budget or at the Office of Information and Regulatory Affairs may say with confidence that this rule is unimportant, it can surely have profound consequences for the lives of those affected. In other words, a monetary analysis of importance will ignore what is financially important for the indigent or impecunious. It also will tend to brush aside nonfinancial concerns, regardless of their importance by other metrics. There is no reason to think that the Constitution would measure importance in this narrow and dehumanizing manner.

The dangers of such an approach are evident from the proposed Regulations from the Executive in Need of Scrutiny Act (“REINS Act”).<sup>95</sup> This bill would require prior approval in a joint resolution of Congress for “major rules”—meaning primarily those with over \$100 million in economic significance.<sup>96</sup> This is just a proposed statute. Could the constitutional line between importance and unimportance be drawn with an arbitrary dollar figure? And could the courts step in to do this where the Constitution says nothing of the sort? Such a monetary distinction between what is exclusively congressional and what can be left to the executive may fit the vision of a businessperson or economist. But it would be passing strange from a Supreme Court justice.

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<sup>94</sup> Compare Wurman, *supra* note 7, at 1512–14, with Hamburger, *supra* note 90, at 1896–97.

<sup>95</sup> Regulations from the Executive in Need of Scrutiny Act of 2019, S. 92, 116th Cong. (2019).

<sup>96</sup> *Id.* sec. 3, § 801(a)(3). Section 804 defines “major rule” to mean any rule resulting or likely to result in “an annual effect on the economy of \$100 million or more.” *Id.* § 804(2)(A).

On the other hand, without a financial delineation of importance, there is another risk, that the judges will pursue an undefined and therefore wavering line between importance and unimportance. They may end up chaotically tacking back and forth in response to popular winds or their personal preferences.

Indeed, a judicial inquiry into the idea of importance is apt to be very political. Whether or not something is important will be perceived differently by different persons, depending on their situations. It therefore is unsurprising that such decisions tend to be political. It is the role of the people or their legislature to decide whether a right or duty is important enough to become a matter of law.<sup>97</sup> At that point, the judges should apply the duty or protect the right, even if they take another view of the matter. Their office is to discern the law, not to make political judgments, let alone about something as open-ended as importance.

An importance distinction would introduce a strange inequality. It would preserve the freedom of elective self-government for Americans whose activities seem important, while largely disenfranchising the rest.

The Boston Tea Party is a reminder that apparently trivial things can be important, depending on one's vantage point. The American Revolution began in Boston Harbor with a protest against a three-penny tax on tea—something that the British considered a minor imposition.<sup>98</sup> The British, however, did not realize the importance of living under laws made with elective consent.<sup>99</sup> Importance, in short, is apt to be understood differently by the rule makers and those who are ruled.

Ultimately, importance fails as a standard because it is antithetical to the Constitution's allocation of powers. As already suggested, the Constitution enumerates legislative powers in terms of subject matter, and it vests *all* legislative powers in Congress, not in the President or the courts.<sup>100</sup> However this is understood, it is not a half-and-half measure that splits the child between Congress and the executive, let alone on grounds of importance. Thus, even unimportant uses of legislative power remain legislative and vested in Congress. They are as legislative and as vested in Congress as important uses of legislative power.



The delegation problem is serious. Part I showed that the current nondelegation doctrine is unsustainably fictional, lax, and unconstitutional. Part II observed that the scholarly embrace of delegation blithely ignores the framing decisions and the constitutional texts that

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<sup>97</sup> See U.S. CONST. art. I, § 1.

<sup>98</sup> BENJAMIN L. CARP, *DEFIANCE OF THE PATRIOTS: THE BOSTON TEA PARTY AND THE MAKING OF AMERICA 19–20* (2010).

<sup>99</sup> *Id.* at 2–3.

<sup>100</sup> U.S. CONST. art. I, §§ 1, 8.

reject delegation. Part III has added that a middle ground along the line of importance is also implausible. Whatever else might be drawn from Marshall's opinion in *Wayman*, the Chief Justice did not offer importance as a measure of the line between exclusive and nonexclusive powers. He had good reason for not doing so, because this measure is untenable, dangerous, and absent from the Constitution. So how is a lawful position to be found? The answer will come in a series of conceptual layers, the first being consent.

#### IV. REPRESENTATIVE CONSENT

The key principle underlying the formation of the United States was consent—in particular, consent by an elected representative body.<sup>101</sup> This consent was essential for enactment of both the Constitution and statutes. Without such consent, these laws would not really be laws; they would be without obligation or legitimacy.

This need for representative lawmaking calls into doubt any claim that lawmaking originally could be transferred to a body that was not elected—that did not make law with representative consent. It also suggests the contemporary illegitimacy of any such transfer of lawmaking power.

##### A. *The Importance of Representative Consent*

The fundamental question in political theory has long been how to reconcile individual freedom with governmental power. The answer lies in the natural significance of consent. Already in the Middle Ages, and more systematically in the seventeenth and eighteenth centuries, theorists expounded the need for consent to government.<sup>102</sup> Their theory

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<sup>101</sup> THE DECLARATION OF INDEPENDENCE (U.S. 1776).

<sup>102</sup> The rich history of the medieval development of ideas of consent has been traced, for example, by 6 SIR R. W. CARLYLE & A. J. CARLYLE, *A HISTORY OF MEDÆVAL POLITICAL THEORY IN THE WEST* 83, 149, 460 (New York, Barnes & Noble n.d.). Brian Tierney notes glosses circa 1200 that “commonly cited the Roman law dictum ‘What touches all is to be approved by all.’” Brian Tierney, *Origins of Papal Infallibility 1150–1350*, in 6 *STUDIES IN THE HISTORY OF CHRISTIAN THOUGHT* 1, 48 (Heiko A. Oberman ed., 1972). And this was sometimes tied to notions of the “consent of a corporation which was binding on all its members.” *Id.* at 49. For the importance of the maxim “*Vox populi, vox dei*” in Parliament in 1327, see PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 74 (2008). The peak of medieval philosophical requiring consent came from NICHOLAS OF CUSA, *THE CATHOLIC CONCORDANCE* 98 (Paul E. Sigmund, trans., Cambridge Univ. Press 1995) (“[I]f by nature men are equally powerful and equally free, then the true and well-ordered authority of one who is a fellow and equal in power can only be established by the choice and consent of others, just as laws are established by consent.”).

For Locke, see JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 348–51 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690). Among the other English theorists whose ideas about consensual government were widely appreciated in America was Algernon Sidney, who had argued

was roughly as follows. Individuals in the absence of government are not naturally subordinated to each other but are equally free.<sup>103</sup> Individuals therefore cannot be subject to anyone, including any government, without their consent.<sup>104</sup>

This was the fundamental principle underlying the formation of the United States. As put by the Continental Congress's October 1774 Declaration and Resolves, Americans were "entitled to life, liberty, and property: and they have never ceded to any sovereign power whatever, a right to dispose of either without their consent."<sup>105</sup> Or in the words of the Declaration of Independence, "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness," and "[t]hat to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed."<sup>106</sup>

Individuals, therefore, cannot be bound by law, except consensually. In a democracy this consent is personal, and in a republic it is through the election of representatives. Although initially there must be consent to the form of government, legislation also requires consent.

John Locke, for example, spoke of "Bonds of Laws made by persons authorized thereunto, by the Consent and Appointment of the People, without which no one Man, or number of Men, amongst them, can have Authority of making Laws, that shall be binding to the rest."<sup>107</sup> The philosopher added: "When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make

from principles of nature that "governments arise from the consent of men, and are instituted by men according to their own inclinations." ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT 49 (Thomas West ed., 1996) (1704).

Incidentally, the Mortenson and Bagley article chops up one of Sidney's sentences to suggest that he countenanced statutory delegations of legislative power: "Sidney observed . . . that while the King 'can [not] have the Legislative power in himself,' the legislative branch could choose to give him the 'part in it' that 'is necessarily to be performed by him, as the Law prescribes.'" Mortenson & Bagley, *supra* note 5, at 298 (alteration in original). But when the sentence as a whole is examined, it merely refers to how ancient English constitutional custom gave the king the role of assenting to bills. SIDNEY, *supra* at 572–78.

<sup>103</sup> LOCKE, *supra* note 102, at 289.

<sup>104</sup> *Id.* at 289, 348 ("Men being . . . by Nature, all free, equal and independent, no one can be put out of this Estate, and subjected to the Political Power of another, without his own *Consent*.").

<sup>105</sup> Decl. and Resolves of the Continental Congress (Oct. 14, 1774), in JOURNAL OF THE PROCEEDINGS OF THE CONGRESS, HELD AT PHILADELPHIA, SEPTEMBER 5, 1774, at 60 (Philadelphia, William Bradford & Thomas Bradford 1774).

<sup>106</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776). In the Pennsylvania Ratifying Convention, James Wilson quoted the Declaration, including the statement that "governments are instituted among men, deriving their just powers from the consent of the governed," and he observed, "This is the broad basis on which our independence was placed; on the same certain and solid foundation [the U.S. Constitution] is erected." 2 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 472–73 (Merrill Jensen ed., 1976).

<sup>107</sup> LOCKE, *supra* note 102, at 425–26.



Laws without Authority, which the People are not therefore bound to obey.”<sup>108</sup> On the basis of this need for elective representation, American colonists declared it “the first principle in civil society, founded in nature and reason, that no law of the society can be binding on any individual[], without his consent, given by himself in person, or by his representative of his own free election.”<sup>109</sup> Rules could bind only if made by an elected representative legislature.

This became an eighteenth-century refrain. An English commentator explained that “the consent of the whole people, as far as it can be obtained, is indispensably necessary to every law, by which the whole people are to be bound; else the whole people are enslaved to the one, or the few, who frame the laws for them.”<sup>110</sup> An American more concretely observed that one of the “first rights” of Americans was “that of voting in all cases where themselves are to be bound.”<sup>111</sup>

The theory of consent through an elected representative body is not, of course, without complexities.<sup>112</sup> For example, consent to past laws can only be presumed for many individuals, including those who have been barred from voting, who change their minds, or who are of later generations. And to preserve this presumption of consent, individuals must be free to emigrate. But the main point is simple. If law is not to rest merely on brute force, but is to have obligation, it must be adopted with a broad degree of consent, and in an extended republic, this means through the election of representatives.

### B. *The Administrative Repudiation of Representative Consent*

Most governments in human history have not relied on elected representative legislatures to make laws.<sup>113</sup> The United States is therefore

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<sup>108</sup> *Id.* at 426.

<sup>109</sup> A REPORT OF THE RECORD COMMISSIONERS OF THE CITY OF BOSTON, CONTAINING THE BOSTON TOWN RECORDS, 1758–1769, at 261 (Boston, Rockwell and Churchill 1886) (describing Resolutions of the Boston Town Meeting on Sept. 13, 1768).

<sup>110</sup> 1 BURGH, *supra* note 59, at 3 (emphasis omitted). Legislative power was that of “consulting, debating, enacting laws, and forming regulations, according to which all are to conduct themselves.” *Id.* at 5. Granville Sharp wrote of “that maxim of the English Constitution, that ‘Law, to bind all, must be assented to by all.’” SHARP, *supra* note 59, at 4 (emphasis omitted) (quoting THOMAS BRANCH, PRINCIPIA LEGIS ET AEQUITATIS 107 (London, 5th ed. 1824)).

<sup>111</sup> Philodemus [Thomas Tudor Tucker], *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice*, in 1 AMERICAN POLITICAL WRITING DURING THE FOUNDING ERA, 1760–1805, at 606, 611 (Charles S. Hyneman & Donald S. Lutz eds., 1983).

<sup>112</sup> Granville Sharp wrote: “It must indeed be acknowledged, that the Representation of the people of England is not so perfect as equity may seem to require, since very many individuals have no Vote in Elections, and consequently cannot be said expressly to give *their Assent* to the laws by which they are governed.” SHARP, *supra* note 59, at 4. He therefore said that “there can be no legal appearance of *Assent* without some degree of *Representation*.” *Id.*

<sup>113</sup> See CHRIS THORNHILL, DEMOCRATIC CRISIS AND GLOBAL CONSTITUTIONAL LAW 1–6 (2021).

a notable experiment in self-government.<sup>114</sup> But administrative regulation threatens this self-governance. It displaces the Constitution's avenue for elective representative consent to legislation.

Administrative power thus revives government from above. The Constitution established government with elective authority from below, and this became a reality in the long struggle for equal voting rights. But administrative rulemaking displaces that power exercised from below with a new version of power from above. Such rulemaking is therefore at odds with the very foundation of our government's legitimacy.

The transfer of legislative power out of Congress—whether done candidly through delegation or less candidly through the nondelegation doctrine—is not merely a matter of judicial doctrine or even of constitutional law. At issue are all the blessings of self-government and all the dangers of control from above—not to mention the near millennium of struggle in common law systems to establish consensual government through law.



The administrative degradation of consensual lawmaking is eating away at our government's legitimacy. It is a severe problem, and all the judicial excuses in the world, including the nondelegation doctrine, cannot overcome the damage. So even before getting to questions about the different powers, their separation, and so forth, there is reason to worry about the loss of consensual self-government through our elected representative legislature.

## V. DIFFERENT POWERS

The Constitution's tripartite powers are substantively different from each other. It thus is possible for the Constitution to vest each of them in a different branch of government.

Defenders of delegated power tend to define legislative power in terms of the legislative process. From this perspective, legislative power is whatever is done through the Constitution's process for lawmaking—that is, through enactment and presentment.<sup>115</sup> Similarly, it is said that executive power is just an “empty vessel,” which includes whatever Congress delegates to the executive for it to execute.<sup>116</sup> Along the same

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<sup>114</sup> See, e.g., Letter from George Washington to Catharine Sawbridge Macaulay Graham (Jan. 9, 1790), [https://founders.archives.gov/documents/Washington/05-04-02-0363#print\\_view](https://founders.archives.gov/documents/Washington/05-04-02-0363#print_view) [<https://perma.cc/NHX6-YVS4>] (“The establishment of our new Government seemed to be the last great experiment, for promoting human happiness, by reasonable compact, in civil Society. It was to be, in the first instance, in a considerable degree, a government of accomodation [sic] as well as a government of Laws.”).

<sup>115</sup> Posner & Vermeule, *supra* note 35, at 1725–26.

<sup>116</sup> *Id.* at 1725; Mortenson & Bagley, *supra* note 5, at 279–81.

lines, perhaps the judicial power is to be understood as whatever is done through judicial process. In this view, the processes define the powers.

But the Constitution's tripartite powers were understood to be different in their very nature, not merely in their processes. A committee of Pennsylvania's Council of Censors said in 1784 that the Pennsylvania Constitution allocates power "to the legislative or the executive, according to its nature."<sup>117</sup> In the 1787 Constitutional Convention, James Madison proposed that the executive should be able to exercise congressionally delegated powers only if they were "not Legislative nor Judiciary in their nature"—a proposal to which this Foreword will return.<sup>118</sup> A decade later, Madison assumed that "all will agree" that each of the different departments was of a different "nature."<sup>119</sup> In this vision, each of the tripartite powers is, at least at its core, naturally different from the others.

In tracing the natural differences among the Constitution's powers, Part V will often allude to legal obligation—the binding quality of law and legal judgments. Such enactments and judgments traditionally were thought to come with both internal and external obligation—that is, with both an interior commitment to obey and the threat of exterior coercion by government.<sup>120</sup> This binding or sticky character of law is a key measure of the differences among the powers.

<sup>117</sup> A VIEW OF THE PROCEEDINGS OF THE SECOND SESSION OF THE COUNCIL OF CENSORS, CONVENED AT PHILADELPHIA, ON THE 1ST OF JUNE, 1784 (1784), reprinted in THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at 101 (Harrisburg, John S. Wiestling 1825).

<sup>118</sup> 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 66–67 (Max Farrand ed., 1911) [hereinafter FARRAND]; see *infra* Section IX.C. Madison's proposal was rejected because its objectives had already been achieved. *Infra* Section IX.C.

<sup>119</sup> 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, H.D. (Va. 1798), reprinted in INSTRUCTIONS TO THE SENATORS OF VIRGINIA IN THE CONGRESS OF THE UNITED STATES 31 (Richmond, Thomas Ritchie 1819) ("However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments 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.").

<sup>120</sup> The *locus classicus* for discussion of the obligation of law was the Institutes of Justinian. THE INSTITUTES OF JUSTINIAN 282 (J.T. Abdy & Bryan Walker trans., Cambridge, Cambridge Univ. Press 1876) ("*Obligatio est iuris vinculum quo necessitate adstringimur alicuius solvendae rei secundum nostrae civitatis iura.*"); see also 1 SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS 48 (Basil Kennett trans., London 2d ed. 1710) (1672) [hereinafter PUFENDORF, NATURE AND NATIONS] ("The Roman Lawyers call it *Bond of the Law.*"). On this basis, it was conventional to speak of both the force and the obligation of law. See SAMUEL VON PUFENDORF, 2 DE OFFICIO HOMINIS ET CIVIS JUXTA LEGEM NATURALEM LIBRI DUO 14 (Frank Gardner Moore trans., New York, Oxford Univ. Press 1927) (1682) (associating "the power to oblige, that is, to impose an inward necessity, and the power to force or compel by penalties to observe the law"). Echoing such ideas, Americans sometimes spoke about the force and obligation of law. See, e.g., *An Act to Repeal the Several Acts of Assembly for Seizure and Condemnation of British Goods Found on Land* § 2, in WILLIAM WALLER HENING, ACTS PASSED AT A GENERAL ASSEMBLY OF THE COMMONWEALTH OF

### A. *Judicial Power*

The Constitution vests the courts with the “judicial Power”—a power primarily involving binding judgments about binding law.<sup>121</sup> This power peripherally includes things like making rules of court and otherwise controlling court rooms and officers.<sup>122</sup> At its core, however, the judicial power has always been to resolve cases and controversies by making binding judgments about binding law.<sup>123</sup>

The judgments of courts are binding on the parties.<sup>124</sup> And cases and controversies have traditionally involved questions of law—that is, questions about legally binding duties and rights.<sup>125</sup> Reinforcing this understanding of judicial power, the judges, by virtue of their office, were and still are understood to have a duty to exercise their judgment in accord with the law of the land.<sup>126</sup> This is what it means to be a judge.<sup>127</sup> So, for layers of reasons, the judicial power is a power to make judgments binding on the parties about binding law.

This dual focus on legal obligation—the obligation of both the underlying laws and the judgments of the courts—fits with other, more

VIRGINIA 195 (Richmond, John Dunlap & James Hayes 1783) (“[T]his Act shall have the force and obligation of [l]aw, from and after the thirteenth day of May, in the present year.”).

Note H.L.A. Hart’s observations about the difficulty of understanding law as a coercive command and about the corresponding significance of an internal sense of obligation. H.L.A. HART, *THE CONCEPT OF LAW* 42, 48 (1961) (regarding the inability to understand law as a limit on officials when the law is considered mere coercive command).

<sup>121</sup> U.S. CONST. art. III, § 1.

<sup>122</sup> See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 41–43 (1825); *Michaelson v. United States*, 266 U.S. 42, 65–66 (1924).

<sup>123</sup> U.S. CONST. art. III, §§ 1–2.

<sup>124</sup> That court judgments were binding was so basic it was rarely discussed. Nonetheless, it occasionally came to the surface. For example, it was said that “there is a Necessity of obeying” the order or “Command of a Judge.” See *Oldum v. Allerton & Pope*, 2 Va. Colonial Dec. B331, B332 (General Ct. of Va. 1739).

<sup>125</sup> See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 565 (2007) (on the difference between private rights and mere privileges); HAMBURGER, *supra* note 102, at 537–43 (on the seventeenth-century distinction between understanding of “cases” and “controversies” in contrast to political or philosophical questions, which were “extra-judicial,” and on 1780 Virginia dispute over the contrast between “cases” and “questions”).

In the Constitutional Convention, James Madison worried about the proposal that the Supreme Court should have jurisdiction over “cases arising Under the Constitution.” 2 FARRAND, *supra* note 118, at 430. He feared that this would bar the other branches of government from exercising their “right of expounding the Constitution.” *Id.* He therefore suggested that the Supreme Court should be “limited to cases of a Judiciary Nature”—this being an allusion to the traditional understanding that only actual legal disputes between parties were judicially cognizable. See *id.* But the convention unanimously agreed to the grant of jurisdiction without this limitation—“it being generally supposed that the jurisdiction given was constructively limited to cases of a Judiciary nature.” *Id.*

<sup>126</sup> See HAMBURGER, *supra* note 102, at 9–14, 105–06 (on the office and duty of judges in English law).

<sup>127</sup> See *id.*

familiar observations about judicial power. Although the courts can issue binding judgments, the judges cannot give advisory opinions.<sup>128</sup> Nor can the courts give judgments that are subject to executive or legislative review.<sup>129</sup> And because judicial power resolves only decisions about binding law, the courts traditionally could not adjudicate nonbinding rules, such as rules on the distribution of benefits to which the claimant did not have a legal right.<sup>130</sup> The Supreme Court has increasingly recognized that the denial of a benefit can sometimes have the same effect as a constraint and so should be treated as if it were binding.<sup>131</sup> But even though such cases stretch the idea of what is binding, they do not disturb the broader argument here that judicial power centrally involves binding judgments about binding law.

In contrast to the courts, the Congress and the executive are not vested with the judicial power.<sup>132</sup> And under their constitutional powers, they do not enjoy any authority to make legally binding judgments about binding duties or rights. The closest thing to an exception is the Senate's power to try impeachments.<sup>133</sup> But the Constitution carefully ensures that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," leaving

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<sup>128</sup> Letter from Sup. Ct. Justs. to George Washington (Aug. 8, 1793), <https://founders.archives.gov/documents/Washington/05-13-02-0263> [<https://perma.cc/6L93-9B5V>] (refusing to give advisory opinion).

<sup>129</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792) (refusal of courts to make decisions under Invalid Pension Act that would be reviewable by the political branches); 6 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, at 53–54, 370–71 (Maeva Marcus ed., 1998) (providing details of *Hayburn's Case*); see *Gordon v. United States*, 2 U.S. (2 Wall.) 561 (1864) (holding that the Supreme Court lacks jurisdiction to hear appeals from the Court of Claims, apparently because a court could not exercise executive power and its judicial power could not be subject to review by the political branches).

<sup>130</sup> Note the crucial distinction between judges and courts. When a claimant lacked a legal right to a benefit, an individual *judge* could decide the question, but a *court* could not. Individual judges could lawfully exercise executive power and therefore could be assigned executive determinations about the distribution of benefits to which there was no legal right. For example, a pension under the Invalid Pensions Act was not a legal right—as is clear because the judicial determinations about eligibility were reviewable by the political branches. So, the determinations could have been given to individual judges. As summarized by Maeva Marcus, Congress tended to impose such duties “on individuals [in the judiciary] rather than on the courts themselves.” 4 *THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800*, *supra* note 129, at 723. The problem in *Hayburn's Case* was that Congress mistakenly gave the determinations to the courts, not the individual judges. See *supra* note 129.

<sup>131</sup> *Goldberg v. Kelly*, 397 U.S. 254 (treating the denial of some benefits as a denial of due process); *Mathews v. Eldridge*, 424 U.S. 319 (1976) (specifying a test for when a denial of benefits amounts to a denial of due process).

<sup>132</sup> Compare U.S. CONST. arts. I–II, with *id.* art. III.

<sup>133</sup> *Id.* art. I, § 3.

any punishment to the courts “according to Law.”<sup>134</sup> In thus confining its effect to a denial of political privileges, the impeachment provision minimizes its intrusion on rights. So, even though impeachment is an exception to the broader point here about judicial power, it at least partly recognizes that binding judgments about binding law are judicial in nature.

Another possible exception might have been the capacity of the legislature to pass bills of attainder. In such enactments, legislation substitutes for a binding judgment about binding law. The Constitution, however, expressly bars such intrusions into judicial power.<sup>135</sup>

Of course, the Congress and the executive must each interpret the law to make sure it stays within its binding duties and respects the binding rights of others. But such interpretations are not binding judgments; they are merely the efforts of the political branches to avoid violating the law. For example, the executive can mimic aspects of judicial procedures when granting patents, titles to federal lands, and other privileges, or when making determinations about the factual predicates for statutory duties.<sup>136</sup> This executive imitation of judicial process is suitable for such consequential decisions. But although these decisions can confer valuable rights and can vaguely imitate judicial process, that’s not to say they are exercises of judicial power. They thus do not call into question the distinctively judicial character of the judicial power vested in the courts.

During the past century or so, the development of administrative power has relocated much judicial power. With legislative authorization and judicial blessing, executive and independent agencies make binding judgments about binding laws—or at least about binding rules, interpretations, and other administrative edicts.<sup>137</sup> The claim at this point, however, is merely that the judicial power is, at its core, the power to make binding judgments in cases and controversies about binding duties and rights, and that this is substantively different from the legislative or executive powers. Whatever one thinks of Congress’s transfer of judicial power to agencies, the judicial power is different from the other powers. It thus is possible for the Constitution to locate the judicial power solely in the courts, not the other branches.

### B. *Legislative Powers*

The Constitution vests its legislative powers in Congress and then enumerates them.<sup>138</sup> Like the judicial power, the legislative powers

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<sup>134</sup> *Id.*

<sup>135</sup> *Id.* art. I, § 9.

<sup>136</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 193–211.

<sup>137</sup> *Id.* at 228.

<sup>138</sup> U.S. CONST. art. I.

centrally come with legal obligation. But the judicial and the legislative powers are different. Whereas the core of judicial power is to render binding judgments about binding rights or duties in cases or controversies,<sup>139</sup> legislative power most basically involves an exercise of will in ordaining legally binding rules.<sup>140</sup> This power to will binding rules is the natural core of legislative power.

*Legislative Will.* Law has long been understood as the will of the legislature. A statute or constitution was thus an expression of legislative will, this being what made the law binding.<sup>141</sup> If this legislative will sounds like intent, that is not a coincidence. Intent is often understood as an approach to interpretation, as if it were merely a methodology chosen by some judges.<sup>142</sup> Yet traditionally it was understood as the lawmaker's will, which was binding.<sup>143</sup> Judges had to give effect to legislative will because this was binding as law.

The relevant will was not the multiple wills of myriad legislators, let alone their interior aims or goals.<sup>144</sup> Rather, it was the will or intent of the lawmaking body as expressed in its statute or constitution.<sup>145</sup> In this sense, its will or intent was no different than the enactment's sense or meaning and could be summed up as *the intent of the enactment*.<sup>146</sup>

A legislative body was of course expected to exercise judgment, both legal judgment about what the Constitution required and, more broadly, moral and policy judgment about what was desirable. But its legislative power was a power to make law through an exercise of its will. In *The Federalist*, Alexander Hamilton contrasted legislative *will* with executive *force* and the *judgment* of the courts.<sup>147</sup> Judges therefore had to focus on "the will of the legislature declared in its statutes."<sup>148</sup> He added that where the legislature's will "stands in opposition to that of the people declared in the constitution, the judges ought to be governed

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<sup>139</sup> See *supra* Section V.A.

<sup>140</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 85, 129.

<sup>141</sup> *Id.* at 84–85.

<sup>142</sup> HAMBURGER, *supra* note 104, at 47–48.

<sup>143</sup> As summarized by the eighteenth-century Cambridge professor Thomas Rutherforth, "the obligations that are produced by the civil laws of our country, arise from the intention of the legislator; not merely as this intention is an act of the mind, but as it is declared or expressed." THOMAS RUTHERFORTH, INSTITUTES OF NATURAL LAW: BEING THE SUBSTANCE OF A COURSE OF LECTURES ON *GROTIUS DE JURE BELLII ET PACIS* 404 (Baltimore, William & Joseph Neal 2d ed. 1832) (1756).

<sup>144</sup> HAMBURGER, *supra* note 102, at 57–58.

<sup>145</sup> *Id.* at 47–48.

<sup>146</sup> *Id.* at 57; JOHN BAKER, 6 THE OXFORD HISTORY OF THE LAWS OF ENGLAND 79 (2003).

<sup>147</sup> THE FEDERALIST No. 78, at 523 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) ("The judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.")

<sup>148</sup> *Id.* at 525.

by the latter, rather than the former.”<sup>149</sup> Chancellor Wythe of Virginia explained in a 1794 case: “A Statute is a declaration of the Legislative will—the publication of that will is all that remains to give it energy.”<sup>150</sup> The next year, another Virginia judge, St. George Tucker, said, “I consider a Statute as an Evidence of the will of the Legislature, which shall have the most full & compleat effect in every part.”<sup>151</sup> The legislative power was an exercise of will.

*Binding Rules.* Legislative power, as a matter of theory, came in layers.<sup>152</sup> At its core, it seemed naturally to include making binding rules—those that had obligation and thus delineated rights and duties.<sup>153</sup> In addition, it included matters that, historically or otherwise, seemed valuable in the legislature, such as spending.<sup>154</sup>

Binding rules—those that came with legal obligation—were understood to be naturally legislative and so had to be exercises of the legislature’s will. This conclusion seemed to follow from the relation between consent and legal obligation.<sup>155</sup> It was seen in Part IV that government could not be legitimate and its laws could not bind—that is, they could not define duties and rights—without consent.<sup>156</sup> If all individuals were by nature equally free, then none could be subject to government without their consent. This consent was necessary not only for the Constitution but also for legislation.<sup>157</sup> In a large society, this meant that laws had to be enacted by an elected representative legislature. Only in this way could the laws be binding. Legislative power thus naturally seemed to include at least the making of binding rules—the rules that come with legal obligation.<sup>158</sup>

<sup>149</sup> *Id.*

<sup>150</sup> *Harrison v. Allen* (Va. High Ct. Ch. Sept. 17, 1794), reprinted in 1 ST. GEORGE TUCKER’S LAW REPORTS AND SELECTED PAPERS 1782–1825, at 329, 333 (Charles F. Hobson ed., 2013).

<sup>151</sup> *Commonwealth v. Potter* (Va. Gen. Ct. 1795), reprinted in 1 ST. GEORGE TUCKER’S LAW REPORTS AND SELECTED PAPERS 1782–1825, *supra* note 150, at 368, 369. Tucker also objected that to decide “ex Arbitrio Judicis” would be “making Legislators of Judges.” *Id.* at 370.

<sup>152</sup> Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 MO. L. REV. 939, 959 (2016).

<sup>153</sup> *Id.* at 979.

<sup>154</sup> See THE FEDERALIST NO. 78, *supra* note 147, at 522–23.

<sup>155</sup> Hamburger, *supra* note 152, at 964–65.

<sup>156</sup> See *supra* Part IV.

<sup>157</sup> Hamburger, *supra* note 152, at 964–65.

<sup>158</sup> Rather than ask readers to embrace the natural law theory of sovereignty, the point here is merely to summarize the theory and point to its importance for early American constitutions.

At the same time, readers skeptical of the theory might pause to consider their attachment to consent theory in other spheres. Consider, for example, ideas about voting rights, informed consent to medical treatment, sex between consenting adults, and the role of consent or choice in sexual rights and rights of contraception and abortion. The importance of consent in understanding what it means to be a free individual has not gone away.



From this point of view, though Congress's legislative powers included some nonbinding matters, such as borrowing money, they necessarily included at least the making of binding rules—the rules regulating duties and rights.<sup>159</sup> As Alexander Hamilton explained in *The Federalist*, “The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated.”<sup>160</sup>

At least these legally binding rules were legislative in nature.<sup>161</sup> These rules, which defined rights and duties, could not have legal obligation without representative consent.<sup>162</sup>

*Nonbinding Laws, Including Authorization.* Although binding rules naturally had to be included in the legislative powers, the Constitution's legislative powers could also include making nonbinding rules. Consider, for example, the powers to borrow money, to coin money, to establish post offices and post roads, to constitute inferior courts, to raise and support armies, to provide and maintain a navy, to provide for calling forth the militia, and so forth.<sup>163</sup> Although some of these powers,

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Yet while individual consent has been welcomed in social relations, it has been downgraded in politics—especially as to the power of administrative agencies. That is the anomaly, not the importance of consent.

<sup>159</sup> See U.S. CONST. art I, § 8.

<sup>160</sup> THE FEDERALIST NO. 78, *supra* note 147 (Alexander Hamilton); see also THE FEDERALIST NO. 75, *supra* note 147 (Alexander Hamilton).

Of course, this is not to dispute that there are other possible ways to conceptualize legislative power. One possibility is to view relatively discretionary decisions as legislative—the relatively nondiscretionary decisions being executive. But it is difficult to sustain this line between these powers. For example, under the Constitution, the executive undoubtedly can exercise wide discretion in the distribution of benefits and other privileges, in the admission of aliens, and in the licensing or exclusion of enemy aliens. See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 87–89. Discretion therefore cannot easily distinguish between legislative and executive power.

<sup>161</sup> THE FEDERALIST NO. 78, *supra* note 147, at 522–23 (Alexander Hamilton).

<sup>162</sup> Some commentators and judges suggest that agencies cannot make rules that bind *the public* or that delineate *private* rights or duties. The implication is that agencies can make rules that bind government officers or employees—at least in their governmental duties. The logic of consent, however, required Congress to make binding laws, whether they bound the public or government officers. Not only the right and duties of the public but also of officers had to be defined by acts of Congress. See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 87–88.

This is why even Alexander Hamilton, when serving as Secretary of the Treasury, assumed that he could control and discipline subordinates only by threatening to fire them. His department's regulations and other instructions to them were not binding but were merely the conditions of their continued employment. *Id.* at 90.

<sup>163</sup> U.S. CONST. art. I, § 8. It has been claimed, on the basis of *Martin v. Mott*, 12 U.S. (12 Wheat.) 19 (1827), that Congress delegated its legislative power when authorizing the Executive to call out the militia. See Mortenson & Bagley, *supra* note 35, at 2363. But the Constitution gives Congress the power “[t]o provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions.” U.S. CONST. art. I, § 8. To provide for calling forth the militia was not actually to call it out. So, the suggestion that legislative power was delegated seems an overstatement.

at least in conjunction with the Necessary and Proper Clause, could justify the making of binding laws, they more broadly involved nonbinding enactments.<sup>164</sup>

What, then, does the Constitution require when it vests Congress with coining money, establishing post offices and roads, constituting inferior courts, raising and supporting armies, providing and maintaining a navy, and so forth?<sup>165</sup> The physical establishing, constituting, supporting, and maintaining of such things, as well as directions to executive officers about such things, would seem to be executive acts, vested in the executive.<sup>166</sup> So, when the Constitution gives Congress the power to coin money, establish post offices, and so forth, it seems to be requiring such things to be authorized by Congress.<sup>167</sup> The carrying out is executive, but the authorization is legislative.<sup>168</sup> For example, Congress must authorize coinage, post offices, the navy, and pensions for invalid seamen before the executive can do the physical acts of coining, building, hiring, and paying.<sup>169</sup> Other indications of what is legislative come from the Constitution's limits. For example, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."<sup>170</sup> The appropriation of money, in the sense of declaring its appropriation, must be done by Congress.

All such authorizing legislation—ranging from post offices and naval pensions to appropriation—is distinct from legislation that binds but not entirely distinct. Authorizing laws do not directly oblige the public to do anything—or not do anything. Yet they authorize the executive, and thereby they bind others not to interfere.<sup>171</sup> In authorizing the executive, these authorizing laws are thus at least indirectly binding. So, it is appropriate, even necessary, for such underlying authorization to come from Congress. At the same time, as H.L.A. Hart explains, authorizing laws of this sort should not be confused with what ordinarily are considered binding laws.<sup>172</sup>

None of this is to insist that the Constitution's legislative powers on coinage, post offices, and so forth merely require authorization

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<sup>164</sup> See *supra* note 159 and accompanying text.

<sup>165</sup> U.S. CONST. art. I, § 8.

<sup>166</sup> It will be seen below in *infra* Section V.C that executive power involves the government's action, strength, or force.

<sup>167</sup> U.S. CONST. art. I, § 8.

<sup>168</sup> HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 85.

<sup>169</sup> U.S. CONST. art. I, § 8.

<sup>170</sup> See *id.* § 9.

<sup>171</sup> In the positivist vision that H.L.A. Hart considers reductionistic, such authorizing laws can be viewed as "statements of the conditions under which duties arise." See HART, *supra* note 120, at 41.

<sup>172</sup> *Id.* ("Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons.")

from Congress. It is possible that such powers also require Congress to authorize with a degree of specificity. This was a common argument in, for example, the Post-Roads Debate.<sup>173</sup> It also was James Madison's complaint about the Aliens Act when he protested that the authorization for the President to license aliens was insufficiently detailed.<sup>174</sup> But whereas laws can bind only to the extent they make evident what they require, laws can authorize without being so directive.<sup>175</sup> A statute on coining money, establishing post roads and offices, raising and supporting armies, providing and maintaining a navy, or appropriating money can authorize these activities in relatively general terms, leaving much discretion to the executive.

Legislative power thus includes all of the nation's authority to make binding rules—plus the authority to make a range of relatively nonbinding rules. The binding rules, by their nature, had to be made with consent and so had to be legislative.<sup>176</sup> And they could bind only to the extent they made evident what was required.<sup>177</sup> In contrast, there were relatively nonbinding rules, notably those providing congressional authorization for the executive. They were obligatory in the limited

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<sup>173</sup> See 3 ANNALS OF CONG. 229, 231, 233–34 (1791) (statements of Reps. Livermore, Hartley, and Page).

<sup>174</sup> See *infra* note 175.

<sup>175</sup> When Madison argued against the Aliens Act, he suggested it was akin to laws imposing civil or even criminal obligation:

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments 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. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.

To determine then, whether the appropriate powers of the distinct departments are united by the act authorising the executive to remove aliens, it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.

JAMES MADISON, REPORT OF 1800, *reprinted in* 17 THE PAPERS OF JAMES MADISON 303, 324–25 (David B. Mattern et al. eds. 1991). On this basis, Madison insisted that the Aliens Act was too open ended. But licensing for enemy aliens had always been a matter of executive license, as he knew because he drafted Virginia's 1785 statute authorizing the state's executive to exclude enemy aliens. See Hamburger, *supra* note 90, at 1932–33.

<sup>176</sup> See *supra* Section V.B.

<sup>177</sup> See *supra* note 175.

sense that they bound others not to interfere with the executive, but more generally were not binding.<sup>178</sup>

*The Constitution's Enumeration of Legislative Powers.* Notwithstanding all that has been said about consent and about binding vs. nonbinding laws, there's no need to rely on this theoretical analysis to identify the Constitution's legislative powers. The Constitution lists all of its legislative powers, including all of the federal government's power to regulate.<sup>179</sup> For the federal government, the power to regulate was primarily the power to "regulate" commerce among the states—the power that is the font of most administrative regulation.<sup>180</sup> So, whatever one thinks of the natural basis of legislative power, there is great clarity that the regulatory power of administrative agencies is legislative power.

In other words, one doesn't have to buy into eighteenth-century ideas about binding laws made with consent to recognize what the Constitution treats as legislative powers. Regardless of what one thinks about eighteenth-century theories, any question about what the Constitution views as legislative powers is resolved by the Constitution itself when it enumerates such powers. So, there should be no doubt that most administrative regulation, being based on the power to regulate commerce among the states, is an exercise of legislative power.

*Legislative Power Distinct from the Judicial Power.* Having thus far examined the judicial and the legislative powers, this Section can consider their differences. Both legislative and judicial acts can bind, but they do so in different ways.

Whereas laws are prototypically rules, in the sense of being generalities directed to the society as a whole, judicial decisions are judgments in particular cases or controversies applying such rules to particular persons. When lecturing on the Constitution in the 1790s, St. George Tucker explained that "the legislative power may be defined to be the power of making laws, or general rules in all cases not prohibited by the Const[itution]: the application of these rules to particular cases being the province of the judiciary."<sup>181</sup> Both the legislative and the judicial powers could bind, but the one did so generally by will, the other in particular cases through judgment. This is why the one rested on representative consent—that is, on politics—and the other on independent judgment.

The legislative and judicial powers were fundamentally different. Each could belong to its own branch of government.

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<sup>178</sup> See *supra* notes 171–72.

<sup>179</sup> See U.S. CONST. art. I, § 8.

<sup>180</sup> *Id.*

<sup>181</sup> Henry St. George Tucker, *Law Lectures* bk. 6, at 220 (c. 1790) (on file with the Earl Gregg Swem Library, College of William and Mary), <https://digitalarchive.wm.edu/handle/10288/13361> [<https://perma.cc/S4DJ-LXRS>].

### C. Executive Power

The executive power did not include the power to bind. Although it included the nation's coercive power, the executive power did not include any authority to make any rule or judgment that bound persons to obey. It thus stands in sharp contrast to the other powers.

This Section will proceed by examining three possible visions of executive power. It concludes that the Constitution's executive power was the action, strength, or force of the United States.<sup>182</sup> But the main point is that whichever was the Constitution's conception of it, executive power did not include a power to make binding legislation or adjudications.<sup>183</sup>

*Law Execution.* One account of executive power suggests that it was the power to execute the law. This approach has some support in eighteenth-century sources.<sup>184</sup> But that is not to say it was the dominant eighteenth-century position, let alone that it can be attributed to the Constitution.<sup>185</sup>

The improbability of the law-execution vision becomes apparent already when one considers its application to foreign affairs. As noted by Professors Saikrishna Prakash and Michael Ramsey, it was widely understood that “foreign affairs powers were part of the executive power.”<sup>186</sup> Significant American commentators and leaders made this assumption “immediately before, during, and after the Constitution's ratification.”<sup>187</sup> This is a problem for the law-execution view of executive power.

In foreign affairs, the President and his subordinates cannot always expect to find statutory guidance or even authority. They often have acted, and must act, in ways that are difficult to understand as executing the law. Locke, Montesquieu, and Blackstone already

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<sup>182</sup> U.S. CONST. art. II, § 1.

<sup>183</sup> *Id.* art. II.

<sup>184</sup> St. George Tucker, for example, said that the executive power, in its “abstract definition,” was “the duty of carrying the laws into effect.” Tucker, *supra* note 181, at 220.

<sup>185</sup> For such claims, see Julian Davis Mortenson, *Article II Vests Executive Power, not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1188, 1235 (2019) (arguing about executive power that “the meaning was unambiguously limited to law execution,” in particular that it was meant as a “empty vessel”); Mortenson & Bagley, *supra* note 5, at 314–15 (“Without exception of which we are aware, late eighteenth-century Anglo-American lawyers, academics, and politicians understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.”). For criticism of this position, see MICHAEL W. MCCONNELL, *THE PRESIDENT WHO WOULD NOT BE KING* 251–55 (2020) (quoting, among other things, the Essex Result).

<sup>186</sup> Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231, 253 (2001); see also Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 750–51 (discussion of John Louis De Lolme).

<sup>187</sup> Prakash & Ramsey, *supra* note 186, at 253.

viewed foreign affairs as part of the monarch's executive power.<sup>188</sup> And foreign matters are similarly within the President's executive power.<sup>189</sup> The point is not that a President can or should act contrary to law, but rather that the executive power of the American President typically involves much that cannot be conceptualized as the execution of law.<sup>190</sup>

Another difficulty with the law-execution concept of executive power lies in the very quotations recited by its supporters. The scholarship of Mortenson and Bagley quotes Jean Jacques Rousseau and Thomas Rutherford.<sup>191</sup> But the quoted passages actually define executive power in terms of the nation's "strength."<sup>192</sup> Rousseau spoke about executive power as the "strength" of the body politic, and Rutherford said that the executive power was its "joint strength."<sup>193</sup> This is from the passages quoted to suggest otherwise!<sup>194</sup>

The Constitution's text confirms that the Constitution did not simply adopt the law-executing vision. Article II of the Constitution initially grants the President "executive Power" and much later stipulates his duty to "take Care that the Laws be faithfully executed."<sup>195</sup> This distinction between the executive power and the faithful execution duty is significant. The one generalizes about executive power without limiting it to the execution of the laws; in contrast, the other more narrowly concerns the execution of the laws.<sup>196</sup> Because the duty is narrowly about *law* execution, it becomes apparent that the more generic executive power meant something broader.

Executive power evidently included law execution but was not limited to that. Put another way, the scholars who urge a law-execution vision of executive power have mistaken the duty as the full measure of the power. Yes, the duty specifies law execution. But that suggests

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<sup>188</sup> *Id.*

<sup>189</sup> U.S. CONST. art. II, §§ 2–3.

<sup>190</sup> See Prakash & Ramsey, *supra* note 186, at 251; McCONNELL, *supra* note 185, at 251–53. Note, moreover, that American law typically does not bind foreigners, let alone foreign countries. See Hamburger, *supra* note 90, at 1873. It would be offensive to them, and dangerous to us, to suggest that they are bound by American law.

<sup>191</sup> Mortenson & Bagley, *supra* note 5, at 294, 315 (relying on Rousseau and Rutherford quotations that refer to executive power as the society's "strength").

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*; see Hamburger, *Delegating*, *supra* note 6, at 111–13 (pointing out the misreading of Rousseau and Rutherford).

<sup>194</sup> See Hamburger, *Delegating*, *supra* note 6, at 111–13. Montesquieu also associated the executive power with the nation's action. Writing about the army, he observed that "it ought not to depend immediately on the legislative, but on the executive power; and this from the very nature of the thing, its business consisting more in action than in deliberation." 1 BARON DE MONTESQUIEU, THE SPIRIT OF LAWS 229 (Thomas Nugent trans., London, J. Nourse & P. Vaillant 1758) (1748).

<sup>195</sup> U.S. CONST. art. II, §§ 1, 3.

<sup>196</sup> See *id.*

that the Constitution's generic grant of executive power, which does not confine itself to law, meant more than law execution.

Nonetheless, the law-executing vision has been adapted in support of delegation. A modest version of the law-execution approach would view executive power as prosecution and other law enforcement. Not content with this, a more ambitious version presented by Julian Mortenson and seconded by Nicholas Bagley claims that law execution meant carrying out congressional instructions.<sup>197</sup> On this assumption, executive power is an "empty vessel," and Congress can delegate its legislative power to the executive.<sup>198</sup>

This bold version of the law-executing vision, however, suffers the same evidentiary weaknesses as the modest version. First, it is contradicted by some of the very eighteenth-century quotations that are recited by its supporters; in other words, it clearly was rejected by significant eighteenth-century theorists.<sup>199</sup> Second, it is profoundly impractical as it cannot explain the President's power in foreign policy.<sup>200</sup> Third, it conflicts with the Constitution's textual distinction between the law-executing duty and the more generic grant of executive power.<sup>201</sup>

Whatever one thinks of either version of the law-executing vision, both recognize that the power to make binding rules was legislative. Even the more ambitious version of this view does not claim that executive power by itself included any binding power. Instead, it merely suggests that the power to make binding rules was legislative and Congress could delegate its legislative power to the executive.<sup>202</sup>

*A Residual Power.* A second conceptual approach is to treat executive power as a residual category. The nature of executive power remained more open to debate in the eighteenth century than the nature of legislative and judicial power.<sup>203</sup> So it is unsurprising that there were competing versions of it. And one possibility was simply to view it as a residual power—what was left over beyond the legislative and judicial

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<sup>197</sup> Mortenson & Bagley, *supra* note 5, at 280 ("The executive power, however, was simply the authority to execute the laws—an empty vessel for Congress to fill.").

<sup>198</sup> *Id.*

<sup>199</sup> See *supra* note 193 and accompanying text.

<sup>200</sup> See *supra* note 186 and accompanying text.

<sup>201</sup> See *supra* note 196 and accompanying text.

<sup>202</sup> Mortenson & Bagley, *supra* note 5, at 280; Mortenson & Bagley, *supra* note 35, at 2331 ("In making rules pursuant to congressional instruction, administrative agencies are simultaneously exercising both legislative power (by promulgating authoritative legal commands) and also executive power (by implementing Congress's authoritative instructions).") (emphasis omitted).

<sup>203</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 328 ("The definition of executive power . . . remained open to dispute even as late as the founding of the United States. Some commentators understood it to be at least the power of executing the law, and from this perspective they said it was ministerial.").

powers. For example, although James Madison probably had some substantive views of executive power, he readily relied upon the residual view when this was advantageous. In the Constitutional Convention, for example, he spoke of powers “not Legislative nor Judiciary in their nature.”<sup>204</sup>

This sort of residual approach fails to offer a positive conception of executive power. But it was not necessarily incompatible with substantive ideas of that power. And it was entirely compatible with Part V’s larger point that the Constitution envisioned different powers in different branches.

*The Nation’s Action, Strength, or Force.* A third conception of executive power is that it consists of the nation’s lawful action, strength, or force. This view had a deep history in European philosophy on the separated powers.<sup>205</sup> As will be explained in Part VI, there was a long tradition of distinguishing among legislative will, judgment in cases, and a nation’s action, strength, or force, which was executive.<sup>206</sup> For now, suffice it to say that this vision of executive power was widely endorsed. Explaining the powers of the “body politic,” Rousseau wrote that “force and will are distinct: The latter being called *legislative power*, the former *executive power*.”<sup>207</sup> In England, James Burgh wrote that for executive power, “nothing but well regulated force is wanted.”<sup>208</sup>

This position was subtly presented by the Cambridge professor Thomas Rutherford. He repeatedly defined executive power as a power of “acting” with the society’s “joint strength.”<sup>209</sup> Academically, he preferred the law-execution vision, for he thought “the executive power, in the nature of the thing, is not discretionary in any part.”<sup>210</sup> Being an academic, however, he recognized that constitutions could vary from the assumption he drew from nature. He observed that in external or foreign matters, constitutions frequently had to leave wide

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<sup>204</sup> 1 FARRAND, *supra* note 118, at 66–67. There are suggestions in the scholarly literature that a residual view of executive power is incompatible with a more positive view of it. *See, e.g.*, Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. 93 (2020). But the logic of exclusive powers and the contemporary evidence suggests otherwise.

<sup>205</sup> *See infra* Part VI.

<sup>206</sup> A nation’s legislative will and its judgment in cases could be viewed as being among its “actions,” in a broad sense of the word. So, text here could have said that the executive power was a nation’s *other* action, strength, or force. But in the tripartite vision of powers, as will be seen in Part VII, it was understood that a nation’s executive action, force, or strength was different from its exercise of its legislative and judicial powers. So, it seems unnecessary to specify that the executive power was a nation’s *other* action, strength, or force.

<sup>207</sup> JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS* 84 (Victor Gourevitch trans., Cambridge Univ. Press 2019).

<sup>208</sup> 1 BURGH, *supra* note 59, at 5 (emphasis omitted).

<sup>209</sup> RUTHERFORTH, *supra* note 143, at 273.

<sup>210</sup> *Id.* at 279.



executive discretion, unconfined and sometimes even unauthorized by legislation.<sup>211</sup>

From this perspective, the nation's joint strength had two applications. Internally, it served to protect rights and duties defined by the legislative power; externally, it protected against foreign threats without necessarily being confined by legislation.<sup>212</sup>

So deeply ingrained was the view of executive power as the nation's action, strength, or force that Alexander Hamilton simply took it for granted in *The Federalist*. When expounding judicial power, he distinguished between legislative *will*, judicial *judgment*, and executive *force*.<sup>213</sup> It was the only vision of executive power endorsed in *The Federalist*.

<sup>211</sup> Rutherforth observed that the executive needed the constitution to assure areas of executive discretion or prerogative—internally in pardons, and externally in matters of war, peace, and treaties:

[W]here the legislative and executive power are lodged in different hands, it is usual, especially if the legislative body is a large one, to allow those who have the executive power, to act discretionally in some cases; that is, it is usual for them to have, in some instances, such a discretionary power as is called prerogative.

*Id.* at 280 (echoing LOCKE, *supra* note 102, at 392–93). By “prerogative,” Rutherforth meant a discretionary power. The “constitution of government” was what authorized and protected this discretion, primarily in external issues. *Id.* at 279–80. He thus anticipated that an executive might enjoy substantial realms of constitutionally authorized discretion in exercising his nation's strength externally.

<sup>212</sup> Rutherforth wrote:

Now, the executive power is a power of acting with this joint strength, in order to obtain the purposes for which such strength was formed. And, consequently, the executive power is either internal or external. We may call it internal, when it is exercised upon objects within the society; when it is employed in securing the rights, or enforcing the duties of the several members, in respect either of one another, or of the society itself. And we may call it external executive power, when it is exercised upon objects out of the society; when it is employed in protecting either the body or the several members of it against external injuries, in preventing such injuries from being done, or in procuring reparation, or in inflicting punishment for them, after they are done.

RUTHERFORTH, *supra* note 143, at 273–74. Similarly, Montesquieu distinguished between “the executive power with respect to those acts of state which relate to the law of nations; and the executive power with respect to the internal government of the country, or to those domestic exertions of authority which are directed by the civil, or municipal, laws established in it.” BARON DE MONTESQUIEU, *A VIEW OF THE ENGLISH CONSTITUTION* 1 (London, White & Payne 1781).

<sup>213</sup> THE FEDERALIST NO. 78, *supra* note 147, at 392 (Alexander Hamilton) (“The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

This vision matches the textual distinction between executive power and the take care duty. Recall the difference between the President's executive power and his duty to "take Care that the *Laws* be faithfully executed."<sup>214</sup> The disparity suggests that the execution of the laws is not the full definition of his executive power. This makes sense conceptually when one understands executive power as the nation's action, strength, or force. Such is the vision of executive power that most naturally fits the practicalities, the history, and the text.

This vision of executive power also solves some important problems. For example, it may seem puzzling that the Constitution mentions appointments, not removal. Does this mean the framers forgot to mention removal? Not at all. Both appointments and removal were governmental actions, in contrast to legislation or judging, and thus within the executive power.<sup>215</sup> But they were treated differently. The Appointments Clause adjusted the President's executive powers in appointments.<sup>216</sup> In contrast, the President's removal authority under the grant of executive power was left unmodified; so there was no need to mention it.

A similar puzzle involves the President's "foreign affairs power." Although the Constitution offers no direct textual foundation for it, courts know something like it must exist and so speak of it as a "power."<sup>217</sup> But far from being a distinct power granted by the Constitution, it is just part of the President's executive power, in the sense of the action or force of the nation.<sup>218</sup> So one can better understand it by speaking of the President's foreign affairs authority under his executive power.<sup>219</sup>

Of course, the definition of executive power as the nation's action, strength, or force is very expansive. But even in its breadth, it does not include any power to bind.<sup>220</sup> It includes a wide range of lawful action,

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<sup>214</sup> See U.S. CONST. art. II, §§ 1, 3 (emphasis added).

<sup>215</sup> For a similar argument, albeit resting on a slightly different conception of executive power, see Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 598 (1994) ("We . . . reject the idea that the President lacks a textually explicit power of removal, adopting instead the argument that the President may remove executive officers using his Vesting Clause grant of 'executive Power' that allows him to superintend the execution of federal law.").

<sup>216</sup> See U.S. CONST. art. II, § 2.

<sup>217</sup> *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 319 (1936) ("Not only, as we have shown, is the federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited.").

<sup>218</sup> See *Zivotofsky v. Kerry*, 576 U.S. 1, 37–38 (2015).

<sup>219</sup> Cf. *infra* Sections VIII.B–C (on the distinction between constitutional powers and the authority exercised under them).

<sup>220</sup> PHILIP HAMBURGER, *PURCHASING SUBMISSION: CONDITIONS, POWER, AND FREEDOM* 88 (2021).

including coercive action abroad, but no power to bind, whether to make binding rules or adjudications.<sup>221</sup>

Although this third vision of executive power appears to be the one assumed by the Constitution, this Foreword does not rest on it. On the contrary, all that the Foreword asks of readers is that they recognize what the different conceptual approaches have in common. None of them claim that executive power, by itself, was a power to create legal obligation, either in rules or adjudications. Even in the most ambitious vision of executive power—offered by Mortenson and Bagley—the power to make binding rules is conceived to be legislative.<sup>222</sup> Their claim is merely that legislative power could be transferred to the Executive and then exercised as authorized by legislation.<sup>223</sup>



The Constitution's tripartite powers—judicial, legislative, and executive—differed from each other. Judicial power was centrally to make binding judgments in cases or controversies about binding law. Legislative power at its core was to make binding rules. And executive power was the nation's action, strength, or force, which included no power to bind. Each power was thus essentially different—so the Constitution could place each in its own branch of government.

## VI. SEPARATION OF POWERS

Separation offers another conceptual approach to the Constitution's powers. The Constitution secures the separation of powers, not in such words, but more carefully by its vesting of powers.

The separation of powers has long been disparaged. Eighteenth-century German scholars derided the separation of powers and mocked constitutional formalities as unrealistic obstacles to good government.<sup>224</sup> Drawing on that heritage, late nineteenth-century progressive scholars in America similarly questioned any formal separation

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<sup>221</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 84–85, 192–93. Of course, this is not to deny that executive power included the authority, as defined by statute, to impose distress, collect duties, make inspections, and so forth. *See id.* at 215–19, 222–24. These actions involved executive coercion under binding statutes, but they themselves did not bind. In other words, it was the underlying statutes rather than the inspections and so forth that created legal obligation. Similarly, executive power included making determinations of facts and legal duties under federal statutes. *See id.* at 107–10. Such determinations increasingly were stretched into justifications for making binding rules and adjudications. *See, e.g.,* *Field v. Clark*, 143 U.S. 649, 690 (1892). But at least formally, determinations did not go so far.

<sup>222</sup> *See* Mortenson & Bagley, *supra* note 35, at 2331.

<sup>223</sup> *Id.*

<sup>224</sup> *See* HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 449–50.

of powers—an attitude that persists in much American administrative scholarship.<sup>225</sup>

But the Constitution does separate its powers. It will be seen that the separation of powers gave expression to a familiar and still valued decision-making theory. It also was understood to be essential for liberty—a point that remains true. And because separation of powers was adopted as a default rule, the existence of checks and balances does not prevent the Constitution from maintaining a separation of powers.

Separation thus offers a second conceptual layer—a second reason for questioning whether the Constitution's powers can be transferred among the branches of government.

### A. *Decision-making Theory*

The U.S. Constitution's separation of powers gives institutional expression to a longstanding vision of specialized decision-making, which still is recognized as valuable. The vesting of the Constitution's powers in different bodies is thus not merely a formality but a living manifestation of the benefits of specialized decision-making.

Many philosophers beginning in the Middle Ages distinguished three human faculties or capabilities. In the soul or mind, there were two faculties: that of judgment (or understanding or intellect) and that of will (or passion).<sup>226</sup> Of course, these faculties of the mind did not stand alone, for the will could be carried out only by another faculty: the action, strength, or force of the body.<sup>227</sup>

This tripartite division of specialized faculties remains the foundation for much contemporary decision-making theory. In order to make accurate evaluations or judgments, unclouded by misleading preferences, individuals can self-consciously try to segregate their judgment from their will or passion, putting aside their precommitments so as to ensure they begin with an accurate understanding. Having judged their circumstances, they can exert their will or sense of choice about how to proceed and then can carry out their will by exerting their body in action or force. Already as children, we learn to look and listen, to choose sensibly when to embark from the pavement, and finally to move promptly across the street.

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<sup>225</sup> See *id.* at 470–71, 477, 495; see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1231 (1994) (observing that the work of James Landis “fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers”).

<sup>226</sup> See 2 FREDERICK COPLESTON, *A HISTORY OF PHILOSOPHY* 381–82 (Newman Press 1962) (regarding judgment and will); 3 *id.* at 100, 102 (explaining Ockham's ideas of will and judgment in relation to Franciscan traditions).

<sup>227</sup> See 3 *id.* at 100, 102.

What is simplistically taught to children is inculcated with more sophistication in adults. Doctors and scientists train themselves to put aside their precommitments when evaluating evidence.<sup>228</sup> Military pilots learn to outmaneuver their opponents by following the “OODA Loop,” which stands for Observing and Orienting, Deciding, and then Acting.<sup>229</sup> That is, they need to Judge, exercise Will or choice, and then Act. Thus, throughout our lives, not merely in government, decision-making theory requires self-conscious distinctions between judgment, choice, and action.

Of course, some decision-making is intuitive and therefore cannot be segregated into judgment, will, and bodily execution. But at least when caution is advisable and time is available, the benefits of separately focusing on these human faculties or powers is obvious enough.<sup>230</sup> This separate exercise of the specialized tripartite faculties or powers of individuals is very traditional but remains fully contemporary.

It therefore is unsurprising that the separation of human powers became a model for ideas about a separation of governmental powers. An individual can exercise his powers separately by being self-conscious about them. But government can keep them apart only by dividing them institutionally among different parts of government. This was advocated as early as the fourteenth century and was widely popularized in the eighteenth.<sup>231</sup>

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<sup>228</sup> See Vimla L. Patel, David R. Kaufman & Jose F. Arocha, *Emerging Paradigms of Cognition in Medical Decision-Making*, 35 J. BIOMED. INFORMATICS 52, 54 (2002) (“The stereotypical version of the medical decision maker suggests a coolly dispassionate, hyper-rational physician systematically considering well-defined options (i.e., therapeutic choices or diagnostic alternatives) on the basis of a careful weighing of the evidence. Equally common is his or her decidedly less competent colleague—a fallible reasoner—subject to biases and particularly deficient in the application of probability theory to decision problems. These shortcomings frequently result in faulty decision practices.”).

<sup>229</sup> See Richard Feloni & Anaele Pelisson, *A Retired Marine and Elite Fighter Pilot Breaks Down the OODA Loop, the Military Decision-making Process that Guides ‘Every Single Think’ in Life*, BUS. INSIDER (Aug. 13, 2017, 12:00 PM), <https://www.businessinsider.com/ooda-loop-decision-making-2017-8> [<https://perma.cc/6Z62-YS3U>]; John R. Boyd, *The Essence of Winning and Losing*, DANFORD (1995), <https://web.archive.org/web/20110324054054/http://www.danford.net/boyd/essence.htm>; FRANS OSINGA, *SCIENCE, STRATEGY AND WAR: THE STRATEGIC THEORY OF JOHN BOYD* 270 (2005).

<sup>230</sup> Much current literature, in medicine and law, emphasizes the importance of compassion or empathy and notes that this may conflict with ideals of dispassionate judgment. See, e.g., Patel, et al., *supra* note 228, at 52 (regarding medicine); Terry A. Maroney, *The Persistent Cultural Script of Judicial Dispassion*, 99 CALIF. L. REV. 629 (2011) (regarding law). But whether there really is such a conflict depends on where and how the compassion or empathy enters the medical or legal analysis.

<sup>231</sup> For the earliest known analysis of the separation of powers, see BRIAN TIERNEY, *RELIGION, LAW, AND THE GROWTH OF CONSTITUTIONAL THOUGHT* 1150–1650, at 45 (1982); Brian Tierney,

According to the political theory that prevailed in eighteenth-century America, when individuals formed themselves into a society, they already enjoyed the tripartite powers as a people.<sup>232</sup> And because the people allegedly enjoyed all three powers, they could convey to them government. Edmund Randolph—the attorney general of Virginia—argued in 1782 about his state’s constitution that a people “who have either never yet entered into a formal social compact, or having abolished an old one are about to conclude another . . . possess every power, legislative, executive and judiciary.”<sup>233</sup> The people in their constitution thus “delineat[ed] the degree, to which they have parted with legislative, executive and judiciary power.”<sup>234</sup> As was said more succinctly of the Pennsylvania Constitution, “[t]he legislative, executive, and judicial powers of the people” had been “severally, delegated to different bodies.”<sup>235</sup>

The specialized powers of individuals became the powers of the people, and by means of a constitution they became governmental powers, located in different parts of government. A vision of specialized decision-making in individuals thus justified a theory of specialized decision-making in government. Critics might object to an anthropomorphization of government, but that has never been the point. Rather, the goal has always been to secure specialized decision-making, so that the different powers of will, judgment, and action will be exercised separately. What individuals do through self-conscious differentiation, government accomplishes through the separation of powers.

### B. *Protection for Liberty*

In the eighteenth century, not least in the Constitution, separation of powers was much valued for protecting liberty. But the point here

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*Hierarchy, Consent, and the “Western Tradition,”* 15 POL. THEORY 646, 649 (1987) (both discussing the ideas of Hervaeus Natalis c. 1315).

<sup>232</sup> Edmund Randolph, *Notes on Virginia Laws: Includes Pardons for Traitors*, in 91 JAMES MADISON PAPERS, 1723–1859, at 1, 11 (on file with the Library of Congress); see also THE FEDERALIST NO. 51, *supra* note 147, at 351 (James Madison) (“In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments.”).

<sup>233</sup> Randolph, *supra* note 232, at 1, 9.

<sup>234</sup> *Id.* at 11.

<sup>235</sup> REPORT OF THE COMMITTEE OF THE COUNCIL OF CENSORS 3 (Philadelphia, Francis Bailey 1784) (“Whether the Constitution has been preserved inviolate in every part, and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves or exercised other or greater powers, than they are entitled to by the Constitution.”).

Note that Locke did not go so far as to say that all three powers of government were originally in the people. But he considered the judicial power to be part of the executive power and thought individuals enjoyed both in the state of nature. LOCKE, *supra* note 102, at 293–94.

is not merely about old theory and originalism. Rather, the aim is to understand why separation was and still should be considered essential for liberty.

Eighteenth-century American appreciation for the separation of powers is well documented.<sup>236</sup> Just to give an example, a New Hampshire minister noted of his state's new constitution: "the several powers of government are nicely adjusted, so as to have a mutual check on each other, and despotic power guarded against by keeping the *legislative, judicial* and *executive* powers, distinct and separate, an essential arrangement in a free government."<sup>237</sup>

Few constitutional principles were more widely endorsed. Even James Madison, who was qualified in his appreciation of the separation of powers, called it "this essential precaution in favor of liberty" and said, "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty."<sup>238</sup>

Montesquieu—the preeminent theorist of separation—had explained: "When the legislative and executive powers are united in the same person, or in the same body of the magistrates, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."<sup>239</sup>

He added that "there is no liberty, if the power of judging be not separated from the legislative and executive."<sup>240</sup> Otherwise, "the judge would be then the legislator" or "might behave with violence of an oppressor."<sup>241</sup> Worst of all was the combination of all three powers, when "the same body" could "exercise those three powers . . . of enacting laws, . . . executing the public resolutions, and . . . of judging the crimes or differences of individuals."<sup>242</sup> This was the situation in Turkey, "where these three powers [were] united in the Sultan's person," and "the subjects groan under the . . . oppression."<sup>243</sup> It was also, however, a danger in republics, as evident from many Italian city states.<sup>244</sup>

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<sup>236</sup> See M. J. C. VILE, CONSTITUTIONALISM AND THE SEPARATION OF POWERS 153 (Liberty Fund 2d ed. 1998) (1967).

<sup>237</sup> SAMUEL MCCLINTOCK, A SERMON PREACHED BEFORE THE HONORABLE THE COUNCIL, AND THE HONORABLE THE SENATE AND HOUSE OF REPRESENTATIVES, OF THE STATE OF NEW HAMPSHIRE, JUNE 3, 1784, ON OCCASION OF THE COMMENCEMENT OF THE NEW CONSTITUTION AND FORM OF GOVERNMENT 24 (N.H., Robert Gerrish 1784).

<sup>238</sup> THE FEDERALIST No. 47, *supra* note 147, at 323–24 (James Madison).

<sup>239</sup> 1 MONTESQUIEU, *supra* note 194, at 216.

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* at 216–17.

<sup>244</sup> *Id.* at 217.

Montesquieu's broad declamations may seem overstated. It therefore is valuable to bring the question down to earth by looking at contemporary administrative agencies. They tend to combine the powers that the Constitution separated, and the results are worrisome.

The Securities and Exchange Commission is a good example. It is one of the most revered of federal agencies, and it undoubtedly serves valuable governmental ends.<sup>245</sup> But it exercises all three powers of government.<sup>246</sup> It enjoys legislative power in making and "interpreting" rules; it has executive power in setting enforcement policy and overseeing its Enforcement Division; it even exercises judicial power through its Administrative Law Judges and through its power to review their decisions.<sup>247</sup>

One might take comfort in the Administrative Procedure Act's separation of functions within agencies.<sup>248</sup> But for regulated parties, this is little consolation as the statute leaves plenty of room for the conflation of powers.<sup>249</sup>

Consider, for example, the use of executive and judicial power for legislative ends. Enforcement and the ensuing adjudication should be pursued in response to a judgment about when the law has been violated. But agencies can use enforcement and adjudication to reshape the law.<sup>250</sup> Although such practices are especially brazen at the National Labor Relations Board and the Federal Trade Commission, more subtle examples can be found across the administrative state.<sup>251</sup> And of course when an agency knows that it can shape regulation through enforcement and adjudication, it can take advantage of this to leave its rules relatively vague.

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<sup>245</sup> See, e.g., Matthew Goldstein, *Manic Markets, Imploding Funds: Wall Street's New Top Cop Has a Full Plate*, N.Y. TIMES (Apr. 21, 2021), <https://www.nytimes.com/2021/04/21/business/economy/gensler-wall-street-sec.html> [<https://perma.cc/4N4Y-5666>].

<sup>246</sup> See *What We Do*, U.S. SEC. & EXCH. COMM'N (Apr. 6, 2023), <https://www.sec.gov/about/what-we-do> [<https://perma.cc/TFY8-UYVS>].

<sup>247</sup> See *id.* An administrative law judge's initial decision is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings. *Office of Administrative Law Judges*, U.S. SEC. & EXCH. COMM'N (Nov. 19, 2020), <https://www.sec.gov/page/aljsectionlanding> [<https://perma.cc/H28J-LKLF>]. A party may petition the Commission for review, or the Commission may choose to review an initial decision on its own initiative. *Id.* If a party does not petition for review, and the Commission does not order review on its own initiative, the SEC's Rules of Practice provide that the Commission will issue an order stating that the initial decision has become final. *Id.*

<sup>248</sup> Bernard Schwartz, *Adjudication and the Administrative Procedure Act*, 32 U. TULSA L.J. 203, 207 (1996) (regarding the APA's aim "to ameliorate the evils from the commingling of functions").

<sup>249</sup> See *id.* at 208.

<sup>250</sup> See HAMBURGER, *supra* note 220, at 222–23.

<sup>251</sup> For the FTC's use of enforcement and consent decrees, see *id.*



Worst of all is the corruption of the judicial process. Administrative Law Judges usually try their best to be fair. But they know that their decisions are reviewable or need to be finalized by the heads of their agency. So, they are always looking over their shoulders to avoid reversal by anticipating their superiors' wishes.<sup>252</sup> Defendants cannot get independent and unbiased adjudications from such "judges." They are even less likely to get unbiased decisions on review or finalization by the heads of the agency, as they have precommitments to its legislative and enforcement policies.<sup>253</sup> And because the adjudications occur within the agency rather than a court, they are also slanted by the usual administrative restrictions on procedural rights, including discovery biased against defendants, reversed burdens of proof and persuasion, and the unavailability of juries.<sup>254</sup>

These grim realities of unseparated powers in administrative agencies give some texture to Montesquieu's abstractions. Each type of power gets twisted when it is exercised by persons who also exercise the other powers. The result is vagueness in the exercise of legislative power, executive decisions shaped by legislative desires, and judgments that are institutionally biased against Americans. So, the importance of the

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<sup>252</sup> The problem is pervasive:

[T]he decisions of ALJs are often subject to review or finalization by agency heads. The latter are political appointees who do not hear the witnesses or arguments in the cases, who do not need to read the record, and who often made the decision to prosecute or who at least adopted the underlying prosecutorial policies. In other words, these agency leaders—the ultimate decisionmakers in their agencies—usually lack even the pretense of independence. Many defendants therefore do not bother to appeal from their ALJs. And there is reason to fear that the ALJs themselves try to avoid disagreeing with their agency heads.

Philip Hamburger, *The Administrative Evasion of Procedural Rights*, 11 N.Y.U. J.L. & LIBERTY 915, 950–51 (2018).

<sup>253</sup> *Id.*

<sup>254</sup> Even on appeal, defendants cannot get a jury, and because of deference to agency interpretation and factfinding, the value of review in the courts is limited. *Id.* at 958. As for discovery, agencies usually rely on subpoenas without allowing the same discovery for defendants. *Id.* at 951. The burdens of proof and persuasion, moreover, are often reversed:

[T]he applicable burdens of proof and persuasion, whether civil or criminal, are often reversed. Unlike a district court judge, an ALJ can take "official notice" of a material fact even when it does not appear in the record, even when it is not adjudicative, even when it is not within the agency's expertise, even when it is within reasonable dispute, and even without a hearing. And whenever an ALJ takes "official notice" of a fact, the defendant ends up having to undertake the burdens of proof and persuasion. The reversal of burdens is especially far reaching when it results from an understated agency assumption—such as the expectation, alleged by McEwen at the SEC, that "the burden was on the people who were accused to show that they didn't do what the agency said they did." Thus, even where agency actions are criminal in nature, defendants often have to prove their innocence.

*Id.* at 952 (citation omitted).

separation of powers for our freedom rests not only on old theory and originalism but also on the grim realities of contemporary government.

*C. A Default Rule and Thus Consistent with Checks and Balances*

Notwithstanding the numerous Founding-era discussions of the Constitution's separation of powers, it is sometimes protested that the Constitution did not generalize about this principle.<sup>255</sup> Or that the Constitution's check and balances, such as the veto, show that the powers were not really separated.<sup>256</sup> From these perspectives, it is an error to speak about the Constitution's separation of powers.

It is true the Constitution did not recite the principle. But the separation of powers was a default principle. Once this is understood, it becomes clear that it was deeply embedded in the Constitution and was consistent with its checks and balances.

Some state constitutions declared the separation of powers as a constitutional principle. Virginia's 1776 Constitution, for example, announced: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other."<sup>257</sup> Similarly, the Massachusetts Constitution of 1780 declared:

[T]he legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them: The judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws and not of men.<sup>258</sup>

But categorical statements of this sort ran into difficulty.

The awkwardness was that constitutions inevitably tinkered with the separation of powers—adding to, or subtracting from, the idealized version. One reason was to ensure checks and balances. James Madison explained, "No political truth is certainly of greater intrinsic value," but the branches of government could not be "totally separate and distinct from each other," for each branch needed some "control" over the others.<sup>259</sup> Accordingly, when state constitutions announced separation as an abstract principle, there was a danger that separation would become a rigid overgeneralization.

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<sup>255</sup> Shugerman, *supra* note 41, at 1503.

<sup>256</sup> *Id.*

<sup>257</sup> VA. CONST. of 1776. As if this were not enough, the state's bill of rights similarly recited: "That the legislative and executive powers of the State should be separate and distinct from the judiciary." VA. CONST. of 1776, art. I, § 5.

<sup>258</sup> MASS. CONST. of 1789, pt. 1, art. XXX.

<sup>259</sup> THE FEDERALIST No. 47, *supra* note 147, at 324–25 (James Madison).

Recognizing the problem, but without clarity as to how to solve it, the New Hampshire Constitution announced the separation of powers but with the caveat that the powers of government were to be “kept as separate from, and independent of each other . . . as is consistent with that chain of connection that binds the whole fabric of the constitution in one indissoluble bond of union and amity.”<sup>260</sup> The statement of separation as a general principle seemed to require this open-ended qualification.

To avoid this unsatisfactory solution, most constitutions, including the U.S. Constitution, did not generalize about the ideal of separation.<sup>261</sup> Instead, such constitutions simply granted each specialized power to its own specialized part of government, and then carved out exceptions. The result was very concrete. Rather than declare the abstract separation of powers and then backtrack by recognizing an abstract qualification, a typical American constitution carefully vested the different powers in different branches and then specified exceptions.<sup>262</sup>

In this approach, a constitution’s grant of specialized powers to different branches of government was a default allocation.<sup>263</sup> For example, after noting how the Pennsylvania Constitution had distributed the three powers, a committee of the state’s Council of Censors explained, “All power, therefore, not placed out of its proper hands belongs to the legislative or the executive, according to its nature.”<sup>264</sup> Along the

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<sup>260</sup> N.H. CONST. of 1784, art. XXXVII.

<sup>261</sup> When Madison proposed a separation of powers amendment, Rep. Livermore thought it “subversive of the Constitution” and it was not adopted. DEBATE IN H, TO THE COMM. OF THE WHOLE ON THE SUBJECT OF AMENDMENTS (statement of Rep. Livermore), *reprinted in* CREATING THE BILL OF RIGHTS: THE DOCUMENTARY RECORD FROM THE FIRST FEDERAL CONGRESS 192–93 (Helen E. Veit et al. eds., 1991).

<sup>262</sup> See U.S. CONST. arts. I–III.

<sup>263</sup> Professor Gary Lawson writes of “the Constitution’s three ‘vesting’ clauses as effecting a complete division of otherwise unallocated federal governmental authority among the constitutionally specified legislative, executive, and judicial institutions.” Gary Lawson, *Territorial Governments and the Limits of Formalism*, 78 CALIF. L. REV. 853, 857–58 (1990). Thus, “[a]ny exercise of governmental power, and any governmental institution exercising that power, must either fit within one of the three formal categories thus established or find explicit constitutional authorization for such deviation.” *Id.* at 858. According to Professor Steven Calabresi, “Articles II and III are alike in that both contain power-granting Vesting Clauses that are defined, explicated, and substantially limited by the later *power-restraining* provisions of the subsequent sections of those Articles.” Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1400 (1994). In contrast, Professor John Manning protests that the Constitution’s allocation of powers must be somewhat open ended because the document contains no separation of powers clause. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1944 (2011). But this view fails to recognize the degree to which the Constitution establishes its separation of powers as the default when it grants specialized powers to specialized branches of government.

<sup>264</sup> A VIEW OF THE PROCEEDINGS OF THE SECOND SESSION OF THE COUNCIL OF CENSORS, CONVENED AT PHILADELPHIA, ON THE 1ST OF JUNE, 1784, *supra* note 117, at 101.

same lines, the Virginia judge St. George Tucker observed that “one of the fundamental principles of the American government” was “to keep these powers separate and distinct, except in the cases positively enumerated.”<sup>265</sup>

The U.S. Constitution similarly locates each power in the appropriate branch of the federal government, subject to various subtractions, additions, and clarifications. The President has the executive power with a range of adjustments, such as a veto on legislation.<sup>266</sup> The courts have the judicial power, though the judges can serve in executive roles.<sup>267</sup> Congress has the enumerated legislative powers, but the Senate in impeachments has what might otherwise look like judicial power.<sup>268</sup> Other than as allowed by such adjustments, each specialized power belongs to its own specialized part of government.

The separation of powers in the U.S. Constitution is thus a default rule, by which the different types of powers are kept separate, except as mentioned. Apart from the specified variations, each type of power belongs to its own branch.

#### D. *Recharacterization at the Edges to Preserve Separation*

Tellingly, even in varying from the default rule of separation, the Constitution does its best to maintain its separation of powers. Although this could not be done with perfection, it reveals how carefully the Constitution was drafted to preserve the separation of powers.

It is often assumed that the President’s veto gives him an element of legislative power and that the Senate’s trial of impeachments gives it some judicial power, and so forth. Indeed, already in the 1780s, this sort of mixing and matching of powers at the edges of the separation of powers was discussed.<sup>269</sup> One might therefore think that the Constitution

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<sup>265</sup> Tucker, *supra* note 181, at bk. 2, 4 (last loose page inserted into notebook). A Philadelphia newspaper essay observed that “each of these branches, of right, exercises all authority, devolved by the community, which properly belongs to it, unless the contrary be clearly expressed.” See VILE, *supra* note 236, at 153 (quoting A.B., PA. GAZETTE, Apr. 28, 1784). Note also Hamilton’s subsequent observation:

The general doctrine then of our constitution is, that the EXECUTIVE POWER of the Nation is vested in the President; subject only to the *exceptions* and *qu[a]lifications* which are expressed in the instrument.

ALEXANDER HAMILTON & JAMES MADISON, THE PACIFICUS-HELVIDIUS DEBATES OF 1793–1794, at 13 (Morton J. Frisch ed., Liberty Fund 2007) (1793) (alteration in original).

<sup>266</sup> U.S. CONST. art. II.

<sup>267</sup> *Id.* art. III.

<sup>268</sup> See *id.* art. I.

<sup>269</sup> See THE FEDERALIST NO. 48, *supra* note 147 (James Madison). Being more a political theorist than a lawyer, Madison did not attend to how the Constitution conserved the differences among the separated powers.

does not fully embrace the separation of powers and, in fact, permits overlapping powers.

But such a view can easily be taken too far. One corrective is to note that these elements of apparent overlap are only little adjustments to the more clear-cut separation of the major tripartite powers. They are small-scale adjustments that were added primarily to ensure checks and balances.<sup>270</sup>

Moreover, even if the presidential veto and the senatorial trial of impeachments deviate from an abstract separation of powers at the margins, they are not instances of overlapping powers. On the contrary, even if the Constitution carves out a small slice of legislative power for the President, it is for him alone; there is no overlap with Congress's legislative powers. And even if the Constitution shifts a sliver of judicial power to the Senate, it is only for the Senate; there is no overlap with the courts' judicial power.

More fundamentally, when the Constitution substantially deviates from the abstract separation of powers, it minimizes the affront to that principle by recharacterizing the transferred elements of those powers. The veto is taken out of legislative power, and the trial of impeachments is removed from the judicial power.<sup>271</sup>

The veto had been legislative. The English constitution was said to divide legislative power among the Lords, the Commons, and the King—so that the royal veto was part of the legislative power.<sup>272</sup> In contrast, the U.S. Constitution carefully vests its legislative powers in Congress, consisting of its two houses.<sup>273</sup> The Constitution thereby makes clear that whatever the veto may have been in England, it is not part of the Constitution's legislative power.<sup>274</sup>

A similar recharacterization happened to the trial of impeachments. In the English constitution, the House of Lords was the highest judicial body, and its trials of impeachments were judicial.<sup>275</sup> The U.S. Constitution, however, places the judicial power of the United States in the Supreme Court and other federal courts.<sup>276</sup> This means that

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<sup>270</sup> *See id.*

<sup>271</sup> U.S. CONST. art. I, §§ 2–3; *id.* art. III, § 2.

<sup>272</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*85. Reflecting this English assumption about the legislative character of the veto, it was observed that in the English constitution, “the Negative Voice, and Executive Power, are in the same person.” WILLIAM PUDSEY, THE CONSTITUTION AND LAWS OF ENGLAND CONSIDER'D 46 (London 1701).

<sup>273</sup> U.S. CONST. art. I, § 1.

<sup>274</sup> As put by James Madison, “The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law.” THE FEDERALIST No. 47, *supra* note 147, at 326.

<sup>275</sup> *See* Jack Simson Caird, *Impeachment*, HOUSE OF COMMONS LIBR. (June 6, 2016), <https://commonslibrary.parliament.uk/research-briefings/cbp-7612/> [<https://perma.cc/3GZ9-J377>].

<sup>276</sup> U.S. CONST. art. III, § 1.

the power of impeachments is not part of the Constitution's judicial power.<sup>277</sup>

Of course, one cannot forget the underlying theoretical character of the veto and the trial of impeachments. So, they cannot be fully converted to match the general power of the branch in which they are located. But whatever they naturally may be, it is clear that at least for purposes of the Constitution's separation of powers, the one power is not legislative and the other is not judicial.

The Constitution thus did not simply mix and match the powers at their edges. Instead, it carefully preserved a separation of powers by recategorizing apparent exceptions. This confirms that even though the Constitution adopted separation only as default rule, it aimed for a full separation of powers, each power being entirely in its own branch of government.



The Constitution separates its powers, keeping each in its own part of government. And by adopting separation as a default rule and recharacterizing deviations at the edge, it provides for checks and balances without giving up on a separation of powers. It thereby institutionalizes an important model of decision-making and secures liberty, as evident from contemporary administrative power.

## VII. EXCLUSIVITY

What this Foreword has thus far discussed in terms of the differences among powers and their separation now must be considered from another angle, their exclusivity. Early Americans did not always precisely say that the powers were exclusive. But they generally understood each power to be exclusively in its own branch of government.<sup>278</sup>

This matters at least because it allows one to see that the Constitution distinguishes between external and internal exclusivity. As to other branches—that is, externally—each power was exclusively in its own branch. But internally, within each branch, the powers were not always exclusive.<sup>279</sup> The Constitution, in other words, was very careful in its treatment of exclusivity, making powers exclusive externally while leaving room for them to be nonexclusive internally, where this seemed necessary.

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<sup>277</sup> See *id.*; *id.* art. I, § 2.

<sup>278</sup> See *infra* Section VII.A.

<sup>279</sup> See *infra* Section VII.B.

### A. *Externally Exclusive*

The Constitution's powers were externally exclusive. That is, each was located exclusively in its designated branch, not the other branches. This already should be apparent from what has been seen about consent, the difference among the powers, and their separation. But it also was spelled out by some early commentary.

The 1787 North Carolina case of *Bayard v. Singleton*<sup>280</sup> held a state statute unconstitutional and void.<sup>281</sup> A year prior to the final decision, while still wrestling with the issues in the case, one of the judges, Samuel Ashe, observed:

[T]he People of this Country, with a general Union of Sentiment, by their delegates met in Congress, and formed that System, on those fundamental principles of Government comprised in the [North Carolina] Constitution dividing the powers of Government into separate & distinct branches, to wit, the Legislative[,] the Judicial, & Executive; and Assigning to each, several & distinct powers, and prescribing their several limits & boundaries.<sup>282</sup>

Judge Ashe clearly assumed that the “several & distinct powers” were assigned to the “separate & distinct branches”—that each power was exclusively in its own branch.<sup>283</sup>

In 1788, in *The Federalist*, Alexander Hamilton noted the “regular distribution of power into distinct departments.”<sup>284</sup> For example, “[t]he interpretation of the laws is the proper and peculiar province of the courts.”<sup>285</sup> Although this latter passage nowadays tends to feature in discussions of judicial review, it also suggests the exclusivity of the Constitution's powers. Certainly, that is how St. George Tucker understood it. In *Kemper v. Hawkins*<sup>286</sup>—a 1793 Virginia case—Judge Tucker argued from the exclusivity of the different powers.<sup>287</sup> He opined that “since it is the province of the legislature to *make*, and of the executive to *enforce* obedience to the laws, the *duty* of expounding must be exclusively vested in the judiciary.”<sup>288</sup> On this basis, he echoed Hamilton that

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<sup>280</sup> 1 N.C. 5, 1 Mart. 48 (Super. Ct. of Law and Eq. 1787).

<sup>281</sup> For the details of the case, see HAMBURGER, *supra* note 102, at 449–61.

<sup>282</sup> *Id.* at 453 (quoting Letter from Judge Samuel Ashe to the Speakers of the Houses of the Gen. Assembly (Dec. 14, 1786) (recalling what he said in *Bayard v. Singleton*)).

<sup>283</sup> See HAMBURGER, *supra* note 102, at 453.

<sup>284</sup> THE FEDERALIST No. 9, *supra* note 147, at 43 (Alexander Hamilton).

<sup>285</sup> THE FEDERALIST No. 78, *supra* note 147, at 525 (Alexander Hamilton).

<sup>286</sup> 3 Va. 20 (1793).

<sup>287</sup> *Id.*

<sup>288</sup> *Id.* at 22 (emphasis added).

“[t]he interpretation of the laws is the proper and peculiar province of the courts.”<sup>289</sup>

During the 1790s, beginning in 1791, St. George Tucker taught constitutional law at William and Mary, and in his lectures he said:

[A]ll the powers granted by the Constitution are either legislative, executive, or judicial; and to keep them forever separate & distinct, except in the Cases positively *enumerated*, has been uniformly the policy, and constitutes one of the fundamental principles of the American Government.<sup>290</sup>

This was the standard default approach to the separation of powers, in which the Constitution allocated the different powers to their different branches, except as enumerated. What is revealing here is Tucker’s view that the Constitution aimed to keep the powers “forever separate [and] distinct.”<sup>291</sup> The powers evidently were to be exclusively in their branches and not open to being shifted around.<sup>292</sup>

One of the earliest treatises on the Constitution was *Sketches of the Principles of Government*, published in 1793 by Nathaniel Chipman — the first judge of the United States District Court for the District of Vermont.<sup>293</sup> This treatise was not very original; it merely recited familiar truths. For example, it observed: “The government of the United States of America is constituted with legislative, judicial, and executive powers, vested in distinct and separate departments.”<sup>294</sup> Interestingly, the book then made clear that this distribution of powers was not merely an initial distribution of cards, but was a continuing limit. In Chipman’s words, the Constitution had the effect of “drawing a line between the several branches” for it “has pointed out generally the objects of federal legislation, and has limited and modified the several powers of the general government.”<sup>295</sup> The different powers were to remain exclusively in their different branches.

In his Farewell Address, George Washington closed his public life and the century with a reminder of the nation’s first principles. Washington was aided in writing the final draft by Alexander Hamilton, who had as broad a conception of the federal government’s power as

<sup>289</sup> *Id.* at 24; THE FEDERALIST No. 78, *supra* note 147, at 525 (Alexander Hamilton).

<sup>290</sup> Tucker, *supra* note 181, at bk. 2, 4 (last loose page inserted into notebook).

<sup>291</sup> *Id.*

<sup>292</sup> Tucker was sufficiently anxious to find a textual foundation for the external exclusivity of the powers: “[T]he word *the*, used in defining the powers of the executive, and of the judiciary, is, with these exceptions, co-extensive in its signification with [the word] *all*.” *Id.* He thereby failed to recognize how the Constitution carefully distinguished among the powers to ensure that at least some of them would be internally nonexclusive. *See infra* Section VII.B.

<sup>293</sup> NATHANIEL CHIPMAN, SKETCHES OF THE PRINCIPLES OF GOVERNMENT (Vt., J. Lyon 1793).

<sup>294</sup> *Id.* at 256.

<sup>295</sup> *Id.* at 261.



any of the founders.<sup>296</sup> So, it is significant that Washington urged those entrusted with power to “confine themselves within their respective Constitutional spheres, avoiding in the exercise of the Powers of one department to encroach upon another.”<sup>297</sup> He feared that the “spirit of encroachment tends to consolidate the powers of all the departments in one, and thus to create whatever the form of government, a real despotism.”<sup>298</sup> Leaving aside how far we have gone toward such a consolidation, Washington and Hamilton clearly thought that those who led the different departments of government should remain within their own “Constitutional spheres,” and not “encroach” on the powers granted to other departments.<sup>299</sup>

A final illustration of the powers’ exclusivity comes from *Hayburn’s Case*.<sup>300</sup> When Congress decided to give pensions to war veterans who had been rendered invalids, it asked the federal circuit courts to decide who was eligible.<sup>301</sup> As recorded in *Hayburn’s Case*, three circuit courts in 1792 refused.<sup>302</sup>

Although the circuits made slightly different arguments, they all agreed that, under the Constitution, their power was merely judicial—so even with congressional authorization, they could not do acts that were of another character.<sup>303</sup> The Circuit Court for the District of Pennsylvania protested that “the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.”<sup>304</sup> The Circuit Court for the District of North Carolina declared that “the Legislative, Executive, and Judicial departments, are each formed in a separate and independent

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<sup>296</sup> Letter from Alexander Hamilton to George Washington (July 30, 1796), *reprinted in* SELECTED WRITINGS AND SPEECHES OF ALEXANDER HAMILTON 430 (Morton J. Frisch ed., 1985) (containing Hamilton’s draft of Washington’s farewell address).

<sup>297</sup> George Washington, Farewell Address (Sept. 19, 1796), *in* 20 THE PAPERS OF GEORGE WASHINGTON, PRESIDENTIAL SERIES 703, 711 (David R. Hoth & William M. Ferraro eds., Univ. of Va. Press 2019).

<sup>298</sup> *Id.* He added:

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.

*Id.* at 711–12.

<sup>299</sup> *Id.* at 711.

<sup>300</sup> *See* 2 U.S. (2 Dall.) 409 (1792).

<sup>301</sup> *Id.* at 410–11.

<sup>302</sup> *See id.* at 410–12.

<sup>303</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 211–15.

<sup>304</sup> *Hayburn’s Case*, 2 U.S. (2 Dall.) at 411 (emphasis omitted) (argument of C.C.D. Pa.).

manner; and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.”<sup>305</sup> So, “such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating Judicial power, for the exercise of . . . any power not in its nature judicial.”<sup>306</sup> The Circuit Court for the District of New York similarly said that “by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either.”<sup>307</sup> Consequently, “neither the Legislative nor the Executive branches, can constitutionally assign to the Judicial any duties, but such as are properly judicial.”<sup>308</sup> Put another way, even with congressional authorization, the courts could not exercise any power other than their own.<sup>309</sup>

The separated powers were externally exclusive. Each was vested exclusively in its own branch of government and was to remain exclusively there, not in any other branch.

### B. *Internally Not Always Exclusive*

However exclusively the Constitution vests its powers in their respective branches, this is not to say its powers are entirely exclusive within the branches. Indeed, the Constitution carefully distinguishes between what is exclusive as to other branches and what is exclusive as to subordinate parts of each branch. The effect is to bar any shift of power to another branch while permitting some delegation within the branches.<sup>310</sup>

The Constitution vests all of its legislative powers in Congress, stating: “All legislative Powers herein granted shall be vested in a Congress

<sup>305</sup> *Id.* at 412 (argument of C.C.D.N.C.).

<sup>306</sup> *Id.* at 412–13 (emphasis omitted).

<sup>307</sup> *Id.* at 410 (emphasis omitted) (argument of C.C.D.N.Y.).

<sup>308</sup> *Id.* (emphasis omitted).

<sup>309</sup> Similarly, one circuit added that Congress, having only legislative power, could not exercise judicial power:

[N]o decision of any court of the United States can under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion, or even suspension, by the Legislature itself, in whom no judicial power of any kind appears to be vested, but the important one relative to impeachments.

*Id.* at 413 (argument of C.C.D.N.C.).

<sup>310</sup> The Mortenson and Bagley article confuses this internal exclusivity with the external. They write:

So if all three functional powers have already been delegated once by the people, and if executive and judicial powers could both be redelegated, then why would the legislative power be any different? The answer is that it wasn't. To the contrary: Absent express derogation from the principle, legislative authority was every bit as susceptible to redelegation as its executive and judicial siblings.

of the United States.”<sup>311</sup> In contrast, when the Constitution vests executive power in the President, and judicial power in the courts, it does not use the word *all*.<sup>312</sup> This variation has long been recognized, even if not well understood.<sup>313</sup> Rather than a coincidence, it seems to signal that the legislative powers are exclusive not only externally but also internally.

The Constitution’s vesting of *all* of its legislative powers in Congress is entirely exclusive—both as to other branches and as to bodies subordinate to Congress. If all legislative powers are to be in Congress, they cannot be elsewhere. If the grant were merely permissive, not exclusive, there would be no reason for the word *all*. This word is thus significant in signaling that the legislative powers are exclusively in Congress—not only vis-à-vis other branches but also vis-à-vis subordinate bodies.<sup>314</sup>

Of course, Congress can delegate some incidental authority to subordinates. The houses can authorize clerks to keep records and doorkeepers to control access, and Congress can authorize the Congressional Budget Office and the Congressional Research Service to provide information. But Congress cannot delegate its power to legislate. Only one body, Congress, can exercise this power—a conclusion confirmed by the Constitution’s bicameral process for enacting laws.<sup>315</sup>

In contrast, when it comes to executive power, the Constitution must omit the word *all*. The Constitution has to leave room for the President to delegate much executive power to his subordinates. For example, though only the President can veto a bill or grant a pardon,<sup>316</sup> he can and inevitably must leave the enforcement of the laws to subordinates. The Constitution therefore cannot vest *all* executive power in the President, lest this preclude the exercise of executive power by those who serve under him.

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Mortenson & Bagley, *supra* note 5, at 298. This mistakenly assumes that courts generally can delegate their judicial power. It also mistakenly assumes that the Constitution treats all of the tripartite powers as equally nonexclusive.

<sup>311</sup> U.S. CONST. art. I, § 1.

<sup>312</sup> Compare *id.* art. II, § 1, and *id.* art. III., § 1, with *id.* art. I, § 1.

<sup>313</sup> The word *all* was noted already by the Virginia judge St. George Tucker. But in his anxiety to find a textual foundation for the external exclusivity of the tripartite powers, he claimed in the 1790s that “[t]he word the, used in defining the powers of the Executive, and of the judiciary, is, with their Exceptions, co-extensive in its signification, with all.” Tucker, *supra* note 181, at bk. 2, 4 (last loose page inserted into notebook) (emphasis omitted). He thereby failed to recognize how the Constitution carefully distinguished among the powers to ensure that at least some of them would be internally nonexclusive.

<sup>314</sup> For the external exclusivity evident from the word *all*, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 386–88; *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); Shugerman, *supra* note 41, at 7–8, 59–60. Note that whereas prior scholarship, including my own, has focused on the word *all* for understanding external exclusivity, the point in the text here is that it makes even more of a difference for questions of internal exclusivity.

<sup>315</sup> See U.S. CONST. art. I, § 7.

<sup>316</sup> *Id.*; *id.* art. II, § 2.

Indeed, the Constitution makes clear that the President may and should leave much executive power to subordinates. Domestically, it provides that he “shall take Care that the Laws be faithfully executed,” thus revealing his dependence on others to execute the laws.<sup>317</sup> In foreign affairs, it says that he “shall appoint Ambassadors, other public Ministers and Consuls” and “shall be Commander in Chief,” all of which confirms that he must rely on subordinates in diplomacy and war.<sup>318</sup> The Constitution’s text thus not merely permits but requires that much executive power be internally nonexclusive.

Similarly, the Constitution does not use the word *all* regarding the judicial power but for more complex reasons. Some commentators conclude from the absence of the word *all* that it is “unproblematic” to shift adjudication to executive agencies.<sup>319</sup> But this argument moves too quickly. It ignores institutional arrangements such as the separation of powers and the external exclusivity of the powers. It also forgets the personal duty of the judges.

Although in the Roman-derived civil law system judges had long been able to delegate their power, in the common law system the duty of a judge required him to exercise his own judgment; he could not delegate it to anyone else, not even his clerk or a master in chancery.<sup>320</sup> The Constitution captures this tradition of judicial duty simply by using the word “Judges.”<sup>321</sup> The personal duty of a judge effectively precluded any external transfer of judicial power.<sup>322</sup>

Yet this is not to say the Constitution could have used the word *all*. If it had vested *all* judicial power in the Supreme Court and in such inferior Courts as Congress may establish, it would have invested the Supreme Court and inferior courts with the same judicial power. This would be awkward, as the different courts needed to exercise different layers of the judicial power—most basically, trial and appellate power. Moreover, the courts often needed to delegate some power internally, as when a court of appeals remanded a case to a district court. So, the word *all* could not be used.

It therefore is no surprise that the Constitution drops the word *all* for the executive and judicial powers. Instead, it simply vests *the* executive power and *the* judicial power. The Constitution thereby ensures that these powers are not exclusive within their branches—even while

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<sup>317</sup> *Id.* art. II, § 3.

<sup>318</sup> *Id.* § 2.

<sup>319</sup> Shugerman, *supra* note 41, at 1558 (“[I]t seems that if Article III vesting is less exclusive, then adjudication by administrative agencies in the executive branch is unproblematic.”).

<sup>320</sup> HAMBURGER, *supra* note 102, at 109.

<sup>321</sup> U.S. CONST. art. III, § 1; *id.* art. VI.

<sup>322</sup> See HAMBURGER, *supra* note 102, at 109.

establishing each of the three powers as exclusive in relation to the other branches.



The Constitution's phrasing reveals different approaches to internal and external exclusivity. The vesting of the executive power and the judicial power is not entirely exclusive vis-à-vis subordinate parts of these branches. At the same time, each of the Constitution's tripartite powers is vested exclusively vis-à-vis the other branches. Although some powers are internally nonexclusive, all of the powers are externally exclusive.

### VIII. NONEXCLUSIVE AUTHORITY UNDER EXCLUSIVE POWERS

By this point, it should be apparent that the Constitution's powers are exclusively in their respective branches—as evident from the principle of representative consent, the differences among the powers allocated to the different branches, the separation of powers, and the distinction between external and internal exclusivity. So, it now is necessary to consider what might seem a conundrum. How can the exclusive allocation of powers to different branches be reconciled with the legitimacy of at least some overlapping power? In other words, how can the powers be exclusive and yet sometimes, apparently, nonexclusive?

#### A. *The Problem*

At a practical level, the difficulty is that there are many instances in which multiple branches can lawfully engage in the same action. For example, both Congress and the courts can make rules of court. How, then, can it be said that there is a separation of powers?

If the separation of powers is robust—if it is not just an initial placement of powers, which then can be rearranged, but an enduring and exclusive allocation of powers—it seems incompatible with the apparent overlap of powers among the branches of government. And if the separation of powers thus conflicts with what appears to be an overlap of powers, then perhaps the separation of powers is very weak, nearly trivial—an initial distribution of powers that Congress can alter.

This conundrum is as important as it is puzzling. Already in the aftermath of the Founding, Congress authorized the executive and the courts to do some things that Congress might have done—for example, it authorized the courts to make rules of court and authorized some executive departments to make rules governing their personnel and rules and decisions on the distribution of privileges, such as pensions.<sup>323</sup>

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<sup>323</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 8–9 (1825) (regarding statutory authorization for rules of court); HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at

Since then, the problem of overlap or nonexclusivity has become only more salient on account of the growth of administrative power. Administrative agencies—some located in the executive branch and others allegedly independent—enjoy congressional authorization to exercise what by all appearances are versions of the legislative and judicial powers.<sup>324</sup> Such agencies epitomize the overlap of powers; they seem to prove that the powers cannot be exclusively in their own branches.

But even without the administrative state, the problem is serious. Recall that early Congresses authorized courts to make rules of court, executive departments to regulate their personnel, and so forth.<sup>325</sup> These early instances of seemingly overlapping powers are more than enough to require an explanation. How can the Constitution's powers be both separate and apparently overlapping—simultaneously exclusive and nonexclusive?

### B. *Exclusive Powers and Nonexclusive Authority*

The difficulty may seem insuperable. The powers cannot be both exclusive and nonexclusive. Yet there is a solution. The problem largely evaporates with a more careful use of language—in particular, with a distinction between the Constitution's *powers* and the *authority* exercised under them. Consider the possibility that a power is a sphere of action granted by the Constitution, and the authority exercised under it is a part or application of that power. From this perspective, the Constitution's different powers are vested exclusively in the different branches of government, but the authority exercised under these powers is not always exclusive. That is, although some such authority is exclusive, some of it can overlap. Exclusive powers permit an extensive degree of nonexclusive authority.

This distinction has already been made by Gary Lawson in slightly different terms. He explains that “certain functions might fit within more than one kind of power.”<sup>326</sup> Closer to the language used here, Justice Gorsuch notes that “[w]hile the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch.”<sup>327</sup>

The conceptual claim is that by distinguishing power and authority, one can reconcile the separation of powers with the overlapping use

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86 (regarding statutory authorization for departmental rules instructing officers, including on pensions).

<sup>324</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 111–20, 261–68.

<sup>325</sup> See *supra* Section VII.B.

<sup>326</sup> Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 358 (2002).

<sup>327</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019).

of the powers. If the Constitution's powers are exclusive, but this is not always true of the authority exercised under them, then the separated powers come with much unseparated authority.

Admittedly, this point may turn out to be incompatible with aspects of administrative power—in particular, it bodes ill for executive exercises of legislative and judicial power. But wherever one comes out on such questions, it is valuable at least to be self-conscious about the difference between power and authority. It is important to recognize that authority can be nonexclusive even when the underlying power is not. On this understanding, there is no conundrum: the exclusive powers can be reconciled with exercises of nonexclusive authority.

### C. *Power vs. Authority*

It is worth pursuing the solution in more detail. Recall that the initial step is to distinguish power and authority—the former being a sphere of action granted by the Constitution, and the latter being a part or application of it. The Constitution, for instance, gives Congress the *power* to regulate commerce among the states, and within that power, Congress has the *authority* to regulate the interstate shipping of explosives.<sup>328</sup> To take a judicial example, the courts have the judicial *power* and thereby enjoy the *authority* to make rules of court.<sup>329</sup>

An authority is a power to do something. But the power to regulate commerce among the states is a power in a different sense from the power to restrict the interstate shipping of explosives. Whereas the one is a power vested in Congress by the Constitution, the second is a power exercised under or as part of the other. To avoid confusion between these different layers of power, it is useful to distinguish between the power granted by the Constitution and the authority exercised under it.

This distinction avoids confusion between definitional powers and nondefinitional authority. Under its power to regulate commerce, for example, Congress can place limits on the sale of particular pesticides across state lines.<sup>330</sup> The legislature's power is defined in terms of regulating commerce among the states, and this includes its authority to restrict the interstate sale of the pesticides. Similarly, under its necessary and proper power, Congress can authorize the Secret Service to protect the president.<sup>331</sup> The power to make necessary and proper laws is definitional as to what Congress may do, but the authority exercised

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<sup>328</sup> U.S. CONST. art. I, § 8.

<sup>329</sup> *Id.* art. III, § 1.

<sup>330</sup> *Id.* art. I, § 8.

<sup>331</sup> *Id.*; see 18 U.S.C. § 3056 (2018).

under this power is not; instead, it is merely part of the lawful reach or application of the constitutional power.

#### D. *Exclusive vs. Nonexclusive Authority*

Having distinguished between powers and authority, one can draw a line between exclusive and nonexclusive authority. The Constitution's powers are exclusively in their own branches. But the authority of the branches under their powers is only sometimes exclusive, not always. The exclusive powers, in other words, can have some overlapping reach. And this overlap in authority explains much about the separation of powers that has seemed puzzling.

*The Difficulty of Distinguishing Between Exclusive and Nonexclusive Constitutional Powers.* Recall that some commentators have distinguished between exclusive and nonexclusive constitutional powers. Chief Justice Marshall spoke in this manner in *Wayman v. Southard*, saying that Congress cannot “delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”<sup>332</sup> On this basis, it has been suggested that the power of making rules of court in *Wayman* was legislative, but not exclusively legislative, the implication being that Congress could leave part of its legislative power to be exercised by the courts.<sup>333</sup>

But is the “power” to make rules of court legislative? Is it not also judicial? If so, does it ordinarily make sense to say that Congress delegated its legislative power to the courts?

Moreover, if the word *powers* in such discussions is understood to mean the powers designated by the Constitution, a distinction between exclusive and nonexclusive powers runs into severe difficulties. For one thing, it collides with the Constitution's reliance on consent, its different powers, its separation of powers, and its exclusivity.<sup>334</sup>

Rather than draw a line between the exclusive and nonexclusive legislative powers, some commentators invite the justices to conclude that all legislative power is nonexclusive.<sup>335</sup> This complete abandonment of the separation of powers is not very persuasive, because it collides with the Constitution, its history, Chief Justice Marshall's opinion in *Wayman*, and even contemporary doctrine, which maintains at least the

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<sup>332</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825).

<sup>333</sup> Wurman, *supra* note 7, at 1502 (“In my view, the evidence suggests that Chief Justice John Marshall was likely right in his analysis of nondelegation in 1825: there are ‘important subjects’ with respect to which Congress must make the relevant decisions, and there are matters of ‘less interest’ with respect to which the executive may ‘fill up the details.’”).

<sup>334</sup> See discussion *supra* Parts IV–VII.

<sup>335</sup> See Mortenson & Bagley, *supra* note 5, at 2326–28.



pretense of nondelegation.<sup>336</sup> The only other solution currently on the table is to follow Marshall's *Wayman* opinion in distinguishing between important and unimportant legislation. But this approach, as seen in Part III, runs into sobering difficulties. An importance distinction conflicts with the Constitution's all-or-nothing vesting of legislative powers by subject matter<sup>337</sup> and invites the judiciary to pursue a highly political doctrinal goose chase.<sup>338</sup>

So, if some of the powers vested by the Constitution are to be nonexclusive, the justices will have to come up with a persuasive line between the exclusive and nonexclusive powers.<sup>339</sup> Thus far, that seems a difficult and institutionally perilous task.

*Distinguishing Exclusive and Nonexclusive Authority.* It therefore is crucial to take seriously the distinctions offered here. Most basically, as already seen, there is a distinction between constitutional powers and the constitutional authority exercised under such powers.<sup>340</sup> In addition, there is a distinction between exclusive and nonexclusive authority.

From this perspective, Chief Justice Marshall's allusions in *Wayman* to exclusive and nonexclusive *powers* can be recast in more moderate terms. In particular, one might distinguish between the exclusive and nonexclusive *authority* enjoyed under the exclusive powers.

The authority to make rules of court surely exists under both the judicial and the legislative powers. When speaking in *Wayman* about "the regulation of the conduct of the officer of the Court in giving effect to its judgments," Marshall said that a "general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."<sup>341</sup> So Marshall might have said that the

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<sup>336</sup> See *supra* Parts III, VIII; *infra* Part IX. The full delegation position becomes almost comic when one considers its implications. In a nation founded on the principle of "No Taxation without Representation," is it to be believed that Congress could give the taxing power to some unelected agency head? If the rules of court in *Wayman* were legislative, could Congress give the power to make such rules to the Attorney General? Could Congress delegate legislative power not merely to agencies but to the President, so that he personally would make rules binding on Americans? Legislative power would thus be in the hands of the very person in whom the Constitution places the veto, and a sort of partial veto would be in the legislature, thus inverting the Constitution's structure. Could Congress give its legislative power to private bodies, perhaps to my Great Aunt Gertrude? To state these consequences of a fully permissive view of delegation is to refute it.

<sup>337</sup> See U.S. CONST. art. I, § 8.

<sup>338</sup> See *supra* Section III.C.

<sup>339</sup> See *supra* Section VII.B.

<sup>340</sup> See generally *supra* Section VIII.C.

<sup>341</sup> *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 45 (1825). As pointed out by Aaron Gordon, the Supreme Court had recently been even more emphatic about this point. Gordon, *supra* note 6, at 753 n.119 (quoting *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 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 . . . .

*authority* to make rules of court was not exclusively legislative or judicial.<sup>342</sup> From this point of view, Congress could authorize and direct the courts to make rules that they already had authority to make under their judicial power.

Although the legislative and judicial powers were exclusively in their respective branches, the authority to make rules of court was not exclusively legislative or judicial. Similarly, although the legislative and executive powers were exclusively in their respective branches, the authority to make rules on the distribution of benefits was not exclusively legislative or executive.

This combination of exclusive powers and nonexclusive authority resolves the apparent conflict between the separation and the overlap of powers. In fact, the overlap is in the *authority* exercised under the separate powers.<sup>343</sup> Although some such authority is exclusive, some of it is nonexclusive, and this shared reach of the powers occasionally allows different branches to do the same thing even under their different and separated powers.<sup>344</sup>

#### *E. Binding vs. Nonbinding Rules and Adjudications*

The distinctions between powers and authority, and between exclusive and nonexclusive authority, have divergent implications for binding and nonbinding government acts. The authority to make binding rules is exclusively within the legislative power, and the authority to make binding judgments about binding law is exclusively within the judicial power.<sup>345</sup> Neither is within executive power.<sup>346</sup> Therefore,

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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.”).

<sup>342</sup> That Marshall understood the distinction between powers and what can be done under them is clear from his opinion two years earlier in *Gibbons v. Ogden*. See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 204 (1824). When discussing the overlapping authority of the states and the federal government, he observed: “All experience shows, that the same measures, or measures scarcely distinguishable from each other, may flow from distinct powers; but this does not prove that the powers themselves are identical.” *Id.* In *Gibbons*, as in *Wayman*, Marshall failed to use a distinct term for authority, but in *Gibbons* he at least spoke about the same *measures* under distinct *powers*, thus avoiding the confusion that has arisen from his dual uses of the word “powers” in *Wayman*. *Id.* His opinion in *Gibbons* thus clarifies that he at least understood the distinction drawn here in terms of *power* and *authority*.

<sup>343</sup> See *supra* Section VIII.B.

<sup>344</sup> See *supra* Section VIII.B.

<sup>345</sup> See *supra* Section V.B.

<sup>346</sup> See *supra* Section V.C.

Congress cannot authorize the executive to make such rules or adjudications.

But where rules and decisions allocate benefits or other privileges, such rules and decisions can be within executive as well as legislative power.<sup>347</sup> Being nonexclusive, such rules and decisions can be made by Congress, the executive, or both.

*Binding Rules and Adjudications.* Consider binding rules—those that come with legal obligation. If consent is necessary for rules to be binding, then the making of binding rules must be part of the legislative power and must be exclusively in Congress.<sup>348</sup> Moreover, if executive power is the nation's action or force, and if judicial power involves binding judgments about binding laws in cases or controversies, then these powers cannot include any authority to make binding rules.<sup>349</sup> On such grounds, it seems that the authority to make binding rules is exclusively legislative, not executive or judicial.

Now, let's turn to adjudications. If an office of independent judgment is necessary for adjudications to be binding, and if binding judgments about binding laws are the core of the judicial power, the making of binding adjudications about binding laws must be part of the judicial power.<sup>350</sup> And if executive power is merely the nation's action or force, and if legislative power, although binding, does not extend to adjudications of cases, then these powers do not include any authority to make binding adjudications. On these grounds, the authority to make such adjudications is exclusively judicial, not executive or legislative.

Accordingly, the executive and its agencies, not to mention the allegedly independent agencies, cannot have any authority to make binding rules or adjudications.<sup>351</sup> The authority to do such things is, respectively, exclusively legislative or judicial.

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<sup>347</sup> See *supra* Section V.C.

<sup>348</sup> See *supra* Section IV.A.

<sup>349</sup> See *supra* Section VI.C.

<sup>350</sup> Although the statutes establishing administrative adjudication provide some protections for independence of administrative adjudicators, especially administrative law judges, the protections are always incomplete, leaving such adjudicators without the external independence, let alone the internal commitment to independence, that is the foundation of the Constitution's judicial power. For example, the administrative law judges employed by the Securities and Exchange Commission are not constitutionally protected in tenure or salary, and substantively their statutory protections are less than those enjoyed by Article III judges. Schwartz, *supra* note 248, at 212; see *generally* 15 U.S.C. § 78d-1. Most seriously, their decisions are subject to review by the commissioners, who are political appointees and who make the agency's regulations and oversee the prosecutorial policies of its Enforcement Division. 15 U.S.C. § 78d-1(b).

<sup>351</sup> This Foreword discusses independent agencies together with executive agencies, on the ground that even the independent agencies are at least partly executive and probably should be considered wholly executive.

This exclusivity obviously has jurisdictional and other limits. It broke down where Indian traders engaged in cross-border trade with Indian tribes.<sup>352</sup> This exclusivity also did not apply to legislation and adjudication in the District of Columbia and the territories, where the Constitution authorized Congress to exercise local legislative and judicial powers.<sup>353</sup> These jurisdictional limits confined the exclusivity of these powers.<sup>354</sup>

But the treatment of cross-border matters and federal districts and territories does not show that the executive generally could make binding rules or adjudications for national domestic regulation. Where regulation was national in the sense of not applying narrowly to territories or districts, and where it was domestic in the sense of not applying simply to cross-border matters, binding rules belonged exclusively to Congress, and binding adjudications were exclusively for the courts.

*Benefits and Other Privileges.* Notwithstanding what has been said about the exclusive authority to make binding rules and adjudications, much authority is not exclusive. Of particular importance, rules

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<sup>352</sup> See An Act to Regulate Trade and Intercourse with the Indian Tribes, ch. 33, 1 Stat. 137 (1790); HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 104–07; see also *infra* Appendix.

<sup>353</sup> U.S. CONST. art. I, § 8 (giving Congress power “To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of Particular States, and the Acceptance of Congress, become the seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other needful Buildings”); *Id.* art. IV, § 3 (“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 . . .”). Article I, Section 8, presumably meant a power to legislate exclusively of the states. See Eli Nachmany, *The Irrelevance of the Northwest Ordinance Example to the Debate About Originalism and the Nondelegation Doctrine*, 2022 U. ILL. L. REV. ONLINE 17; Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 575–76 (2007).

Oddly, congressional authorization for local elected legislatures in the territories or the District of Columbia is assumed by delegationists to justify the delegation of Congress’s legislative power to federal agencies. For example, the Northwest Ordinance and other congressional legislation authorizing territorial legislatures is taken to show that Congress could delegate the legislative power vested in it by Article I. Mortenson & Bagley, *supra* note 5, at 303–04, 334–36. Similarly, such a conclusion is drawn from state authorization for municipal and other local legislatures. Eggert, *supra* note 35, at 747. But the authorization for local populations to elect their own local legislatures is very different from the delegation of legislative power to unelected central agencies. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 390–91.

<sup>354</sup> In addition, it must be remembered that factual determinations were not exercises of judicial power and so could be executive. Congress did not authorize an executive exercise of legislative or judicial power when it made an American tariff rest on a presidential determination about a foreign tariff or when it made a land tax rest on an assessor’s determination of the land’s value. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 107–10, 209–10. Of course, there was good reason to worry that such determinations could drift into executive adjudication or rulemaking, and this eventually happened. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 690 (1892).

and decisions allocating benefits and other privileges are ordinarily nonexclusive.<sup>355</sup>

Both Congress and the executive can make rules governing the allocation of benefits and even can specify who in particular should get the benefits. Congress can exercise legislative power in enacting such rules or determinations, and at least with congressional authorization, the executive can exercise its own power to issue a rule or reach a determination instructing its officers about the distribution of the benefits. The powers are different but can overlap in what they accomplish.

Tellingly, congressional authorization was not always necessary for much executive rulemaking. The Secretary of the Treasury sometimes made regulations instructing Treasury officers with statutory authorization, but more typically without it.<sup>356</sup> Similarly, when the Patent Board made rules regularizing its granting of patents, it acted without congressional authorization for such rulemaking.<sup>357</sup> This independent rulemaking could not have been an exercise of congressionally delegated legislative power. Instead, it was within the executive power. Congressional action could be unnecessary because often the executive already had sufficient authority under its own power.

In short, there was no overlapping authority to make binding rules. But there was much overlapping rulemaking authority in other areas.<sup>358</sup>

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<sup>355</sup> See *supra* note 160 and accompanying text.

<sup>356</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 86 (regarding no general statutory authorization for Treasury rules instructing officers).

<sup>357</sup> Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813) (on file with the National Archives), <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> [<https://perma.cc/SHD7-9GPM>] (mentioning rules established by the Patent Board); An Act to Promote the Progress of Useful Arts, ch. 7, 1 Stat. 109, 110 (1790) (not authorizing rulemaking); An Act to Promote the Progress of Useful Arts; and to Repeal the Act Heretofore Made for That Purpose, ch. 6, 1 Stat. 318, 318 (1793) (not authorizing rulemaking).

<sup>358</sup> This Foreword's conclusion that the executive could not make binding rules—that is, rules with legal obligation—may seem to collide with the rulemaking authority granted by the 1798 federal statute providing for valuations of real property and slaves. See An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves within the United States, ch. 70, § 8, 1 Stat. 580, 585 (1798). As explained in the Appendix, that statute authorized tax commissioners to make “regulations” that were to be binding on the commissioners and their assessors—in other words, binding on themselves and their subordinates. See *infra* Appendix. Although these regulations are not evidence that the executive could make rules that were obligatory on the public, they provide at least one data point in support of the view that, with legislative authorization, the executive could make rules in the nature of instructions that were obligatory on executive officials.

But this treatment of executive regulations as binding on officials seems to have been quite unusual. The typical assumption was that wayward officials could merely be fired, not prosecuted. Indeed, as will be suggested in the Appendix, there is reason to think that the 1798 authorization for executive regulations that were binding on officials was a deviation from the Constitution. See



The distinction between the Constitution's powers and the authority enjoyed under them is revealing. It allows one to differentiate exclusive and nonexclusive authority and so clarifies how the separation of powers can be reconciled with unseparated authority.

## IX. DELEGATION

This Foreword now can turn to the possibility that the powers of the federal government were transferrable across branches of government on a theory of delegation. Having carefully established law upon representative consent, differentiated the tripartite powers, kept them separate, and placed each exclusively in its own branch of government, did the Constitution then permit them to be moved around to other branches?

The answer is simply, no. The prevailing English political theory rejected any such delegation, and the framers repudiated any executive exercise of congressionally delegated power. All of this, moreover, is fortunate.

### A. *The Roman Law Tradition*

The notion that a delegated power could not be further delegated was familiar already in the Roman law tradition. Defenders of contemporary delegation have long disparaged the Latin maxim against sub-delegation, *potestas delegata non potest delegare*.<sup>359</sup> Most recently, the Mortenson and Bagley article argues that the maxim was merely a private law doctrine, not a constitutional principle.<sup>360</sup> Their article further claims the maxim is not relevant for what the founders thought, because

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*infra* Appendix. But even if the 1798 authorization is informative about constitutional intent, it only suggests that executive rules could be binding on executive officers, not on the public.

A further wrinkle is that the regulations under the 1798 statute were made by commissioners in pursuit of their duty to make assessments, which were executive determinations of legal duties. See *infra* Appendix. Although determinations were not judicial proceedings, they were modelled on judicial decisions precisely in order to avoid stepping outside executive power. See *infra* Appendix. The commissioners' regulations thus arose in a very narrow set of circumstances. They are not necessarily a ground for thinking that conventional executive rules could bind subordinate officers.

<sup>359</sup> See, e.g., Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L. REV. 168, 173, 195 (1929) (disparaging the maxim's place in common law on account of Coke's reliance on an erroneous transcription of Bracton). But cf. Horst P. Ehmke, "Delegata Potestas Non Postest Delegari," *A Maxim of American Constitutional Law*, 47 CORNELL L.Q. 50, 50–51 (1962).

<sup>360</sup> Mortenson & Bagley, *supra* note 5, at 297 (describing the maxim as one of "private law" and saying that "the sourcing even for the private law claim is thin" and that there is only "scanty source material" (emphasis omitted)).

it allegedly lacked depth in common law literature and doesn't turn up in word searches of the Framing debates.<sup>361</sup>

But the maxim was not just a private law doctrine. And it played a key role in the development of modern political theory.

To be precise, the maxim against subdelegation was widely familiar in Roman law and in the medieval and early modern study of that law.<sup>362</sup> And from Roman times onward, the rejection of subdelegation was understood to have constitutional implications. So, this principle—with public as well as private significance—was deeply imbedded in European legal thought. It is an essential foundation for understanding the political theory of men such as John Locke.<sup>363</sup>

Roman law focused on the danger of subdelegating judicial authority. Unlike common law, Roman law permitted the delegation of judicial power.<sup>364</sup> But only once. Justinian's Digest recited: "It is obvious that one cannot delegate to another a jurisdiction which one holds by delegation."<sup>365</sup> It added: "It has been provided by ancestral custom that a person may delegate the administration of justice to another only where he has it in his own right and not by the favor of another."<sup>366</sup> At least as to judicial power, the bar against subdelegation was old and obvious.<sup>367</sup>

What began as a constitutional limit on the subdelegation of judicial power was eventually generalized into a broad principle. Glosses from the eleventh and twelfth centuries recited *delegatus non potest delegare*.<sup>368</sup> And variations on this theme, such as *delegatus delegare non potest* and *delegates non potest delegare*, appear in later canon law and

<sup>361</sup> *Id.* Incidentally, the Mortenson and Bagley article complains that my 2014 book makes an "originalist[]" constitutional claim from the maxim *potestas delegata non potest delegare*—a claim that they then condemn for its "ahistoricity" because they cannot find that maxim in common law cases. *Id.* at 296–97. Their article then disparages my book for citing post-Founding century cases on behalf of an originalist argument. *Id.* But this is a strange critique.

The relevant section of my book had nothing to do with originalism. Instead, it argued from the maxim *potestas delegata non potest delegare* to show the implications of contemporary private law doctrine on delegation. See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 386. The section even began by putting aside any reliance on the maxim as a constitutional principle: "Even when the constitutional analysis is cast aside and delegation is considered as a mundane legal principle, delegation does not do the work attributed to it." *Id.* So, the suggestion that my 2014 book was using the Latin maxim to make an originalist or other argument from the Constitution is odd.

In contrast, my argument here is originalist. The Latin maxim has originalist relevance, albeit in a more subtle way than simply to attribute it to the Founders.

<sup>362</sup> See *infra* notes 370–72 and accompanying text.

<sup>363</sup> See *infra* Section IX.B.

<sup>364</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 396–98.

<sup>365</sup> 1 THE DIGEST OF JUSTINIAN 39 (Alan Watson trans., Univ. of Pa. Press 1985).

<sup>366</sup> *Id.* at 40.

<sup>367</sup> See *id.*

<sup>368</sup> See Duff & Whiteside, *supra* note 359, at 171.

civilian texts.<sup>369</sup> Such ideas inevitably entered English law. Chief Justice Edward Coke prominently declared: “delegatam potestatem, quae non potest delegari.”<sup>370</sup>

So, even before examining the political theory of John Locke, one can see that there were long-standing constitutional concerns about subdelegation. The objections ran so far back that even Justinianic lawyers considered them ancestral custom, and they became part of the canon and civil law commentaries on Roman law.<sup>371</sup> It was a deep intellectual heritage, and on this foundation, John Locke and the Lockean commentator Thomas Rutherforth would elaborate their theories.<sup>372</sup>

### B. Political Theory

Although there were contested views of delegation in seventeenth- and eighteenth-century Europe, it is possible to make three

<sup>369</sup> *Id.* For sixteenth-century phrasing, Duff and Whiteside cite FLORES LEGUM (Paris 1566), *id.*, to which one might add other citations, such as PAULO BORGASIO FELTRENSE, TRACTATUS DE IRREGULARITATIBUS ET IMPEDIMENTIS ORDINUM, OFFICIORUM, ET BENEFICIORUM ECCLESIASTICORUM 402 (Venice 1574) (*Delegatus non potest delegare*). For well-justified skepticism about Duff and Whiteside’s emphasis on the phrasing of the different versions of the maxim, see Ehmke, *supra* note 359, at 51.

<sup>370</sup> 2 EDWARD COKE, THE SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 597 (London, M. Flesher & R. Young 1642). The maxim thus appeared in one of most authoritative of common law treatises. Note also Coke’s report that “if a Man has a bare Authority coupled with a Trust, as Executors have to sell Land, they can’t sell by Attorney; but if a Man has Authority, as absolute Owner of the Land, there he may do it by Attorney.” *Combe’s Case* (1614) 9 Coke 75, 75 (Eng.). Note that this language about “Authority coupled with a trust” is suggestive of what Locke would elaborate as government’s delegated authority to be exercised in trust. *Id.*

Common law doctrine on delegation developed in part from the preeminent Scottish discussion of the Roman law maxim. Continental civilians had “acknowledge[d]” the old maxim *delegatus non potest delegare* as a limit on the subdelegation of judicial power. 1 JAMES DALRYMPLE VISCOUNT OF STAIR, THE INSTITUTIONS OF THE LAW OF SCOTLAND 221 (David M. Walker, ed., The Univ. Presses of Edinburgh and Yale 1981) (1693). But outside questions of jurisdiction, whether in constitutional or private matters, they tended to assume that delegated power could be subdelegated. *Id.* This troubled Lord Stair—the preeminent commentator on Scottish law—because it undermined the intent of a principal who delegated power to an agent on account of his “personal fitness.” *Id.* So Stair suggested that delegated power could not ordinarily be subdelegated without the principal’s “consent.” *Id.* Stair’s view was picked up by eighteenth-century English writers and soon entered the common law. 1 MATTHEW BACON, A NEW ABRIDGMENT OF THE LAW 203 (4th ed., London, Strahan & Woodfall 1778) (Section D on authority); JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13 (2d ed., Boston, Charles C. Little & James Brown 1844).

<sup>371</sup> See 1 THE DIGEST OF JUSTINIAN, *supra* note 365.

<sup>372</sup> See Noga Morag-Levine, *Common Law, Civil Law, and the Administrative State: from Coke to Lochner*, 24 CONST. COMMENT. 601, 606–07 (2007) (discussing Anglo-American common law’s view of Roman civil law as a threading antithesis, despite being embedded in the common law, and the ultimate Anglo codification of initiatives that warned against “the absolutist tendencies of the civil law”). Of course, the English had mixed feelings about the Roman law. They simultaneously borrowed many of its doctrines while rejecting its Imperial vision of absolute or administrative power. But at least on subdelegation, Roman law could be very appealing.



crucial generalizations.<sup>373</sup> First, the preeminent political theory of eighteenth-century England and America, that of John Locke, forcefully rejected any delegation by a legislature of its legislative power.<sup>374</sup> Second, it is difficult to find any serious and widely appreciated Anglo-American political philosophy of the era that generally endorsed such delegation.<sup>375</sup> Third, although Lockean political theory was important, what really matters for delegation were the widespread assumptions about the need for consensual government—in particular representative law-making. Although this basic ideal was elegantly espoused by Locke, it more fundamentally was supported by nearly all Americans, even those who had never heard of the philosopher.<sup>376</sup>

*Locke.* Apologists for delegation tend to emphasize a single passage in Locke's *Two Treatises of Government* to claim that he did not object to delegations, or at least not to revocable delegations.<sup>377</sup> But when one looks carefully at that passage and the rest of his book, it becomes overwhelmingly clear that he thought that the legislature could never delegate or otherwise shift its legislative power—unless it had distinct constitutional authority to make new legislators.<sup>378</sup>

<sup>373</sup> See Hamburger, *Delegating*, *supra* note 6, at 97–98 (on contested views).

<sup>374</sup> *Id.* at 88.

<sup>375</sup> See *id.*

<sup>376</sup> See, e.g., *id.*

<sup>377</sup> See Mortenson & Bagley, *Delegation*, *supra* note 5, at 307 (quoting LOCKE, *supra* note 102, at 392–93, to suggest that Locke objected only to irrevocable alienations of legislative power); see also Posner & Vermeule, *supra* note 35, at 1727 (quoting the same section to suggest that Locke only objected to transfers of the legislators' power of enactment). *Contra* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1298 (2003) (pointing out that Locke "used the phrase 'the legislative power' to refer to the power to make rules for society and not the ability to exercise the *de jure* powers of legislators," and that Posner and Vermeule's account "simply cannot make sense of Locke's repeated claims that only those whom the *people* have appointed as legislators can make rules for the people").

<sup>378</sup> The Mortenson and Bagley article places great emphasis on the difference between, on the one hand, the words *alienation* and *transfer* and, on the other, the word *delegation*. Mortenson & Bagley, *supra* note 5, at 307–13. An alienation or transfer was irrevocable, but a delegation was not. On this basis, the article claims that Locke and others objected only to irrevocable alienations of legislative power, not mere delegations. See *id.* at 307, 309. But this allows terminology to obscure substance. The key distinction was between original and subsequent shifts in power.

Absolutist writers in the seventeenth century, such as Jean Bodin and Francis Bacon, tended to suggest that when the people relinquished power to a king, the transfer was irrevocable. See *id.* at 309. In contrast, anti-absolutist writers tended to argue that the people could not irrevocably or completely sacrifice their power. The absolutist commentators therefore often spoke about the people's *alienation* of power, and their opponents tended to argue against such *alienation*.

Indeed, when anti-absolutist writers discussed the formation of government, they often said that the people *transferred* or *delegated* their power in order to emphasize that the conveyance was neither irrevocable nor complete. Daniel Defoe, for example, wrote: "The People of England have Delegated all the Executive Power in the King, the Legislative in the King, Lords and Commons, the Sovereign Judicature in the Lords," and "the Remainder is reserv'd in themselves." DANIEL DEFOE, *THE ORIGINAL POWER OF THE COLLECTIVE BODY OF THE PEOPLE OF ENGLAND, EXAMINED AND*

Locke wrote: “*Freedom of Men under Government*, is, to have a standing Rule to live by, common to every one of that Society, and made by the Legislative Power erected in it.”<sup>379</sup> That is, the rules governing society had to be made by the legislature erected by the people. Locke also explained: “The *Liberty of Man*, in Society, is to be under no other Legislative Power, but that established, by consent, in the Common-wealth, nor under the Dominion of any Will, or Restraint of any Law, but what the Legislative shall enact, according to the Trust put in it.”<sup>380</sup>

A people, in their constitution, could consent to let their legislature transfer its power. But Locke clearly thought this an aberration. And he distinguished between the legislative power and the power to convey it. So the legislature could not shift its legislative power merely because it had been given the power to legislate.

Instead, to delegate its power, the legislature had to have been given a distinct power of transferring it—to be precise, it had to have a power of making legislators:

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.”<sup>381</sup>

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ASSERTED 9 (London 1702) (emphasis omitted). The underlying point was that the people always retained at least enough power to preserve their liberty, including a power to recall what they had given. *See id.*

After quoting Bodin and Bacon’s absolutist view that the people had permanently alienated their power, the Mortenson and Bagley article claims that “[t]hese are the positions that Locke was rejecting in Section 141 of the Second Treatise.” Mortenson & Bagley, *supra* note 5, at 309. But this is misleading, as evident from what Locke wrote.

Locke was not concerned merely about the people’s original delegation of legislative power, but also about the possibility that the body to which it was conveyed, such as Parliament, might reconvey it, even if only temporarily, to the king or one of his councils. That was precisely what Parliament had done in its notorious 1539 Act of Proclamations. An Act that Proclamations Made by the King Shall Be Obeyed 1539, 31 Hen. 8, c. 8 (Eng.). Even deeper in the European consciousness, subdelegation was the sort of problem addressed by the Roman law maxims against subdelegation.

So it should be no surprise that Locke argued against a legislature’s delegation, transfer, or other conveyance of legislative power to another body. The Mortenson and Bagley article interprets this question about subdelegation in terms of the debate about the people’s original relinquishment of power, thereby suggesting that Locke and his followers merely objected to irrevocable alienations of legislative power. But this misreads the subdelegation question in terms of the debate about the original delegation. The questions were substantively very different, and to confuse them is a category error.

<sup>379</sup> LOCKE, *supra* note 102, at 302.

<sup>380</sup> *Id.* at 301.

<sup>381</sup> *Id.* at 381. Locke’s point was not entirely original. *See* PUFENDORF, NATURE AND NATIONS, *supra* note 120, at 9 (arguing that kings can subdelegate but cannot transfer the right of reigning).

Only with this additional power of making legislators could the legislature transfer its power.<sup>382</sup>

Locke further explained that governments are “*dissolved from within*” when “the *Legislative*”—meaning the legislature—is “*altered*.”<sup>383</sup> This included when laws were made by persons not appointed as law-makers by the people:

The Constitution of the Legislative is the first and fundamental Act of Society, whereby provision is made for the Continuation of their Union, under the Direction of Persons, and Bonds of Laws made by persons authorized thereunto, by the Consent and Appointment of the People, without which no one Man, or number of Men, amongst them, can have Authority of making Laws, that shall be binding to the rest. When any one, or more, shall take upon them to make Laws, whom the People have not appointed so to do, they make Laws without Authority, which the People are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislative, as they think best, being in full liberty to resist the force of those, who without Authority would impose any thing upon them. Every one is at the disposal of his own Will, when those who had by the delegation of the Society, the declaring of the public Will, are excluded from it, and others usurp the place who have no such Authority or Delegation.<sup>384</sup>

The dissolution of government was, of course, the opportunity for revolution. Locke’s first example of this situation was when laws were made by persons not appointed as lawmakers by the people.<sup>385</sup>

It therefore is simply mistaken to claim that, under Locke’s principles, a legislature such as Congress can make any (revocable or permanent) transfer of its legislative power. Having been granted the power “only to make Laws, and not to make Legislators,” the legislature cannot convey its power.<sup>386</sup>

*Rutherford*. A version of this Lockean perspective was elaborated by the mid-eighteenth-century Cambridge academic Thomas Rutherford. He similarly believed that the legislature could convey its law-making power only if it had been given the additional power to transfer it.<sup>387</sup>

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<sup>382</sup> See LOCKE, *supra* note 102, at 381.

<sup>383</sup> *Id.* at 425.

<sup>384</sup> *Id.* at 425–26 (emphasis omitted).

<sup>385</sup> *Id.*

<sup>386</sup> *Id.* at 381 (emphasis omitted).

<sup>387</sup> See generally RUTHERFORTH, *supra* note 143.

Some commentators, namely Mortenson and Bagley, soften this conclusion. They quote Rutherford to the effect that because the people “gave the legislative power, they could . . . , likewise, give a right of transferring that power.”<sup>388</sup> On this basis, they claim that Rutherford thought the right of transferring legislative power was conveyed whenever there was evidence this was actually intended.<sup>389</sup> That is true as far as it goes; but it does not fully capture Rutherford’s expectation of popular consent to an additional power.

Echoing Locke, Rutherford distinguished a governing power and an appointment power, saying that “a power to govern does not imply a power to choose and appoint a governor.”<sup>390</sup> Put another way, the power to exercise legislative power did not include a power to create new legislators and transfer legislative power to them.<sup>391</sup> The two were different. Accordingly, the mere grant of legislative power did not come with any power to appoint different legislators.<sup>392</sup>

The people could convey that power to the legislature, but this required the “consent of the people” in a distinct “grant” or “concurrence.”<sup>393</sup> The legislature’s power to transfer its power was different from its power to legislate and so required an expression of consent beyond the grant of legislative power—an additional grant not evident in the U.S. Constitution.<sup>394</sup>

<sup>388</sup> Mortenson & Bagley, *supra* note 5, at 310 (emphasis omitted) (quoting RUTHERFORTH, *supra* note 143, at 320).

<sup>389</sup> Mortenson & Bagley, *supra* note 5, at 311 (“[H]e concludes by reframing Locke’s position in Section 141 as a default presumption, rebuttable by specific evidence that a particular legislative principal actually did intend to authorize alienation by its agent.”).

<sup>390</sup> RUTHERFORTH, *supra* note 143, at 318. In this passage, Rutherford’s example involved “a king with legislative power.” *Id.* at 320. But on the next page, he made clear that he was thinking ambidextrously of either “a king or a legislative body.” *Id.* at 321.

<sup>391</sup> *See id.* at 320.

<sup>392</sup> *See id.* at 321.

<sup>393</sup> *Id.* at 320. He asked:

[W]hether the people who delegated the sovereign power, could not . . . confer a right upon the person or persons, to whom they delegated such power, of making it over to others? [W]hether, as they gave the legislative power, they could not, likewise, give a right of transferring that power? If they could, then kingdoms, though they are not patrimonial in themselves, may be made so by the consent of the people, not only by a concurrence, at the time of transferring the sovereign power from the present possessor to his successor, but by a prior grant, at the time of delegating the sovereign power to such present possessor, or at any other time.

*Id.* He also wrote:

[T]hough a king or a legislative body, merely as such, can have no right of appointing their successors, or of transferring their power to such successors; yet there does not appear to be any reason, why the collective body of the people may not, if they think proper, delegate or convey this right to their king or legislative body.

*Id.* at 321.

<sup>394</sup> *See id.* at 320.

*America.* Lockean political theory was widely appreciated in America.<sup>395</sup> The philosopher's *Two Treatises of Government* was familiar in American colleges and was present in numerous libraries.<sup>396</sup> Indeed, it was the preeminent juridical theory of limited government in the Anglo-American world.<sup>397</sup> No other philosophical account of the formation and dissolution of government was as prominent.<sup>398</sup>

A sense of how this high political theory on delegation could be absorbed by ordinary men and women is suggested by the commonplace book of a revolutionary war soldier, George Gilmer. Among the passages from the philosopher Gilmer transcribed was this: “*freedom of men under government*, is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it.”<sup>399</sup> More broadly, a newspaper essay in New York recited Locke's Chapter 141 against legislative delegation and quoted Rutherford that “Mr. Locke's reasoning on this head seems to be decisive.”<sup>400</sup>

*Word-Search Scholarship.* Some defenders of delegation have questioned the importance of Lockean ideas in eighteenth-century England and America, largely because they think his name was not frequently invoked.<sup>401</sup> The suggestion is that, even if Locke's opinion was inconveniently opposed to delegation, his views did not matter that much.<sup>402</sup>

But it is a mistake to rely on eighteenth-century citations to Locke to measure his “influence.” Although word-search scholarship can have some value, it cannot measure the flow of unattributed ideas. For instance, Locke's ideas about government were deeply assimilated by

<sup>395</sup> See Philip A. Hamburger, *Revolution and Judicial Review: Chief Justice Holt's Opinion in City of London v. Wood*, 94 COLUM. L. REV. 2091, 2094 n.8 (1994); Paul A. Rahe, *How Revolutionary Was the American Revolution?*, AM. ENTER. INST. (Mar. 1, 1997), <https://www.aei.org/articles/how-revolutionary-was-the-american-revolution/> [<https://perma.cc/5QRP-G85G>]; BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27 (50th anniversary ed. 2017).

<sup>396</sup> See Rahe, *supra* note 395.

<sup>397</sup> See BAILYN, *supra* note 395.

<sup>398</sup> See *id.* at 27–30.

<sup>399</sup> GEORGE GILMER, COMMONPLACE BOOK 134 (before May 1778) (on file with the Virginia Historical Society at Mss. 5:5, G4213:1) (quoting LOCKE, *supra* note 102, at 302).

<sup>400</sup> *Observations upon the Seven Articles, Reported by the Grand Committee, consisting of Mr. Livermore, Mr. Gagne, Mr. Manning, Mr. Johnson, Mr. Smith, Mr. Simmes, Mr. Pettit, Mr. Henry, Mr. Lee, Mr. Bloodworth, Mr. Pinckney, and Mr. Houston, and now lying on the table of Congress*, N.Y. GAZETTEER, Jan. 29, 1787, reprinted in VA. INDEP. CHRON., Feb. 21, 1787 [hereinafter *Observations upon the Seven Articles*].

<sup>401</sup> See Eggert, *supra* note 35, at 735–46, 789 and scholarship cited there. Long ago, I noted that “it has become a staple of recent historiography—challenged only in the last decade—that the reception of modern natural-law and, particularly, Lockean ideas was both narrow and shallow.” Hamburger, *supra* note 395, at 2149.

<sup>402</sup> See Eggert, *supra* note 35, at 735–46, 789.

the English already during his lifetime.<sup>403</sup> It therefore is unsurprising that the English and Americans continued to adopt versions of his ideas as their own, without seeing any reason to mention the philosopher's name.

Locke's reasoning against delegation was part of his broader arguments defending representative lawmaking and justifying revolution. Americans repeatedly echoed those arguments. Locke was not far in the background when they prefaced the Declaration of Independence and their state constitutions by reciting that all men were created equal or equally free and independent.

Of course, Locke was just one of many early theorists whose ideas appealed to Americans.<sup>404</sup> And Americans were not simply influenced; they thought for themselves.<sup>405</sup> But it is a mistake to suggest Lockean ideas were unfamiliar.<sup>406</sup> The ideal of representative consent—that the laws should be made by one's elected representatives—filtered down from Locke and allied theorists to vast numbers of Americans. Even those who never heard of the philosopher embraced the idea that they should elect their own lawmakers.

*No Competing Theory Permissive of Delegation.* Rather than focus on Locke or even just Lockean ideas, one must also ask about competing views on delegation. Was there a serious and widely appreciated theory permissive of delegation?

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<sup>403</sup> My own work has made an in-depth examination of the transmission of Lockean ideas in England and has found that in 1701 an "intelligent appreciation of Lockean and other modern natural-law ideas . . . could reach from bookshops to the bench." Hamburger, *supra* note 395, at 2149.

[M]any modern historians would have us believe that that early eighteenth-century Englishmen were not familiar with, or even responsive to, Lockean and other modern natural-law ideas. John Dunn, for example, has argued that Locke's *Two Treatises* were not popular before 1750 and that citations to it were largely for the philosophical authority of Locke's name. Yet in 1701 the most influential political journalist and one the most prominent Whigs of the period made use of Locke's ideas, and they did not publish Locke's name any more than they did their own.

*Id.* at 2150. Already in Locke's lifetime, Lockean ideas were being absorbed, so that they no longer seemed the ideas of an erudite philosopher, but became the mental equipment and commitments of myriad individuals. Word-search history cannot measure this important sort of intellectual development.

<sup>404</sup> See *id.* at 2149.

<sup>405</sup> See *id.*; see also RALPH LERNER, *THE THINKING REVOLUTIONARY: PRINCIPLE AND PRACTICE IN THE NEW REPUBLIC* (1988).

<sup>406</sup> Some early American took their attachment to Locke further than others. The Potts family of Pennsylvania apparently commissioned a Chippendale scroll-top desk adorned with a bust of John Locke. See *The Potts Family Chippendale Carved and Highly Figured Mahogany Scroll-Top Desk and Bookcase with Bust of John Locke, Philadelphia, Pennsylvania, Circa 1770*, SOTHEBY'S (2022), <https://www.sothebys.com/en/buy/auction/2022/property-from-the-collection-of-dr-larry-mccallister-2/the-potts-family-chippendale-carved-and-highly> [<https://perma.cc/5H2F-46C3>].

Lockean theory generally barred legislative delegation. The sole exception was when the legislature enjoyed not only legislative power but also the power to make new legislators—an additional power that cannot be found in the Constitution.<sup>407</sup>

So, given that Congress lacks a power to make new legislators, the argument for Congress's power to delegate its power must rest on a theory that subdelegation was generally permissible or at least could be implied. Such a position, however, is precisely what cannot easily be found in any serious work of political philosophy that was widely circulated in eighteenth-century America. Not one.

If a permissive approach to the subdelegation of legislative power was the prevailing eighteenth-century American position, one would expect to find at least one prominent theoretical exposition of it. At least one. But the current proponents of this position have yet to point out a single work of political theory that was widely read and appreciated in eighteenth-century America that actually expounded and endorsed that position.

### C. *New York Nondelegation Debates*

The scholarship in favor of delegation boldly declares “there was no nondelegation doctrine at the Founding” and speaks of the “deafening silence about constitutional limits on delegation.”<sup>408</sup> But this is simply untrue. The nondelegation principle was familiar and was recognized to have constitutional significance—as evident from debates in New York.

An important article by Professor Aditya Bamzai shows that nondelegation was a key issue for New Yorkers in the 1780s. He observes that:

During the period immediately before the Constitution's adoption, members of the New York legal community—including Alexander Hamilton—debated whether the New York Constitution's Legislative Vesting Clause prohibited the delegation of impost authority to the federal government. The participants in the debate accepted that New York's Constitution incorporated a nondelegation principle, though they disagreed over the doctrine's scope.<sup>409</sup>

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<sup>407</sup> See LOCKE, *supra* note 102, at 381.

<sup>408</sup> Mortenson & Bagley, *supra* note 5, at 289; see Mortenson & Bagley, *supra* note 35, at 2334; see also *id.* at 2332 (“We actually doubt that any of them had well-developed views on the matter until late in the 1790s, if then.”).

<sup>409</sup> Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795, 836 (2022).

The cause of the dispute was a proposal for the states to grant Congress the power to impose a five percent impost or tariff on goods.<sup>410</sup> Under the Articles of Confederation, Congress lacked the power to raise taxes, leaving it only the authority to request the states to do this. Predictably, this crippled the confederation—so its survival seemed to rest on securing the agreement of the states to the impost proposal.

New York, however, hesitated. Some New York politicians objected that any such grant of taxing power was a delegation of legislative power.<sup>411</sup> It was amid these debates that the New York newspaper essay mentioned earlier quoted Locke's chapter 141 against legislative delegation and Rutherford's assertion that Locke's reasoning was "decisive."<sup>412</sup>

Not merely a philosophic principle, nondelegation seemed a matter of constitutional text. The legislative vesting clause in New York's Constitution provided that "the supreme legislative power within this State shall be vested in two separate and distinct bodies of men"—the state's Assembly and Senate.<sup>413</sup> On this basis, as summarized by Alexander Hamilton, it was contended that "it would be unconstitutional" for the state legislature "to delegate legislative power to Congress."<sup>414</sup>

Although Hamilton argued in favor of giving Congress the power to impose an impost, he acknowledged that the New York Constitution prohibited delegating legislative authority from the legislature to another body "within this state."<sup>415</sup> But he thought that the state's legislative vesting clause permitted the legislature to "delegate authority outside of the State to a federal Congress."<sup>416</sup> Other provisions of the state constitution clearly assumed the existence of a federal congress. According to Hamilton, these provisions qualified the vesting clause—leaving an opening for the delegation of legislative power to Congress, even if not any shifting of such power to the state's executive or judicial branch.<sup>417</sup>

Notwithstanding Hamilton's subtle arguments, the state legislature refused to empower Congress to adopt an impost.<sup>418</sup> His argument for a qualified understanding of New York's barrier to delegation failed to persuade his fellow legislators.<sup>419</sup>

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<sup>410</sup> See *id.* at 796.

<sup>411</sup> See *id.* at 797.

<sup>412</sup> See *Observations upon the Seven Articles*, *supra* note 400.

<sup>413</sup> Bamzai, *supra* note 409, at 797 (citing N.Y. CONST. of 1777, art. II).

<sup>414</sup> Alexander Hamilton, *New York Assembly: Remarks on an Act Granting to Congress Certain Imposts and Duties [New York, February 15, 1787]*, reprinted in 4 THE PAPERS OF ALEXANDER HAMILTON 71 (Harold C. Syrett & Jacob E. Cooke eds. 1962); Bamzai, *supra* note 409, at 819.

<sup>415</sup> Bamzai, *supra* note 409, at 821 (emphasis omitted) (quoting Hamilton).

<sup>416</sup> *Id.* (emphasis omitted) (quoting Hamilton).

<sup>417</sup> See *id.* at 822–23.

<sup>418</sup> *Id.*

<sup>419</sup> *Id.*



New York's refusal to delegate even a narrow slice of legislative power to Congress galvanized Americans to seek a constitutional convention to give Congress adequate powers.<sup>420</sup> If the state legislatures could not delegate any of their legislative power to Congress, then it would be necessary for the people to give Congress the requisite power.<sup>421</sup> As Bamzai points out, the nondelegation controversy in New York prompted the crisis that led to the framing of the U.S. Constitution:

The debate over the impost led, almost directly, to a debate over a new federal charter, the Constitution, in which the legality of delegation was again at issue. These debates provide compelling evidence that key members of the generation that wrote the U.S. Constitution believed that the vesting of "legislative power" in one entity implicitly barred delegation of such power to another. The very debates that led to the adoption of the federal Constitution were, in part, debates about nondelegation.<sup>422</sup>

The nondelegation principle clearly was familiar to leading members of the founding generation.<sup>423</sup> It was understood, without dispute, to be adopted by the New York Constitution's legislative vesting clause. It was understood, without dispute, to bar the delegation of legislative power to the executive or judiciary. The controversy was whether, nonetheless, other language in the New York Constitution permitted delegation to Congress. And the legislature voted against even that delegation, provoking demands for a constitutional convention.

So much for the claim that "there was no nondelegation doctrine at the Founding."<sup>424</sup>

#### *D. The Framers' Rejection of Delegation*

Not only was the nondelegation principle important at the Founding, it also was central in the very framing of the Constitution. Remember, the claim for delegation is that there was "deafening silence about constitutional limits on delegation."<sup>425</sup> Allegedly, it is "not just confused but incoherent to ask whether an executive action is so legislative in nature as to fall outside of [the executive] basket."<sup>426</sup>

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<sup>420</sup> See *id.* at 826–27.

<sup>421</sup> *Id.* at 829.

<sup>422</sup> *Id.* at 836.

<sup>423</sup> See *id.*

<sup>424</sup> Mortenson & Bagley, *supra* note 5, at 289.

<sup>425</sup> Mortenson & Bagley, *supra* note 35, at 2334; see also *id.* at 2332 ("We actually doubt that any of them had well-developed views on the matter until late in the 1790s, if then.").

<sup>426</sup> Mortenson & Bagley, *supra* note 5, at 280–81.

Utterly unmentioned by such scholarship, however, is that, as now will be explained, the framers themselves debated congressional delegations. James Madison and the rest of the Constitutional Convention clearly assumed that the executive should not exercise any power of legislative or judicial nature. They also assumed that the executive could not exercise any congressionally delegated power without specific constitutional authorization. And they rejected such authorization—even merely for congressionally authorized *executive* power.

When the Convention discussed how to establish a national executive, James Madison proposed that it have a series of powers, including the power to execute congressionally delegated powers.<sup>427</sup> The assumption was that the executive could not exercise any congressionally delegated power, not even executive power, without constitutional authorization.<sup>428</sup>

Madison's initial suggestion along these lines provoked General Charles Cotesworth Pinkney to express concern that "improper powers might . . . be delegated."<sup>429</sup> So Madison came back with a proposal that limited the executive's delegated powers to those that were not legislative or judicial.<sup>430</sup> To be precise, he moved that the executive be established: "[W]ith power to carry into effect, the 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."<sup>431</sup> This motion did not directly define the executive power that Congress could delegate to the executive; instead, it treated executive power as residual—as whatever was not legislative or judicial in nature.

Although James Wilson seconded Madison's motion, Charles Pinkney—not to be confused with the General—moved to strike out the words: "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated."<sup>432</sup> He thought "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'"<sup>433</sup>

The power to effectuate or execute the national laws was most if not all of the domestic side of executive power. According to some commentators, it was the full extent of executive power.<sup>434</sup> So if the executive

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<sup>427</sup> *Id.* at 66–67.

<sup>428</sup> *See id.* at 67.

<sup>429</sup> *Id.*

<sup>430</sup> *Id.*

<sup>431</sup> *Id.* at 66–67. The commas in this quotation appear as periods in the original manuscript—it being very common for eighteenth-century manuscripts to use periods for commas. Editor's angled parentheses indicating insertions not printed here.

<sup>432</sup> *Id.* at 67.

<sup>433</sup> *Id.*

<sup>434</sup> *See supra* Section V.C.

already had the power to carry the national laws into effect, it would not need any further executive power.<sup>435</sup> Accordingly, there was no need to empower the executive to execute congressionally delegated powers—let alone to limit any such powers to those that were not legislative or judicial in nature.

When Edmund Randolph—Virginia’s governor and formerly its attorney general<sup>436</sup>—seconded Pinkney’s motion, Madison largely bowed to the view of his fellow Virginian.<sup>437</sup> Madison conceded that his proposed words about delegation might not be “absolutely necessary” but thought there was no “inconveniency in retaining them” and that they “might serve to prevent doubts and misconstructions.”<sup>438</sup> The Convention then voted (seven states to three) to remove Madison’s delegation language.<sup>439</sup> It retained the rest of his proposal, about giving the executive the power to carry into effect the national laws, and about making appointments in cases not otherwise provided for.<sup>440</sup>

This episode is illuminating. As noted by Aaron Gordon, it suggests that “at least some delegates,” including Madison, thought “an overly permissive statutory grant of power to the executive could amount to an impermissible delegation of legislative power.”<sup>441</sup> That’s true. But not all.

First, the debates show an assumption, apparently undisputed, that if there was to be congressional delegation, the executive should only exercise delegated powers that were neither “Legislative nor Judiciary in their nature.”<sup>442</sup> In other words, Congress should not delegate powers that were legislative or judicial in their nature, and the executive should not exercise any such delegated powers.

Second, the executive should not even exercise any *executive* power delegated by Congress. This may initially seem puzzling, but it makes sense. Madison’s attempt to authorize the exercise of congressionally delegated executive power seemed unnecessary because this would be adequately accomplished by the Constitution itself. That is, once the Constitution established an executive with executive power, including the power to carry out the laws, there would be no need for congressional delegation of any other executive power—or for any authorization

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<sup>435</sup> See, for example, the quotation from Thomas Rutherford, *supra* note 143 and accompanying text.

<sup>436</sup> See *Biographies of the Secretaries of State: Edmund Jennings Randolph (1753–1813)*, U.S. DEP’T OF STATE, OFF. OF THE HISTORIAN, <https://history.state.gov/departmenthistory/people/randolph-edmund-jennings> [<https://perma.cc/56TJ-ACTK>].

<sup>437</sup> See FARRAND, *supra* note 118, at 67.

<sup>438</sup> *Id.*

<sup>439</sup> *See id.*

<sup>440</sup> *See id.*

<sup>441</sup> Gordon, *supra* note 6, at 743.

<sup>442</sup> *Id.*

of the executive to exercise that additional executive power.<sup>443</sup> Put generally, any delegation of the tripartite powers would be done by the Constitution, so there was no need any congressional delegation of such powers.

Third, the debates reveal an assumption that the problem was not merely that Congress could not delegate legislative or judicial power to the executive, but more immediately that the executive could not exercise any such delegated powers. Even when it came to executive power, the question was whether the executive should be able to exercise congressionally delegated executive power that was not conferred on it by the Constitution. Unlike contemporary scholarship, the framers assumed that the executive would need specific constitutional authority to exercise congressionally delegated powers. Delegation is thus a two-fold problem, not merely about what Congress can give, but also about what the executive can accept.<sup>444</sup>

The Convention clearly repudiated any executive exercise of any power delegated by Congress. It most emphatically rejected any executive exercise of delegated legislative or judicial power. It even rejected any executive exercise of congressionally delegated executive power.

The evidence from the framing dispels the strange claim that “there was no nondelegation doctrine at the Founding.”<sup>445</sup> More seriously, what needs recognition is that the framers considered and rejected any authorization for the executive to exercise congressionally delegated power. The executive could not exercise any congressionally delegated power that was legislative or judicial in nature. In the end, it could not even exercise any congressionally delegated executive power.

### *E. The Value of a Principle Barring Delegation*

The principle barring delegation is not merely historical. It is profoundly valuable, especially now that it has been so flagrantly abandoned.

An antidelegation principle is essential, most basically, to keep legislative power in the hands of elected lawmakers. In other words, it preserves the foundation of law in popular consent. Such a principle

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<sup>443</sup> Note that Madison was a political theorist rather than a lawyer, and he probably, therefore, was more familiar with language about delegation than about vesting. In contrast, the two Pinkneys and Randolph were distinguished lawyers, and they may have already understood that the Constitution might have to speak in terms other than *delegation*. But this is mere speculation.

<sup>444</sup> The Foreword will return to this point *infra* Section XI.E.

<sup>445</sup> Mortenson & Bagley, *supra* note 5, at 289. Instead, they think “executive power . . . was simply the authority to execute the laws—an empty vessel for Congress to fill. . . . Any action authorized by law was an exercise of ‘executive power’ inasmuch as it served to execute the law.” *Id.* at 280–81.

is also necessary to preserve the people's constitutional choices. If the people delegate their legislative power to the legislature, and that body can subdelegate its power to other bodies, then the servant can almost effortlessly subvert its masters' constitutional framework.

On both grounds, there have long been ideals, at least in England and America, against letting a legislature delegate its lawmaking power. Even if there had never been such a principle, one might be inclined to invent it. It is, in this sense, not merely a historical ideal, but one of continuing vitality—dare one say, a living principle?

The Lockean argument against delegation is therefore not simply originalist evidence. It continues to be a vital response to an enduring problem.

Locke gave classic expression to the idea that the legitimacy of political power and the obligation of law depend on consent. This consent is necessary both for statutory law and for a constitution. Locke therefore aimed to preserve not only consensual lawmaking but also the people's choice of constitutional structure, particularly their formation of the "Legislative."<sup>446</sup> He argued that "the Constitution of the Legislative" was "the original and supream act of the Society, antecedent to all positive Laws in it, and depending wholly on the People," and therefore "no inferior Power can alter it."<sup>447</sup> So unless the people gave the legislature the distinct power to create alternative legislators, "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others."<sup>448</sup>

This conclusion followed not only from the Constitution but also from the nature of constitutions:

The People alone can appoint the Form of the Commonwealth . . . . And when the People have said, We will submit to rules, and be govern'd 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 Authorized to make Laws for them.<sup>449</sup>

On these assumptions about constitutional law—not to mention underlying ideas about consent—the legislature could not delegate its legislative power: "The Legislative neither must nor can transfer the Power of making laws to any Body else, or place it anywhere but where the

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<sup>446</sup> LOCKE, *supra* note 102, at 391.

<sup>447</sup> *Id.*

<sup>448</sup> *Id.* at 380 (emphasis omitted).

<sup>449</sup> *Id.* at 380–81 (emphasis omitted).

People have.”<sup>450</sup> And when the laws were made by anybody else, “the People are not therefore bound to obey.”<sup>451</sup>

The logic of the nondelegation principle remains as powerful today as in the past. If laws must be made with the people’s consent, they must be enacted by the body elected by the people and established by them as their legislature. In Locke’s words, laws can only be made by those whom the people have both “Chosen, and Authorized to make Laws for them.”<sup>452</sup>



The Constitutional Convention refused to authorize the executive to exercise any congressionally delegated power. It denied authority for the executive to exercise congressionally delegated power that was legislative or judicial in nature or even that was executive. Put another way, the Constitution alone delegated power.

The underlying concerns were and still are very serious. Any further delegation of power would defeat the people’s choice of constitutional structure and their choice of representative lawmakers.

#### X. SHALL BE VESTED

Instead of speaking generically about delegation, the Constitution uses vesting language. And rather than merely say that its powers are vested, it says that they “shall be vested.”<sup>453</sup> Generic ideas about delegation must therefore be understood more specifically in terms of vesting. And even generic ideas about vesting must give way to the Constitution’s mandate that its powers *shall be vested*.

This phrase is decisive. The preexisting discussions of consent, the different powers, the separation of powers, exclusivity, and delegation are strongly suggestive. But even without that intellectual history, the Constitution’s very text on the vesting of legislative powers shows that they cannot be transferred.

Article I of the U.S. Constitution speaks of what *shall be vested* and thereby bars delegation of the legislative powers.<sup>454</sup> This conclusion is reinforced by other portions of the text: Article III’s vesting of judicial power and Article II’s vesting of executive power.<sup>455</sup> So, just in considering the vesting clauses, this Foreword will point to three textual grounds for rejecting any congressional transfer of legislative powers.

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<sup>450</sup> *Id.* at 381 (emphasis omitted).

<sup>451</sup> *Id.* at 426.

<sup>452</sup> *Id.* at 380 (emphasis omitted).

<sup>453</sup> U.S. CONST. art. I, § 1; *id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

<sup>454</sup> *See id.* art. I, § 1.

<sup>455</sup> *See id.* art. II, § 1, cl. 1; *id.* art. III, § 1.

(And when Part XI gets to the Necessary and Proper Clause, this Foreword will add a fourth.)

### A. *Continuity of Delegation Talk*

Of course, even after the adoption of the Constitution, it still could make sense to speak generically about the problem in terms of *delegation*. Politicians, theorists, and even the Tenth Amendment persisted in using that term.<sup>456</sup> And with good reason. *Delegation* was the language of old Roman law and modern political theory.

As shown in Part IX, a long intellectual history, running from Roman law to the publications of John Locke and his followers, laid the foundation for ideas of delegation and objections to subdelegation. Although the Constitution drafted in 1787 did not speak in terms of *delegation*, it clearly built upon preexisting thought and language, as evident from the debates in New York and Philadelphia noted in Sections IX.C–D. Because of that preexisting tradition, it is no surprise that the term *delegation* persisted in theoretical and legal debates.

The Tenth Amendment reveals exactly when it makes sense to use *delegation* language.<sup>457</sup> The Constitution says its powers shall be *vested* in the branches of government. But when generalizing about the Constitution's vesting of powers, the Tenth Amendment speaks in terms of what was or was not *delegated*: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”<sup>458</sup> This distinction between the operative word *vested* and the metalanguage *delegated* is crucial. It is a reminder that it has never been wrong to generalize in terms of *delegation*—as long as one does not forget that this is merely a way of speaking about the Constitution's more specific vesting of its powers.

### B. *Vesting Language More Accurate*

There are distinct advantages to reframing the problem in the Constitution's terms. Delegation talk is useful up to a point—for example, in generic arguments about the threat to the people's elective consent and constitutional choices. But vesting language more accurately describes what is at stake in the U.S. Constitution.

First, vesting language avoids the inaccuracy of describing congressional shifts of power as delegations. A delegated power is one that can

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<sup>456</sup> *Id.* amend. X.

<sup>457</sup> *Id.*

<sup>458</sup> *Id.*

be resumed at the will or discretion of the delegator.<sup>459</sup> When the Secretary of the Interior, for example, delegates some of her powers to a subordinate, she can recall her power at her own discretion.<sup>460</sup> Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress authorizes the executive to exercise legislative power, even if only temporarily, Congress cannot predictably recover that power, as it may have to overcome a Presidential veto, and that will not always or even usually be possible.<sup>461</sup> So, congressional shifts of legislative power to the executive cannot accurately be considered delegations—this being an initial reason to appreciate the Constitution’s vesting language.

Second, vesting language avoids any strange inquiry into whether Congress can delegate judicial power to administrative agencies—as if Congress could delegate a power that does not belong to it. A doctrine on delegation, either allowing or barring it—simply cannot explain legislative transfers of judicial power. As a result, judicial and scholarly discussions of delegation and nondelegation tend to focus on congressional delegations of legislative power, without saying much at all about congressional transfers of judicial power.<sup>462</sup> Any theory framed in terms

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<sup>459</sup> Ideas about what common lawyers call the “delegation” of powers developed partly in the context of the Roman “mandate”—this being prototypically, as put by Lord Bankton, a gratuitous agreement by which “one employs another to do some work or service.” 1 ANDREW McDOWALL, AN INSTITUTE OF THE LAWS OF SCOTLAND IN CIVIL RIGHTS 392 (Edinburgh, R. Fleming 1751). Chief Justice Holt explained: “It is what we call in English an acting by commission.” *Coggs v. Bernard* (1703) 92 Eng. Rep. 107, 113. It thus was an apt model for understanding not only private gratuitous delegations but also government delegations to commissions and the like.

Being formed and revoked merely by intent, mandates were “not only revokable by Express Deed, but also Tacitly.” McDOWALL, *supra*, at 397. Indeed, mandates, by definition, were revokable: “Mandates . . . determine, by the Revocation of the mandant, even tho[ugh] they contain a term of Endurance, or a Clause that the same Shall be irrevocable; and by the renunciation of the mandatary.” *Id.* To this Lord Bankton merely added a caution about not causing damage by revocation: “but both ought to be done while the matter is entire, or otherwise such party is bound to indemnify the other as to bygoness.” *Id.* For the Roman background, see ALAN WATSON, CONTRACT OF MANDATE IN ROMAN LAW (1961); Dennis P. Kehoe, *Mandate and the Management of Business in the Roman Empire*, in 1 ROMAN LAW AND ECONOMICS: INSTITUTIONS AND ORGANIZATIONS 307 (Giuseppe Dari-Mattiacci & Dennis P. Kehoe eds., 2020).

<sup>460</sup> See 43 U.S.C. § 1457c.

<sup>461</sup> See U.S. CONST. art. I, § 7.

<sup>462</sup> An exception is Margaret H. Lemos, *The Other Delegate: Judicially Administered Statutes and the Nondelegation Doctrine*, 81 S. CAL. L. REV. 405, 408–09 (2008) (using legal realist conceptions of judicial lawmaking to suggest that Congress delegates legislative power to the courts). Note also the Mortenson and Bagley article, which boldly claims that “seventeenth- and eighteenth-century thinkers reliably embraced” the “delegation” of “judicial authority.” Mortenson & Bagley, *supra* note 5, at 298. But the article supports this proposition by echoing the delegation of judicial power by medieval kings to their judges, without pausing to recognize that this shows nothing about judicial subdelegation of judicial power, let alone in later centuries. See *id.* In fact, as is familiar from the literature on delegation, the common law barred courts and judges from



of *delegation* is therefore strangely incomplete; it has nothing to say about the congressional shift of judicial power to agencies.

In response, one might assume that the courts acquiesce in such transfers and thereby silently delegate their judicial power. But this would be factually untrue and legally scandalous.<sup>463</sup> Recall that judges in common law systems cannot delegate their judgment.<sup>464</sup> So the delegation vocabulary cannot account for shifts in judicial power. Once again, it is useful to acknowledge that the Constitution speaks in terms of vesting.

A similar problem arises when Congress transfers executive power to independent agencies. Congress does not have executive power and so cannot be delegating it to nonexecutive agencies. The Supreme Court at one point said that independent agencies do not exercise the Constitution's executive power.<sup>465</sup> But at least nowadays, if one is to be honest, such agencies obviously do enjoy executive power—a power that Congress could not have delegated. So, as with the transfer of judicial power, vesting terminology makes more sense.

These examples reveal one of the great advantages of using vesting language—that it lets one speak about the full range of divested powers in the same terms. It is awkward and unpersuasive to have a special delegation doctrine to analyze the transfer of legislative power to administrative agencies, but no doctrine to analyze shifting judicial power to such agencies or executive power to independent agencies. So, it is good to have the vesting analysis, which is general and thus equally applicable to the displacement of legislative, judicial, and executive powers. It applies whenever any power is hived off from any branch of government.

Third, the notion of vesting places constitutional analysis on a more solid basis than ideas of delegation. When judges rely too much on pre-constitutional delegation theory or postconstitutional judicial doctrine, the Constitution falls by the wayside. Current constitutional analysis, therefore, often seems unmoored from the Constitution. In contrast, when one focuses on the Constitution's *vesting* language, there is no doubt about the constitutional foundation.

In sum, a focus on vesting more accurately recognizes what is at stake. *Vesting* is more accurate than *delegation* in describing congressional transfers of legislative power. In contrast to *delegation*, it captures

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delegating their judicial power. See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 396–98; COKE, *supra* note 370, at 597 (objecting to delegation by judges).

<sup>463</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 296–98.

<sup>464</sup> See *id.* at 210.

<sup>465</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (saying that the Federal Trade Commission's "duties are neither political nor executive, but predominantly *quasi-judicial* and *quasi-legislative*") (emphasis added).

the full range of transfers of power. And it rests on the Constitution's distinctive drafting.

### C. *Article I: Shall Be Vested*

Not content to say that its powers are vested, the Constitution says each of its tripartite powers “shall be vested” in its own branch of government.<sup>466</sup> The Constitution thereby textually emphasizes that its powers cannot be rearranged.

Recall that the nondelegation doctrine has long seemed to lack any clear foundation in the Constitution. That's why Cass Sunstein protests that the Constitution “does not in terms forbid delegations of [legislative] power.”<sup>467</sup> Sunstein's point seems powerful because the nondelegation doctrine has been presented as a judicial doctrine, leaving a grave question about its foundation in the Constitution.

The answer lies in plain sight, in the vesting clauses. It is widely assumed that the vesting clauses merely transfer the powers and therefore do not bar their further transfer. For example, recent scholarship by Jed Shugerman surveys old dictionary definitions of the word *vesting* to observe that the word does not necessarily imply a limit on further transfer. From this, it is concluded that the Constitution's word *vested* does not bar any divesting or other shifting of power.<sup>468</sup> Certainly, when the word is considered on its own, as an abstraction in dictionaries, *vested* need not connote any limit on subsequent transfer.

Yet rather than simply vest its powers in the different parts of government, the Constitution enacts that such powers “shall be vested” in the different branches.<sup>469</sup> This phrase not merely conveys the powers but makes their location mandatory.

If the Constitution had merely said that the legislative powers *are hereby vested* in Congress, one might suppose that the Constitution only transferred its powers, without any express textual indication that the legislative powers must stay in Congress. Accordingly, if one were to forget the underlying intellectual history—about consent and about powers that are different, separated, externally exclusive, and subject to old ideas barring subdelegation—one might suppose that the Constitution only transferred its legislative powers without preventing further transfers. On this supposition, Congress could subsequently share or

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<sup>466</sup> See U.S. CONST. art. II, § 1, cl. 1; *id.* art. III, § 1.

<sup>467</sup> See Sunstein, *supra* note 35, at 322.

<sup>468</sup> Shugerman, *supra* note 41, at 1537, 1556 (the word “‘vest’ did not connote exclusivity” and “the assumption that the term ‘vesting’ had a special constitutional status is a kind of semantic drift”).

<sup>469</sup> U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

even entirely convey its powers, so that they would end up being partly or even fully vested elsewhere.

The Constitution's vesting of powers would thus be like the vesting of title to land.<sup>470</sup> Such a vesting would transfer the powers without dictating their ultimate location. But transfers of powers were not treated the same as transfers of property—whether at common law or in the constitutional heritage that ran from Roman law to John Locke.<sup>471</sup> Of particular interest here, the Constitution does not merely vest its powers in the sense of transferring them.

The Constitution says that its powers *shall be vested*.<sup>472</sup> Its very text thus specifies not merely the transfer of its powers, but where they must be located. The legislative powers shall be in Congress, the executive power shall be in the President, and the judicial power shall be in the courts. Whatever *vested* might mean in the abstract, the Constitution's words *shall be vested* mandate not only the transfer of powers but also their location.<sup>473</sup>

This textual conclusion is reinforced by the recent history in New York, where the state's constitution said the state's legislative power "shall be vested" in the two houses of the state legislature. As seen from the scholarship of Aditya Bamzai discussed in Section IX.C., the legislature refused to delegate power to Congress—in part on the view that that state constitution barred any delegation of legislative power. Even Hamilton generally took this view, departing from it only to defend a grant of power to Congress. So, not only the phrase "shall be vested" but also its apparent interpretation in New York pose an obstacle to any legislative delegation.

In defense of delegation, one might argue that when Congress shares some of its powers with the executive, those powers remain vested in Congress. From this perspective, the devolution of the commerce power

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<sup>470</sup> It has been suggested that the Constitution's vesting of powers is akin to the vesting of property and that therefore vested powers, like vested property rights, can be freely transferred. See Eggert, *supra* note 35, at 733.

<sup>471</sup> See *supra* Sections IX.A–B.

<sup>472</sup> U.S. CONST. art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

<sup>473</sup> One might protest that English property transfers sometimes said that title *shall be vested*. That does not appear to have been the most common phrasing in conveyances, but it was frequently employed, for example, in statutory transfers. The phrase *power shall be vested*, however, seems to have been used more rarely—notably in constitutional documents, ranging from the Polish Cardinal Laws to New York's Constitution. 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 68–69 (Boston, Edmund Freeman 1787) (quoting The Polish Cardinal Laws that "a permanent council shall be established, in which the executive power shall be vested."); N.Y. CONST. of 1777, art. II ("[T]he supreme legislative power within this State shall be vested in two separate and distinct bodies of men."). It therefore would seem that the Constitution's *shall be vested* phrasing was borrowed from constitutional documents—perhaps especially the New York Constitution—not property law, and any connotations of its use in property law cannot be assumed in the U.S. Constitution.

to the Department of Agriculture does not deprive Congress of that power. But that misses the point. When the Constitution says the legislative powers *shall be vested* in Congress, it requires them to be there, not elsewhere.<sup>474</sup> That is, when legislative powers are shared with the executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction that they *shall be vested* in Congress. The Constitution does not say that the legislative powers, including the power to regulate commerce, "shall be vested in a Congress of the United States *and such other bodies as Congress specifies.*"

Similarly, when Congress shifts judicial power to the executive branch, this violates the Constitution's directive that the judicial power *shall be vested* in the courts.<sup>475</sup> Leaving aside that Congress cannot delegate the power of another branch (as noted in Section X.B.), the judicial power must be in the courts, and this means it cannot be in the executive branch.<sup>476</sup>

To test the prodelegation interpretation of the words *shall be vested*, suppose the legislative vesting clause textually permitted vested legislative power to be shared across branches—would that mean the executive vesting clause textually permits some executive power to be shared with Congress or the courts? Or that the judicial vesting clause textually lets some of the judicial power be shared with Congress or the executive? Obviously not. Nor does the legislative vesting clause let the legislative power of Congress be shared with the other branches.

The phrase *shall be vested* is decisive. It emphatically reinforces what already should be clear, that the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards. Rather, as evident from its text, the Constitution requires its powers to be vested in their respective branches of government. Because of the words *shall be vested*, this location is mandatory.<sup>477</sup>

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<sup>474</sup> U.S. CONST. art. I, § 1.

<sup>475</sup> *Id.* art. III, § 1.

<sup>476</sup> Incidentally, the excuse that judicial power is merely being shared is factually dubious. All too often, judicial power is largely dislodged from the courts, not merely shared with agencies. When agencies adjudicate, they often act informally to avoid final agency action and thereby avoid judicial review. See HAMBURGER, *supra* note 220, at 116. Although adjudications by administrative law judges can be taken by petition to a circuit court, this circumvents trials in court and juries. Plus, the doctrines requiring judicial deference to agency interpretations and fact-finding leave courts only a fraction of the judicial power. So, the judicial power transferred to agencies is not really shared with the courts. And of course, this judicial power that is taken out of the hands of the courts is the vast bulk of regulatory adjudication in the United States. Cf. ADRIAN VERMEULE, LAW'S ABNEGATION: FROM LAW'S EMPIRE TO THE ADMINISTRATIVE STATE 1 (2016).

<sup>477</sup> See U.S. CONST. art I, § 1; *id.* art II, § 1; *id.* art. III, § 1.

The word *all* reinforces this conclusion. Recall—from Section VII.B.—that when the Constitution says, "All legislative Powers herein granted shall be vested in a Congress of the United States," it suggests that those powers are both externally and internally exclusive. U.S. CONST. art I, § 1. But

So instead of generalizing about delegation or nondelegation, one can—and often should—speak more specifically about vesting and divesting. And because the location of the legislative powers is mandatory, Congress cannot be divested of them, nor can they be vested or located elsewhere.

*D. Article III: Congressional Designation of the Location of Judicial Power*

A second textual argument against delegation of legislative power can be found in the judicial vesting clause. Article III begins: “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>478</sup> This sort of authorization for Congress to designate the location of the judicial power is precisely what Article I did not give Congress as to the legislative powers.<sup>479</sup>

Put another way, when Congress can designate the location of one of the tripartite powers, this is expressly acknowledged. Article III thereby reinforces that Article I does not say the legislative powers “shall be vested in Congress *and such executive agencies as the Congress may from time to time ordain and establish.*”<sup>480</sup> Not having provided this sort of authorization, Article I does not let Congress designate the location of the legislative powers.

Given that Article III spells out that Congress may determine the location of some judicial power,<sup>481</sup> it is nearly comic to observe so much scholarship strive to show that Article I did this for legislative power. The congressional authority expressly recognized in Article III cannot be attributed to Article I. Precisely because Congress so clearly can designate the location of judicial power,<sup>482</sup> it is clear that Congress cannot similarly designate the location of legislative power.

Incidentally, Article III also shows that Congress cannot designate the location of the judicial power outside the inferior courts. Article III states that the judicial power shall be vested in such “inferior” courts as Congress ordains and establishes.<sup>483</sup> Agencies and their tribunals are not

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the repeated phrase “shall be vested” is the clearest and most basic textual barrier to any transfer of any of the Constitution’s powers. The word *all* merely clarifies that, unlike executive and judicial powers, legislative powers cannot even be shared within its branch of government. *See id.* art II, § 1; *id.* art. III, § 1.

<sup>478</sup> *Id.* art. III, § 1.

<sup>479</sup> *See id.* art. I.

<sup>480</sup> *See id.*

<sup>481</sup> *See id.* art. III.

<sup>482</sup> *See id.*

<sup>483</sup> *Id.*

inferior courts; they are not courts at all, let alone Article III courts. So, Congress cannot place the judicial power in them.

*E. Article II: President Vested Only with Executive Power*

On top of the legislative and judicial vesting clauses, the executive vesting clause provides a third textual basis for rejecting transfers of legislative power. The Constitution vests the President with executive power—along with the adjustments in the remainder of Article II.<sup>484</sup> This means he is not and cannot be vested with either of the other tripartite powers. That is, he cannot exercise legislative or judicial power.

In the era of the nondelegation doctrine, it seems enough to discuss such transfers of power merely in terms of Congress and the legislative power being transferred. But in the late eighteenth century the question was also understood in terms of the power of the recipient branch. That is, the transfer of legislative power to an executive agency is a problem not only for Congress and its legislative power but also for the President and his executive power. Can the executive exercise a power that the Constitution did not vest in it?

Recall, from Section IX.D, that this was how the Constitutional Convention approached the delegation problem. James Madison moved that the national executive should have a power to execute congressionally delegated powers.<sup>485</sup> And when General Charles Cotesworth Pinkney worried that “improper powers” might be delegated, Madison added that the delegated powers were not to be legislative or judicial—that the executive could “execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated by the national Legislature.”<sup>486</sup> In his view, the executive needed constitutional authorization to exercise any congressionally delegated powers, even merely executive powers. The executive could not exercise any power, even any executive power, that the Constitution had not vested in the executive.

Thus, what is conventionally understood as delegation is really (as hinted in Section X.B.) a twofold problem. The vesting of powers requires one to ask not merely about what Congress can give, but also about what the executive can receive.

The point is illuminated by *Hayburn’s Case*.<sup>487</sup> When three circuits protested that the courts could not act under the Invalid Pensions Act, they all reasoned that they could not exercise a power that the Constitution had not vested in them.<sup>488</sup> For example, the Circuit Court for

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<sup>484</sup> See U.S. CONST. art II, § 1.

<sup>485</sup> See *supra* Section IX.D.

<sup>486</sup> 1 FARRAND, *supra* note 118, at 67 (editors brackets and internal quotation marks omitted).

<sup>487</sup> *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792).

<sup>488</sup> *Id.* at 410–414 (arguments of Circuit Courts).

the District of Pennsylvania said that “the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the Circuit court must, consequently, have proceeded without constitutional authority.”<sup>489</sup>

This principle in *Hayburn’s Case* did not merely concern the courts but applied equally to each of the branches. As put by the Circuit Court for the District of North Carolina, “the Legislative, Executive, and Judicial departments, are each formed in a separate and independent manner,” and “the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority.”<sup>490</sup> So, bringing the point back to administrative agencies, the executive cannot exercise any power that is not executive.



The Constitution’s vesting of powers decisively shows what already was evident from consent, the different powers, the separation of powers, the exclusive location of the powers, and delegation theory. By saying that its powers *shall be vested*, the Constitution mandates where its powers must be located.<sup>491</sup> So, the tripartite powers cannot be transferred.

Put in the Constitution’s terms, its powers cannot be *divested* from where the Constitution *vests* them, and they cannot be *vested* elsewhere. The question is not merely about *nondelegation*, but more specifically about where the Constitution’s power *shall be vested*, and whether they have been *divested*.

Pursuing the logic of the vesting clauses, this Part has shown at least three textual grounds for rejecting any transfer of legislative power. First, Article I says the legislative powers “shall be vested” in Congress, making this location mandatory.<sup>492</sup> Second, Article III lets Congress designate the location of the judicial power in inferior courts.<sup>493</sup> In contrast, Article I does not say that Congress can designate the location of the legislative powers. Third, the executive can exercise only its own power, not that of another branch. A fourth textual ground will be discussed in Part XI.

## XI. NECESSARY AND PROPER

Having examined consent, the different powers, their separation, their external exclusivity, the objections to their delegation, and where they shall be vested, this Foreword must now consider whether Congress

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<sup>489</sup> *Id.* at 411 (argument of C.C.D. Pa.).

<sup>490</sup> *Id.* at 412 (argument of C.C.D.N.C.).

<sup>491</sup> U.S. CONST. art I, § 1; *id.* art II, § 1; *id.* art. III, § 1.

<sup>492</sup> *Id.* art I, § 1.

<sup>493</sup> *Id.* art. III, § 1.

can unvest what the Constitution vested on the theory that this is necessary and proper.<sup>494</sup> The Constitution gives Congress the power to legislate what is necessary and proper for carrying out other governmental powers.<sup>495</sup> Might this power allow Congress to shift the vested powers from one branch to another?

### A. *Cannot Justify Transferring Powers*

Under the Necessary and Proper Clause, can a statute undo the Constitution's structure? The question very nearly answers itself. But two textual explanations are worth spelling out.<sup>496</sup>

First, a congressional shift of legislative or judicial powers is not *proper*. Professors Gary Lawson and Patricia Granger have made the basic point that proper is an independent requirement that precludes the rearrangement of government powers.<sup>497</sup> But judges have not yet moved much toward recognizing the significance of the word *proper*—so it is important to add some crucial arguments.

Necessity was the old measure of absolute power, which Americans had just recently rejected in both king and Parliament.<sup>498</sup> So it is improbable that the Constitution would have empowered Congress to act merely of necessity. Indeed, such a standard would have eviscerated the Constitution's limits on federal power. The word *proper* was therefore surely understood as an independent requirement.

The text clarifies this. Although Samuel Bray argues that “necessary and proper” was a conjoined single requirement,<sup>499</sup> the power of Congress to enact what is “necessary and proper” stands in contrast to what is “necessary and expedient.”<sup>500</sup> The President can propose to

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<sup>494</sup> *Id.* art. I, § 8.

<sup>495</sup> *Id.*

<sup>496</sup> A more detailed analysis of the Necessary and Proper Clause will appear in my future scholarship.

<sup>497</sup> Gary Lawson & Patricia G. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 297 (1993) (“[U]nder a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights.”); Lawson, *supra* note 326, at 350 (“The Sweeping Clause incorporates the basic constitutional structure; it does not offer a vehicle for circumventing it.”).

<sup>498</sup> James Iredell wrote on August 17, 1786, that Americans “were not ignorant of the theory, of the necessity of the Legislature being absolute in all cases, because it was the great ground of the British Pretensions.” James Iredell, *To the Public, as reprinted in Historic Document*, NAT'L CONST. CTR., <https://constitutioncenter.org/the-constitution/historic-document-library/detail/james-iredell-to-the-public-1786> [<https://perma.cc/HFR8-ZE4M>]. For necessity and absolutism, see HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 423–24.

<sup>499</sup> Samuel L. Bray, “Necessary AND Proper” and “Cruel AND Unusual”: *Hendiadys in the Constitution*, 102 VA. L. REV. 687 (2016).

<sup>500</sup> U.S. CONST. art. I, § 8; *id.* art. II, § 3.



Congress what he judges “necessary and expedient,” but Congress is confined to legislating what is “necessary and proper.”<sup>501</sup>

The text itself thus shows the independent significance of the word *proper*. This limitation should therefore be taken seriously. And it surely is improper to relocate the powers that the Constitution says *shall be vested* in their distinct branches.

Second, rearranging such powers is not only improper; it also conflicts with the limitation of the Necessary and Proper Clause to *vested* powers. That clause could have authorized Congress to carry out legislative or judicial power in the abstract. Instead, it only allows Congress to carry out the government’s other powers as they are “vested” by the Constitution in the government and its departments and officers.<sup>502</sup>

If the Constitution had empowered Congress to make laws necessary and proper to carry into execution the legislative power in the abstract, or the judicial power in the abstract, then it could have been understood as authorizing Congress to shift these powers out of the bodies in which the Constitution vests them. But the Constitution empowers Congress to make laws necessary and proper to carry into execution “the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”<sup>503</sup> Congress is thus confined to enacting what is necessary and proper for carrying out the powers *vested* variously in the government, its departments, and its officers. As explained by Judge Nathaniel Chipman in 1793, Congress is “empowered, to make all laws necessary and proper for carrying into effect, in the government, or any department, or office of the United States, all the powers, with which they are invested, by the constitution.”<sup>504</sup> This restriction of the Necessary and Proper Clause to *vested* powers precludes Congress from using the clause to rearrange or otherwise divest any such powers.

The words *proper* and *vesting* are revealing. They prevent Congress from using the Necessary and Proper Clause to rearrange the *vested* powers.<sup>505</sup>

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<sup>501</sup> *Id.* art. I, § 8; *Id.* art. II, § 3. A much more detailed version of this argument, resting on substantial eighteenth-century evidence, will appear in a forthcoming book.

<sup>502</sup> *Id.* art. I, § 8 (“To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”). For a similar interpretation, even if not with so much emphasis on *vested* powers, see Lawson & Granger, *supra* note 497, at 297.

<sup>503</sup> U.S. CONST. art. I, § 8.

<sup>504</sup> CHIPMAN, *supra* note 293, at 263.

<sup>505</sup> As put by Gary Lawson, the clause “incorporates the basic constitutional structure; it does not offer a vehicle for circumventing it.” Lawson, *supra* note 326, at 350.

### B. Another Textual Objection to Transferring Legislative Power

Although it has been seen thus far that the Necessary and Proper Clause cannot justify redistributing the Constitution's powers, the clause goes further. It also suggests that such transfers are barred. It thus provides a fourth textual foundation for concluding that Congress cannot shift legislative power to agencies.

When Congress authorizes agencies to make rules, it is using the agencies to carry out congressional lawmaking powers. Yet in providing for "carrying" the legislative powers "into Execution,"<sup>506</sup> the Necessary and Proper Clause anticipates that Congress will make laws for this end, not that it will leave agencies to do it by making administrative rules.

The power to act of necessity had long been claimed by kings as part of a royal or executive power above the law, and this "absolute" power seemed very dangerous. The Constitution tames the power to act of necessity—most basically, by making it a congressional power exercised through *law*. So, rather than permit the executive or any agency to do what is necessary and proper to carry out the legislative powers, the Constitution empowers *Congress* to make *laws* that are necessary and proper for carrying the legislative powers into execution.

This authorization for Congress to make laws necessary and proper for carrying the legislative powers into execution means that Congress itself must make such laws. It cannot leave the legislative powers to be carried into execution by mere agencies acting through mere rules. The Necessary and Proper Clause is thus a fourth textual foundation for rejecting any congressional transfer of legislative power.



The Necessary and Proper Clause is no excuse for divesting what the Constitution says *shall be vested*.<sup>507</sup> Such shifting around of power is not proper. In any case, the clause empowers Congress to do what is necessary and proper only in pursuit of vested powers. The Necessary and Proper Clause thus does not justify congressional transfers of power. Indeed, it offers a fourth textual ground for thinking that the Constitution bars Congress from shifting legislative power to agencies.

## XII. DISENFRANCHISEMENT

Constitutional questions are often understood narrowly in terms of Supreme Court doctrines. Transfers of power, for example, tend to be discussed in terms of the Court's nondelegation doctrine. In contrast, this Foreword frames the problem more broadly in terms of a wider

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<sup>506</sup> U.S. CONST. art. I, § 8, cl. 18.

<sup>507</sup> *Id.* art. I, § 1; *id.* art. II, § 1; *id.* art. III, § 1.

range of relevant concepts: primarily consent, different powers, separation of powers, exclusivity, delegation, and vesting. But that's not all. Transfers of power also need to be evaluated in light of their real world consequences.

The current nondelegation doctrine, which actually permits delegation, intrudes upon Americans and their egalitarian expectations. The obligation of law rests on consent—the consent secured by having laws made by an elected Congress.<sup>508</sup> This was, as seen in Part IV and Section V.B, a key principle underlying the formation of the United States and its different powers. Not only in the past, but also today, consent through voting is crucial for the government's legitimacy.

It therefore is sobering that the delegation of legislative power dilutes voting rights. Such delegation developed in the federal government in the late nineteenth century as a prejudiced response to the expansion of suffrage. And it remains a mechanism for class discrimination and disenfranchisement.

#### A. *Diluting Voting Rights*

Delegation derogates from representative government. It undermines consensual elective lawmaking and even meaningful voting rights.

The President, although elected, is not a representative body. Nor is any agency, whether executive or independent. In contrast, Congress is a representative body, consisting of elected representatives of different parts of the country. So, when a statute permits an executive officer or agency to make binding rules—those with the obligation of law—it does more than defeat the Constitution's vesting of legislative powers in Congress. It also defeats the consensual and representative character of American law.

Put another way, the transfer of legislative power to agencies dilutes voting rights. The delegation of legislative power does not discourage anyone from voting. But in taking legislative power out of the elected legislature, delegation sharply reduces the value of suffrage. The form remains, but much of the reality gets drained out and transferred to unelected bureaucrats. We still can vote, but our votes don't mean as much when we don't elect our most active lawmakers.

Violations of voting rights justly elicit great concern, even at a retail level. There should be at least as much disquiet about the wholesale assault on voting rights resulting from delegation.

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<sup>508</sup> See Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 124 (1981).

## B. *Prejudiced Origins*

The consequences for representative government and voting rights were a feature, not a bug. The democratization of politics in the United States centered on the extension of voting rights—first to unpropertied White men, then to Black men, and eventually to women.<sup>509</sup> But although the ideal of equal voting rights attracted many progressives, the reality prompted misgivings. Many progressives worried about the rough-and-tumble character of egalitarian politics and about the tendency of newly enfranchised groups to reject progressive reforms. So, many of these enlightened Americans sought what they considered a more elevated mode of governance.<sup>510</sup>

Some were quite candid. Woodrow Wilson—the grandfather of the American administrative state—complained that “the reformer is bewildered” by the need to persuade “a voting majority of several million.”<sup>511</sup> Wilson specifically feared the diversity of the nation, which meant that the reformer needed to influence “the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of negroes.”<sup>512</sup> He added: “The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes . . . And where is this unphilosophical bulk of mankind more multifarious in its composition than in the United States?”<sup>513</sup> So, “[i]n order to get a footing for new doctrine, one must influence minds cast in every mould of race, minds inheriting every bias of environment, warped by the histories of a score of different nations, warmed or chilled, closed or expanded by almost every climate of the globe.”<sup>514</sup>

Instead of trying to persuade such persons, Wilson welcomed the transfer of legislative power. The people could still have their republic and still could vote, but much legislative power would be shifted out of an elected body and into the hands of the right sort of people.

Unfortunately, scholars of administrative power have long refused to confront its prejudiced origins.<sup>515</sup> They prefer to discuss it as if it

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<sup>509</sup> See U.S. CONST. amends. XV, XIX.

<sup>510</sup> See Ronald J. Pestritto, *The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis*, 24 SOC. PHIL. & POL'Y 16, 20–26 (2007) (regarding Wilson and Goodnow's support for administrative power); JOSEPH POSTELL, *BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT* 167 (2017) (regarding progressive support for administrative power).

<sup>511</sup> See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 208 (1887).

<sup>512</sup> See *id.* at 209.

<sup>513</sup> *Id.*

<sup>514</sup> *Id.*

<sup>515</sup> The traditional attitude is captured by Professor Kathryn Kovacs's comment: “I've often thought of administrative law as being structural and procedural, not substantive. Racism has been someone else's topic, not mine.” Kathryn E. Kovacs, *Introduction to Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT (July 13, 2020),

were merely a matter of doctrine, unconnected to larger questions of expanded suffrage and untainted by unwholesome racial and ethnic animosities.<sup>516</sup> The result is a vast body of administrative scholarship that parses justificatory doctrines with scholastic intensity while ignoring the grim social and political realities that drove the formation of this sort of power.

### C. *Class Discrimination and Disenfranchisement*

The shift of lawmaking power out of the elected legislature was not simply racist. Although Wilson's racism was overt, his attitudes arose more generally from class disdain. Even if one were to assume that all the racial, religious, and other prejudice has dissipated, the shift of legislative power has discriminatory consequences. As I have explained elsewhere:

Far from being narrowly a matter of racism, this has been a transfer of legislative power to the knowledge class—meaning not a class defined in Marxist terms, but those persons whose identity or sense of self-worth centers on their knowledge. More than merely the intelligentsia, this class includes all who are more attached to the authority of knowledge than to the authority of local political communities. This is not to say that such people have been particularly knowledgeable, but rather that their sense of affinity with cosmopolitan knowledge, rather than local connectedness, has been the foundation of their influence and identity. And appreciating the authority

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<https://www.yalejreg.com/nc/introduction-to-symposium-on-racism-in-administrative-law-by-kathryn-e-kovacs/> [<https://perma.cc/BCF9-MSPK>]. Fortunately, the Symposium marks a shift toward recognizing the role of prejudice in the administrative realm. See generally *Symposium on Racism in Administrative Law*, YALE J. ON REGUL.: NOTICE & COMMENT, <https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/> [<https://perma.cc/CKU9-NW9K>]. As explained in my own contribution:

Questions of prejudice and discrimination have long been left at the margins of the academic study of such power, and the symposium is a gratifying signal that such concerns are at last being accepted as more central.

Of course, some of us have been discussing these questions for years—indeed, from an angle that has sometimes been condemned as too critical. So, it seems important to point out just how much administrative power deserves to be condemned as an instrument of prejudice . . . .

Philip Hamburger, *Administrative Discrimination*, YALE J. ON REGUL.: NOTICE & COMMENT (Sept. 13, 2020), <https://www.yalejreg.com/nc/administrative-discrimination-by-philip-hamburger/> [<https://perma.cc/53ZS-YQCL>]. For a more detailed account of the problem, see Philip Hamburger, *Administrative Discrimination*, THE AM. MIND (Sept. 11, 2020), <https://americanmind.org/memo/administrative-discrimination/> [<https://perma.cc/F8X3-J954>].

<sup>516</sup> For example, see CASS SUNSTEIN & ADRIAN VERMEULE, *LAW & LEVIATHAN: REDEEMING THE ADMINISTRATIVE STATE* (2020).

they have attributed to their knowledge, and distrusting the tumultuous politics of a diverse people, they have gradually moved legislative power out of Congress and into administrative agencies, where it can be exercised in more genteel ways by persons like themselves.

In short, the enfranchised masses have disappointed those who think they know better.

Of course, the removal of legislative power from the representatives of a diverse people has implications for minorities. Leaving aside Wilson's overt racism, the problem is the relocation of lawmaking power a further step away from the people and into the hands of a relatively homogenized class. Even when exercised with solicitude for minorities, it is a sort of power exercised from above—and those who dominate the administrative state have always been, if not white men, then at least members of the knowledge class.

It therefore should be no surprise that administrative power comes with costs for the classes and attachments that are more apt to find expression through representative government. In contrast to the power exercised by elected members of Congress, administrative power comes with little accountability to (let alone sympathy for) local, regional, religious, and other distinctive communities. Individually, administrators may be concerned about all Americans, but their power is structured in a way designed to cut off the political demands with which, in a representative system of government, local and other distinctive communities can protect themselves.

Administrative power thus cannot be understood apart from equal voting rights. The gain in popular suffrage has been accompanied by disdain for the choices made through a representative system and a corresponding shift of legislative power out of Congress.

Although the redistribution of legislative power has gratified the knowledge class, it makes a mockery of the struggle for equal voting rights. It reduces equal voting rights to a sort of bait and switch . . . .<sup>517</sup>

Delegated legislative power dilutes voting rights along lines of class. The knowledge class is well-represented in the administrative state, but other Americans are not. And that has always been much of the point.

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<sup>517</sup> Philip Hamburger, *The Administrative Threat to Civil Liberties*, 2017–2018 CATO SUP. CT. REV. 15, 25–26.

After a century of treating delegation as an elevated intellectual exercise in doctrine-crunching, it is time to recognize its societal realities. Delegation is an instrument for discrimination and disenfranchisement.

#### D. *Political Slant*

It may seem odd to speak of the political bias of delegated lawmaking. The whole point of the late nineteenth-century civil service reforms was to end the spoils system and establish an apolitical civil service. Similarly, as to merit hiring and tenure of office, one might discount the risk of political slant. But there is a structurally embedded political bent that is tied to class and government power.

This discrimination was by design, not accident. Recall that when Woodrow Wilson outlined the nascent federal administrative state, he explained his concern for the *reformer*—meaning a person with progressive leanings—saying that “the reformer is bewildered” by the need to persuade “a voting majority of several million.”<sup>518</sup> To get past this obstacle, progressives needed to shift much regulation out of the elected legislature into the hands of persons more like themselves.

The individuals in agencies who formulate regulatory policy tend to have college degrees and even graduate degrees. This is a valuable background for policy analysis, and the prevalence of the educated in policy positions is therefore to be expected. But it also raises the risk of bias. Policy-forming bureaucrats tend to have the political leanings of Americans with higher education. By virtue of their positions, moreover, they tend to favor governmental solutions—indeed, administrative solutions. Just as a man with a hammer is apt to consider that blunt tool an essential solution to a wide range of problems, so bureaucrats are inclined to view their delegated legislative power as valuable.

It thus is nearly inevitable that at least the policymaking administrators in agencies bend toward the politics of their class and power. So when a presidential administration leans in the same direction, the administrators who matter will cooperate. And when it leans in another direction, those administrators will push back. This is a built-in political tilt, which gives a political slant to class disenfranchisement.

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<sup>518</sup> Wilson, *supra* note 511, at 208–09. As put by one scholar, “[a]dministration can remove the necessity of building a public consensus in favor of reform.” DENNIS J. MAHONEY, *POLITICS AND PROGRESS: THE EMERGENCE OF AMERICAN POLITICAL SCIENCE* 136 (2004).

### E. *Religious Slant*

Accompanying the political prejudice is a predisposition against religion, especially relatively traditional or orthodox religion. The basic problem, as I have explained before, is the tendency of the administrative values of rationalism and scientism to leave administrators indifferent, if not hostile, to the religious concerns of many Americans:

[A]dministrative lawmaking is designed to be “rational” and “scientific” rather than responsive to political pressures, and this has religious implications. Although administrative lawmaking is not really very rational or scientific, its self-conscious rationalism and scientism leads administrative lawmakers to be relatively indifferent, if not unsympathetic to religious concerns, and the general exclusion of Americans from choosing their administrative lawmakers therefore comes with a distinctively hard edge for many religious Americans. This is not to say that lawmaking should be antagonistic to science or otherwise irrational, let alone that it should be religious, but rather that administrative lawmakers are not typically as sensitive to religious sensibilities as are representative lawmakers—the sort of lawmakers that Americans have a right to expect in a republic. Administrative lawmaking thus excludes religious Americans from the sort of participation in the political process by which they ordinarily could protect themselves from religiously burdensome laws.<sup>519</sup>

In other words, it is no coincidence that so many recent conflicts between law and religion arise from administrative regulation. Religious Americans who need exemptions from general laws are apt to get a sympathetic hearing from their elected representatives—even if the representative is of another religion or entirely unreligious. In contrast, they cannot count on such solicitude from their administrative rulers.

Heightening the religious bias is the tendency of administrators to be theologically liberal—meaning not that they are particularly religious, but that they are suspicious of religious orthodoxy, dogma, and tradition. This was true already in Wilson’s day, when “Irishmen” topped his list of difficult-to-persuade minorities.<sup>520</sup> Irish immigrants were Catholic.

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<sup>519</sup> Philip Hamburger, *Exclusion and Equality: How Exclusion from the Political Process Renders Religious Liberty Unequal*, 90 NOTRE DAME L. REV. 1919, 1921 (2015).

<sup>520</sup> See Wilson, *supra* note 511, at 209.



Nowadays, a sharp attitude against religious orthodoxy—most prominently against Catholics and Fundamentalists, but also against much traditional Christianity and Judaism—remains common among college-educated Americans. It therefore should be no surprise that such antagonisms prevail among agency policymakers.

Again, this is not to question the value of science as the basis of policy. Nor is it to suggest that administrators should be religious or sympathetic to religion. But policymaking administrators usually are slanted against at least relatively traditional or orthodox religion. Whatever one thinks about this slant, it is a prejudice that does not so frequently twist the decisions of legislators. Like the political prejudice, it adds another ugly edge to the class disenfranchisement.



The reduction of administrative rulemaking to an anodyne question about delegation disguises the extent to which the delegation of legislative power is a mechanism of class and related prejudices. Delegation is never just about delegation. It also is about rendering legislation unrepresentative, diluting the value of equal suffrage, and disenfranchising mere *hoi polloi*—with the goal of confining the influence of their political, religious, and other disfavored opinions.

### XIII. THREATS TO RATIONAL DECISION-MAKING

Even if courts lack the stomach to recognize these visceral social and political dangers, they should at least acknowledge the costs for rational decision-making. The administrative displacement of political decision-making has long been justified as a shift toward rationality.<sup>521</sup> The theory is that experts, being knowledgeable and secluded from partisan politics, can dislodge corrupt political lawmaking with scientifically based expert lawmaking.<sup>522</sup> Yet this claim on behalf of rational expert decision-making may be overstated.

Far from clearly improving matters, the shift of legislative power introduces its down decision-making distortions. The political and religious prejudices already hint at this, and other biases now will be seen to introduce even deeper irrationalities.

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<sup>521</sup> Jerry Mashaw writes, “This connection between administration and reason is a familiar theme in the social and political theory of modernity. Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge.” Jerry L. Mashaw, *Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State*, 70 *FORDHAM L. REV.* 17, 23–24 (2001). For a modern American iteration of the theme, see Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 *TEX. L. REV.* 207, 207–08, 249 (1984).

<sup>522</sup> See Bruff, *supra* note 521, at 209–11 (describing the rational expert vision of the administrative state).

### A. *Confidence Bias*

Administrative expertise is widely assumed to be scientific, and science is commonly considered a reliable basis for regulation.<sup>523</sup> The identification of expertise with science is therefore one of the main justifications for displacing congressional regulation with administrative regulation. But expertise is not science, and bureaucratic expertise is especially distant from cutting-edge science, which necessarily is uncertain.<sup>524</sup> So agency expertise tends to be exercised with the confidence we place in science, even though such expertise is not science and is especially unlike pioneering science.

Science explores what is insufficiently known, and it rests on epistemological modesty. It consists of questioning and testing existing theories to figure out if they can be shown to be in error. When proved erroneous, they are modified or displaced with alternative theories or “hypotheses,” which in turn are questioned, and so forth. This is an unending pursuit of truth by showing error. The only solid truth to be discerned in this system of inquiry is the proof of error.

Scientific inquiry is thus an evolving process, and especially at the cutting edge, it is not reliably stable. What is suggested by one theory is apt to be upended by the next. And as science develops at ever-greater speed, the alleged solidities of scientific knowledge are apt to look ever more tentative. Scientific truths no longer evolve from one century to another, nor even from one generation to another, but often change more rapidly, from decade to decade, sometimes from year to year. Science is increasingly in flux.

In contrast, administrative expertise is all about knowledge that seems stable enough to justify regulation. Expert rulemakers enjoy a sense of authority precisely because of their confidence, and ours, in what they apparently know. And what they claim to know is that which seems established by science. They sometimes recognize the tentative quality of science, especially cutting edge science. But to acknowledge the distance of their expertise from science, let alone from what is unknown at the boundaries of science, they would have to question

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<sup>523</sup> See *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983) (“[A] reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science.”); see also Jacob Gersen & Adrian Vermeule, *Thin Rationality Review*, 114 MICH. L. REV. 1355, 1387–88 (2016) (arguing that “under the rubric of tacit expertise, the agency’s choice may actually be better than the court’s in ways and on grounds that the agency cannot explain to the court . . . . Agencies frequently encounter novel problems at the frontiers of scientific and technical knowledge . . .”).

<sup>524</sup> See, e.g., *Certainty vs. Uncertainty: Understanding Scientific Terms About Climate Change*, UNION OF CONCERNED SCIENTISTS (June 21, 2010), <https://www.ucsusa.org/resources/understanding-scientific-terms-about-climate-change> [<https://perma.cc/M457-FWYB>] (“In science, there’s often not absolute certainty. But, research reduces uncertainty.”).

the basis of their authority. Whether to preserve their power or their self-confidence, they tend to emphasize their confidence in the scientific character of their expertise.

The disparity between their confidence in their expertise and the tentative quality of the underlying science is worrisome. Although the expertise is assumed to be stable, the underlying science is not—especially not at its cutting edge. At best, if regulators have reliably stable expertise, it is out-of-date science. So, when agencies regulate with confidence in their expertise on the assumption that it is scientific, they often are acting with more confidence than is justified.

This bias toward confidence is dangerous. It can lead to overly ambitious regulation, which rearranges American business and society without sufficiently recognizing the risk of error. The danger can be illustrated by the recent COVID-19 regulations on masks, quarantines, and shutdowns. Overconfidence in allegedly scientific knowledge about the virus led to policies that destroyed local face-to-face businesses, empowered massive online corporations, and left innumerable individuals unnecessarily hampered and confined.<sup>525</sup>

Experts can have valuable knowledge, but expertise should not be confused with science; the two are very different. Confidence in expert knowledge stands in sharp contrast to the modesty of scientific inquiry. So, when experts are given lawmaking power, there is a danger that their over-confidence in their expertise will take them beyond what is really scientifically justified.

### *B. Specialization Bias*

Expert lawmaking is specialized lawmaking. This specialization is advantageous, but it typically distracts experts from the breadth of the public interest.

Experts, unsurprisingly, tend to focus on their own spheres of knowledge. This specialization is one of their virtues, for it enables them to understand a particular field in depth. At the same time, specialization can divert experts from other considerations, including the host of other specialized considerations that need to be evaluated to understand the interests of society as a whole. Even if one is skeptical about the possibility of identifying the public interest, and even if one discounts considerations that are not reducible to specialized knowledge, there is little doubt that, for a host of decisions, many different specialized considerations need to be taken into account.

The danger of specialized decision-making is apparent throughout the administrative state. Dental experts recognized the value of

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<sup>525</sup> See generally Mathew Mercuri, *Just Follow the Science: A Government Response to a Pandemic*, 26 J. EVALUATION CLINICAL PRAC. 1575 (2020).

fluoridation for preserving teeth, but they never bothered to weigh its consequences for the mental development of children exposed to fluoride in utero.<sup>526</sup> Bureaucrats with expertise in fire hazards insisted on flame retardants in children's pajamas without pausing to ask whether the chemicals might be toxic to children.<sup>527</sup> Government immunologists focused on the measures necessary to limit the transmission of COVID-19, without adequately taking into account the costs of confining children and shutting down much of economy.<sup>528</sup> Such considerations might not have dramatically changed the government's regulatory conclusions but at least might have moderated them.

When experts in biomedical ethics secured prior licensing for human-subjects research and its publication, even for obviously harmless research, they deliberately shut their eyes to the predictable death toll from restricting medical, let alone public-policy, knowledge.<sup>529</sup> Although they ostentatiously aimed to protect minorities from the burdens of such research, they thereby discouraged research on the distinctive medical problems facing minorities, depriving them

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<sup>526</sup> See Rivka Green, Bruce Lanphear, Richard Hornung, David Flora, Angeles Martinez-Mier, Raichel Neufeld, Pierre Ayotte, Gina Muckle & Christine Till, *Association Between Maternal Fluoride Exposure During Pregnancy and IQ Scores in Offspring in Canada*, 173 JAMA PEDIATRICS 940, 941 (Aug. 19, 2019) (finding that "fluoride exposure during pregnancy was associated with lower IQ scores in children aged 3 to 4 years").

<sup>527</sup> See Clyde Haberman, *A Flame Retardant That Came with Its Own Threat to Health*, N.Y. TIMES (May 3, 2015), <https://www.nytimes.com/2015/05/04/us/a-flame-retardant-that-came-with-its-own-threat-to-health.html> [<https://perma.cc/27R9-ASBG>].

<sup>528</sup> See generally Mercuri, *supra* note 525.

<sup>529</sup> 45 C.F.R. § 46.111(a)(2) (2021) ("Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. . . . The IRB should not consider possible long-range effects of applying knowledge gained in the research (e.g., the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.").

The IRB body count is suggested by Peter Pronovost's study of catheter-related bloodstream infections. Peter Pronovost, Dale Needham, Sean Berenholtz, David Sinopoli, Haitao Chu, Sara Cosgrove, Bryan Sexton, Robert Hyzy, Robert Welsh, Gary Roth, Joseph Bander, John Kepros & Christine Goeschel, *An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU*, 355 NEW ENG. J. MED. 2725 (2006). HHS shut down this study out of concerns that there had not been sufficient IRB approval, stopping further collection of data. But it was published in 2006 with the effect of saving at least 17,000 lives per annum in the United States alone. Kevin B. O'Reilly, *Effort Cuts Down Catheter-Related Infections*, AM. MED. NEWS (Jan. 22, 2007), <https://amednews.com/article/20070122/profession/301229957/7/> [<https://perma.cc/9WVH-H7GZ>]; Allison Lipitz-Snyderman, Dale M. Needham, Elizabeth Colantuoni, Christine A. Goeschel, Jill A. Marsteller, David A. Thompson, Sean M. Berenholtz, Lisa H. Lubomski, Sam Watson & Peter J. Pronovost, *The Ability of Intensive Care Units to Maintain Zero Central Line-Associated Bloodstream Infections*, 171 ARCHIVES INTERNAL MED. 856 (2011). To date, that means well over 250,000 lives (again, just counting the United States). And that was just one study. If one very conservatively supposes that the IRB system impedes only a few profoundly lifesaving studies each year, the lost lives since the imposition of IRBs in 1972 runs into the millions.

of the lifesaving benefits.<sup>530</sup> The specialization bias is dangerous, even lethal.

Of course, nothing here disputes the value of having federal agencies staffed by experts to analyze the need for regulation and even to draft regulations. Such specialized knowledge can be very useful. But although it can be valuable for experts to share their specialized knowledge with legislators, it is very dangerous to leave the lawmaking decisions to experts, as they almost never can adequately overcome their specialization bias. That is, they will tend to focus so much on the concerns relating to their own area of expertise that they will not adequately take other areas of concern into account.

It even is dangerous to leave the enactment of regulations to the unspecialized heads of specialized agencies. Agency heads who are not experts in their agency's field of regulation may be capable of rising above their agency's narrow regulatory mission to recognize broader considerations. But even when they are not experts, the heads of specialized agencies are apt to become attached to their agency's specialized mission and to echo the specialization bias of the agency's experts.

Much federal regulation thus tends to be an expression of various specialized concerns, not the public interest. This distortion is the almost inevitable result of divesting legislative power from Congress to specialized agencies. Whereas the Constitution locates legislative power in a representative body accountable to the people and their general concerns, the shift of such power to specialized agencies, filled with specialized experts, produces policies biased by specialized knowledge.

It cannot be overemphasized that this is not to question the value of specialized knowledge, especially when the experts are self-aware about their bias toward overconfidence and when they present their knowledge to legislators. But expertise is different from expert decision-making. When experts devoted to their specialized knowledge engage in lawmaking, there is a persistent risk of specialization bias.

### C. *Size Bias*

Delegated lawmaking can be utterly destructive of all sorts of private enterprise, but even when it is not harsh, it tends to discriminate among different types of businesses. As put by Charles Reich, many

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<sup>530</sup> Philip Hamburger, *HHS's Contribution to Black Death Rates*, L. & LIBERTY (Jan. 8, 2015), <https://lawliberty.org/hhss-contribution-to-black-death-rates/> [<https://perma.cc/QQ88-GYGZ>] (examining the possibility that IRB censorship of research on the distinctive medical difficulties faced by Black men may be partly responsible for their elevated risk of death in cardiac surgery).

elements of administrative process “favor larger, richer, more experienced companies or individuals over small ones.”<sup>531</sup>

The problem is not necessarily deliberate favoring, but a structural bent, arising from delegated lawmaking. For example, the larger a firm, the more it is apt to have the resources and connectedness necessary to influence administrators. Larger companies also have advantages in lobbying members of Congress. But the sheer number of congressional legislators and their dependence on local support gives smaller companies at least a chance when lawmaking is done in Congress. Less so when it has been delegated to agencies.

The larger companies, moreover, are usually those that have the overhead to cover regulatory costs. A firm needs resources to meet new technical requirements and even simply to decipher obscure regulations and fill out forms. These regulatory costs give the largest companies a competitive edge.

Not merely an economic danger, the risk of the size bias is also political. The administrative bias toward sizable firms tends to elevate national and international firms over local businesses. One effect is to undermine local agriculture, local manufacturing, and local services, and thereby also local communities. The administrative favoring of businesses with international reach can even undercut our national interests. National firms lack much attachment to American localities, and international firms are not even much attached to the nation.<sup>532</sup> It therefore is no small matter that the delegation of legislative power comes with bias toward the largest firms.



All systems are subject to distortion, and there is no reason to think that the Constitution’s system of representative lawmaking is an exception. But there also is no reason to consider administrative lawmaking an exception. It slants toward confidence, specialization, and size—biases that undercut its claim of distinctive rationality.

#### XIV. THREATS TO POLITICAL STABILITY

The administrative exercise of legislative power nearly guarantees instability. Although this already is suggested by the decision-making biases, it is especially a problem because of administratively induced irresponsibility, alienation, and political conflict.

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<sup>531</sup> Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 765 (1964).

<sup>532</sup> Although such questions are difficult to quantify, consider, for example, the old Facebook slogan, “Company over Country.” SHEERA FRENKEL & CECILIA KANG, AN UGLY TRUTH: INSIDE FACEBOOK’S BATTLE FOR DOMINATION ch. 7 (2021).

### A. *Irresponsibility*

The opportunity to devolve legislative power to administrative agencies invites congressional irresponsibility. Congress can escape accountability for regulatory policy and is therefore free to behave irresponsibly.

It is often protested that legislation cannot be left to Congress because it lacks the requisite responsibility.<sup>533</sup> This danger is often attributed to political differences, gridlock, and other political obstacles. But one must also consider the possibility that Congress is responding to judicially created circumstances. For more than a century, the Supreme Court has let Congress unload its legislative power to agencies. So Congress is free to posture without making hard decisions.<sup>534</sup>

It therefore is difficult to conclude simplistically that Congress's reluctance to act responsibly is what requires a transfer of legislative power. Rather, the causation may partly run in the other direction. The opportunity to avoid taking responsibility apparently encourages Congress to sidestep the difficult decisions that should be made by the nation's representative body.

Put another way, the opportunity to exercise power through extra-constitutional mechanisms tends to infantilize the Constitution's elements of government. Congress leaves difficult regulatory decisions to agencies, the President governs by controlling the agencies, and the judges shut their eyes to the unconstitutionality. All three branches are thereby corrupted, leaving Americans with ever less confidence in government.

### B. *Alienation*

Another danger is that because administrative agencies are unelected, it is difficult over the long term to avoid public alienation. When governance by, for, and of the people gets handed to unelected bureaucrats, many individuals are apt to feel that something is awry. Even when Americans do not fully understand the extent to which law-making has been taken from their representatives, they tend to feel disconnected and alienated.

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<sup>533</sup> See Ezra Klein, *Congressional Dysfunction*, Vox (May 15, 2015, 6:18 PM), <https://www.vox.com/2015/1/2/18089154/congressional-dysfunction> [<https://perma.cc/XV5U-BN9M>] (“When people talk about congressional dysfunction they usually mean that Congress, despite its vast authority, seems paralyzed in the face of the nation’s toughest problems.”).

<sup>534</sup> Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1463 (2015) (“Members have persistent incentives for delegation to agencies, because it is often easier to serve their interests through shaping administration than by passing legislation.”).

Americans once were subject to only one national lawmaker, Congress. They therefore could understand their relationship to the law-making body and even could feel some connectedness to its members. The elected legislators could not always heed what was demanded from them, but they at least would go through the motions of listening and responding to their constituents.

Nowadays, Americans are regulated by a huge number of federal agencies. The situation is so confusing that not even the federal government, let alone ordinary Americans, can keep track of such agencies and what they do.<sup>535</sup> And these agencies make law without any fear of being held to account in an election. At most, they submit to notice and comment rulemaking. The vast majority of Americans do not participate in this “charade,” and with good reason.<sup>536</sup> It is a poor substitute for voting.

The transfer of legislative power to unelected bureaucrats deprives Americans of their sense of connection to government. Whatever the justifications, this shift of legislation could not be better calculated to induce a sense of distance and disaffection. So, it is unsurprising that growing numbers of Americans, left and right, feel politically alienated.

### C. *Political Conflict*

Most destabilizing of all is the tendency toward political conflict. When regulatory policy shifts from Congress to the President, it can escape the need for compromise and go to extremes—as argued by Professors John McGinnis and Michael Rappaport.<sup>537</sup> In particular, the danger is that federal power has become both more expansive and more administrative. This pair of developments exacerbates the

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<sup>535</sup> The Sourcebook of United States Executive Agencies states:

[T]here is no authoritative list of government agencies. Every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The *United States Government Manual* lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.

DAVID E. LEWIS & JENNIFER L. SELIN, SOURCEBOOK OF UNITED STATES EXECUTIVE AGENCIES 14–15 (1st ed. 2012); see also Clyde Wayne Crews Jr., *How Many Federal Agencies Exist? We Can't Drain the Swamp Until We Know*, FORBES (July 5, 2017, 4:03 PM), <https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/?sh=4cefc6051aa2>. [https://perma.cc/C48Q-Z94V].

<sup>536</sup> See David J. Baron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP. CT. REV. 201, 231–32 (calling the notice-and-comment process a “charade”).

<sup>537</sup> See John O. McGinnis & Michael B. Rappaport, *Presidential Polarization*, 83 OHIO ST. L.J. 5 (2022).



political stakes and intensifies political conflict, especially in presidential elections.

In the twentieth century, the Supreme Court simultaneously expanded Congress's legislative powers and allowed them to be exercised by administrative agencies.<sup>538</sup> The Court thereby loosed administrative agencies to exercise immense legislative power.

For a long time, the implications were muted because neither Congress nor the agencies took full advantage of what they might get away with under the Court's doctrines. But in recent decades, the federal government has relied upon the Court's expansive vision of federal legislative power to regulate education, speech, healthcare, insurance, sexual relations, and other areas that once seemed largely beyond Washington's reach.<sup>539</sup> Federal agencies have become the regulatory vanguard—audaciously exploiting congressional ambiguity and silence to bring the breadth of federal power to bear on Americans.

The breadth of centralized legislative power displaces much state politics. It also reaches deep into private institutions and life.<sup>540</sup> When national political victory comes with this vast power, much anxiety focuses on politics. Americans, quite rationally, fear being subjugated. Those who win can oppress; those who lose are apt to be oppressed. Bloated federal legislative power thus not only nationalizes American politics but also politicizes American life.

What makes this especially dangerous is that administrative agencies, not only Congress, now exercise this expansive legislative power. These agencies are in the hands of unelected bureaucrats, who can be unleashed—or at least restrained—by the President.<sup>541</sup> Presidential elections therefore elicit an intensity of feeling that strains lawful, let alone civilized, conduct. They have become do-or-die battles for control of massive regulatory power. With so much riding on a single election, the stakes become too high. An almost irresistible incentive exists to suppress opponents and their views—abandoning all traditions of cooperation, tolerance, and freedom of speech.

Put another way, when an almost general legislative power becomes consolidated in federal agencies under presidential direction, regulation becomes both unrepresentative and unstable. On the one hand, bureaucratic regulation is not very responsive to the nation's diversity. On the other hand, when bureaucrats are moved or at least restrained by a single leader, who is vulnerable with each presidential election, regulatory policy can change dramatically with each president.<sup>542</sup> This

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<sup>538</sup> See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2269–70 (2001).

<sup>539</sup> See *id.* at 2303.

<sup>540</sup> See *id.*

<sup>541</sup> For presidential control of the administrative state, see *id.* at 2247–48.

<sup>542</sup> See *id.*

makes presidential elections crucial. They become do-or-die battles for control.

None of this is to discount other factors—including ideology and the growth of social media—in stimulating political conflict. Nor is it to deny that some earlier presidential elections have been vicious. But the opportunity for vast regulatory power through administrative agencies guarantees the existential tone of presidential contests.

So, it is very dangerous that federal regulatory power becomes simultaneously so expansive and so administrative. Vast power rests on presidential elections, and in the resulting all-or-nothing battles, politics becomes warfare.



The transfer of lawmaking to agencies invites singularly dangerous deformations of the body politic. The nation pays a price for the congressional irresponsibility, and it may not even survive the alienation and the invitation to political conflict.

#### CONCLUSION

The nondelegation doctrine is on its last legs. It is of dubious authority, it is lax, it fictionally permits what it says it forbids, and it does not help the judges sort out their cases.

In one proposed solution to the nondelegation problem, some scholars urge that the Constitution, as originally understood, permits delegation.<sup>543</sup> This approach has the virtue of abandoning the pretense of nondelegation. But it equally fails to sort out cases. And it conflicts with the historical and textual evidence. To be precise, it departs from the underlying principles of representative consent and of different, separated, and exclusive powers; it flies in the face of the framers' refusal to authorize the executive to exercise delegated powers; it even contradicts the Constitution's text, which not once, but four times impedes the delegation or divesting of legislative powers.<sup>544</sup>

Another proposed solution to nondelegation problem is to slice through the baby along lines of importance. This may seem a reasonable middle ground. But it conflicts with the Constitution, which draws no such distinction.<sup>545</sup> It also dangerously asks judges to deprive Americans of their freedom of self-government along an inescapably economic or political fault-line, favoring Americans whose activities seem important and largely disenfranchising the rest.

It is therefore necessary to consider the Constitution's treatment of its powers. Does the Constitution allow Congress to shift them from one branch to another? This Foreword approaches the question with

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<sup>543</sup> See Mortenson & Bagley, *supra* note 5.

<sup>544</sup> See U.S. CONST. art. I, §§ 1, 8; *id.* art. II, § 1; *id.* art. III, § 1.

<sup>545</sup> See *id.* art. I.

layers of principles, founding assumptions, text, and contemporary considerations:

*Underlying Principles:*

- Law must be made with consent—in particular, it must be made by an elected representative legislature. Without such consent, government is not legitimate and its laws are not binding.
- The tripartite powers are different in their nature, and the Constitution allocates them to different branches of government. Whereas the legislative power centrally involves making binding laws, and whereas the core of judicial power is to make binding judgments in cases and controversies about binding laws, the executive power includes no power to bind. It includes authority to distribute benefits, even to impose constraint under binding laws or judgments, but not to create legal obligation.
- The Constitution carries out the separation of powers through a default allocation of powers to different branches of government. Even when the Constitution specifies exceptions from its distribution of powers, it avoids questioning the general principle of separation of powers.
- Although the Constitution's powers are not always internally exclusive, they are externally exclusive. Each power is externally exclusive to its branch.
- Even with each power exclusively in its branch, the branches sometimes enjoy overlapping or nonexclusive authority under their respective powers. For example, both Congress and courts can make rules of court while exercising their own powers. And both Congress and the executive can make rules under their own powers for the distribution of congressionally authorized benefits. Their nonexclusive authority does not call into doubt their exclusive powers.
- As for delegation, the debates leading up to adoption of the Constitution—both in New York and in Philadelphia—reveal familiarity with, and attachment to, the nondelegation principle.

*Framing Assumptions:*

- Unlike contemporary scholars and judges, the framers focused their attention on whether the executive was empowered to exercise congressionally delegated power. Even if Congress delegated power to the Executive, the framers assumed the executive still needed specific constitutional authorization to exercise any such power.

- The framers rejected a proposal authorizing the executive to exercise congressionally delegated powers—even when it was clarified that it would not extend to powers that were legislative or judicial in their nature. The framers thus rejected such authorization not only for delegated legislative and judicial powers but even for delegated executive power.
- The framers thereby made clear that there should not be any statutory delegation to the executive of any type of power—whether legislative, judicial, or executive. Their underlying assumption seems to have been that such powers would be delegated by the Constitution, not Congress.

*Constitutional Text:*

- The Constitution doesn't merely delegate its powers. Rather it speaks of *vested* powers. Indeed, there are four textual obstacles to transfers of its legislative powers.
- First, rather than say that the legislative powers *are hereby vested* in Congress, Article I says they “shall be vested” in that body.<sup>546</sup> The Constitution thereby not merely transfers the legislative powers but makes their location mandatory.
- Second, Article III's vesting clause authorizes Congress to designate where much of the judicial power shall be vested.<sup>547</sup> In contrast, Article I's vesting clause does not give Congress such a power to designate the location of any of the legislative powers.<sup>548</sup> The judicial vesting clause thus confirms that the legislative vesting clause does not let Congress designate the location of legislative power.
- Third, the executive cannot exercise power that is not vested in it. It therefore cannot exercise legislative or judicial power—as evident from the framing debates, the Constitution's text, and *Hayburn's Case*.<sup>549</sup>
- A fourth layer of textual argument rests on the necessary and proper power. It is carefully drafted to avoid giving Congress any justification for divesting the powers vested by the Constitution. Even more to the point, it reveals that the power to do what is necessary and proper to carry legislative powers into execution must be exercised through congressional lawmaking, not agency rulemaking.

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<sup>546</sup> *Id.* art. I, § 1.

<sup>547</sup> *Id.* art. III, § 1.

<sup>548</sup> *See id.* art. I, § 1.

<sup>549</sup> *Hayburn's Case*, 2 U.S. (2 Dall.) 409 (1792).

*Contemporary Concerns:*

- The shift of legislative power from Congress to administrative agencies dilutes voting rights. The process began in the late nineteenth century with racial and religious prejudices about the expansion of suffrage. Even today, the transfer of legislative power out of Congress disenfranchises vast numbers of Americans, diluting their voting rights, depriving them of political agency, and introducing discrimination along lines of class, politics, and religion.
- Far from being a distinctively rational mode of decision-making, delegated lawmaking introduces confidence, specialization, and size biases. It thereby undermines the very decision-making rationality it purports to secure.
- Administrative lawmaking invites congressional irresponsibility, popular alienation, and political extremism and conflict. It is profoundly destabilizing.

The argument thus rests on multiple concepts and on a range of evidence, including fundamental principles, drafting assumptions, text, and contemporary dangers. These diverse considerations are all aligned against transferring the tripartite powers among the branches of government.

So it is time to recognize the risks of dislocating legislative or other power outside the branch in which it *shall be vested*. Regardless of whether the transfer is done under the fig leaf of the nondelegation doctrine or in any other guise, it is unconstitutional and dangerous.<sup>550</sup>

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<sup>550</sup> Incidentally, it should not be assumed that this Foreword's arguments would regularly require judges to hold statutes void. One might fear that wherever Congress divests itself of legislative power and vests it in an agency, this Foreword's views would force a judge to reach an up-or-down decision about the statute as a whole. Certainly, when vesting problems are considered abstractly, a judge may feel that he must choose between upholding the statute or holding it void.

But it is not necessary for a challenge to a binding agency rule to approach the problem at the highest level of generality—that is, by asking whether Congress has unlawfully divested itself of legislative power and vested it elsewhere. Instead, a challenge to such a rule could focus on the more immediate and concrete problem of whether the agency is unlawfully exercising legislative power that the Constitution has not vested in it and whether it is divesting Congress of that power. In other words, rather than evaluate the underlying statute, a judge often can more modestly examine the authorized agency rule and hold it void.

The framers themselves (as seen above in Section IX.D) and the judges in *Hayburn's Case* (as shown above in Section V.A) clearly thought the immediate problem was the exercise of nonexecutive power by the executive, or nonjudicial power by the courts, not the delegation of legislative power by Congress. And that remains true for both principled and practical reasons more than two centuries later.

To be sure, a judge's reasoning in such a case might eventually reach other agency rules and even the statute. In the meantime, however, the judge could focus on the unlawfulness of a concrete administrative rule and avoid more abstract questions about full range of statutory authorization.

The key practical implication is that although the executive can make rules and decisions distributing benefits and other privileges under law, it cannot make binding rules or adjudications—those that come with legal obligation.

One might protest that agencies make important contributions to government. Yet those contributions would continue. All that would change is that their work would not include anything that binds. It would not include anything that would be an exercise of Congress's legislative powers or the court's judicial powers.

Agencies still could issue many nonbinding rules and adjudications. These would include rules and decisions directing government officers and employees. Though not legally enforceable against those persons, such rules and decisions could be enforceable under threat of being dismissed—this being the government's standard approach at the founding and for a long time afterward.<sup>551</sup> Agencies could also, as permitted by Congress, make rules and adjudications allocating benefits and other privileges. At least where such rules and adjudications did not create or adjust legally obligatory duties or rights, they generally could be made by agencies. Moreover, agencies could still make determinations of fact where these really are just conditions of congressionally legislated duties or rights.<sup>552</sup> Perhaps even more substantially, agencies could develop policies and formulate them into proposals for binding statutes. Thus, the apparatus of agency expertise and policymaking could remain intact. But at the final stage, the agency head would have to recommend its rules to Congress, not simply adopt them by him or herself.<sup>553</sup>

This conclusion may seem unnerving because it upends what has become the status quo. But the unlawfulness and the perils of the current system are profound. It cannot stand.

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<sup>551</sup> See HAMBURGER, *supra* note 6, at 90, 93–95.

<sup>552</sup> In the past when executive determinations still seemed to live up to their form as mere determinations of fact, they did not seem to be an exercise of legislative or judicial power. But they have increasingly been abused so as to turn them into a mechanism for the executive to make binding law or adjudications. In other words, although such determinations formally do not create legal obligation, they in reality often come close, and therefore if misused and widely employed, they can substantially divest Congress of legislative power and divest the courts of judicial power. Therefore, whatever the alignment of their form and the reality in the distant past, it may be time to recognize the reality that, in many instances, they now divest Congress and the courts of their powers.

<sup>553</sup> One might also worry that without binding agency adjudications, the courts would be swamped. But this sort of objection become less troubling when one recognizes that the administrative state relies on a relatively small number of administrative law judges for binding adjudications about binding rights or duties. There are only five at the Securities and Exchange Commission and only 276 outside the Social Security Administration. See *Administrative Law Judge*, BALLOTPEdia, [https://ballotpedia.org/Administrative\\_law\\_judge](https://ballotpedia.org/Administrative_law_judge) [<https://perma.cc/5CAS-9UUT>] (addressing “ALJs by the numbers”).

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Change is not always bad. There is no reason to cling to a regime of unrepresentative legislation and diluted voting rights, let alone to preserve a system of judicial power displaced out of the courts and far from their procedural rights. Instead, it is time to count the blessings of living in a constitutional republic, with laws made by elected lawmakers and adjudications made by judges and juries in the courts. This was, is, and should be our government.

## APPENDIX: EARLY FEDERAL PRACTICES

Although this Foreword has explored the nondelegation problem with layers of constitutional *concepts*, the question can also be approached by looking at early federal *practices*. Indeed, many scholars rely on this sort of postconstitutional evidence to justify the shift of legislative power to agencies. Their claim is that such transfers were a familiar reality of the early federal government. From this, they conclude that the Constitution, as originally understood, permitted delegated agency lawmaking. But does the evidence really prove this point?

Even before evaluating the early federal instances that are said to legitimize administrative rulemaking, one must pause to recognize that such examples are not self-sorting. That is, some may be illustrations of what was permissible under the Constitution's intent, and some may be examples of strained interpretation or even lawlessness. It is highly probable that the early federal government occasionally deviated from the Constitution. Amid a host of practical, personal, and ideological pressures, some such deviations were inevitable. So it cannot be simply taken for granted that early federal instances of delegated rulemaking or adjudication are strong evidence of their lawfulness or of the Constitution's intent.

But there is a more important response: the alleged early federal examples of delegated legislative power do not prove what is claimed for them. None of them reveal a delegation or transfer of national domestic binding rulemaking.<sup>554</sup> The evidence is thus entirely consistent with this Foreword's thesis.

Long ago, an article by Professors Eric Posner and Adrian Vermeule listed early federal statutes that "presuppose that the executive may receive statutory grants of rulemaking discretion not constrained by any further intelligible principle or congressional direction."<sup>555</sup> More recently, the Mortenson and Bagley article offers much evidence to show that early Congresses "delegated in sweeping terms."<sup>556</sup> But none of the examples offered show that Congress delegated binding national domestic rulemaking.

*Jurisdictional and Other Exceptions.* Of course, there could be delegation beyond various jurisdictional and other margins—in matters such as Indian traders, enemy aliens, and the territories. Advocates of

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<sup>554</sup> Hamburger, *Delegating*, *supra* note 6, at 107 (The Mortenson and Bagley article "does not point to any early instance when the Executive, with or without congressional authorization, made binding rules or adjudications that were national and domestic in their scope. None. Not one." Thus, "the Article does not produce a single example of early federal executive action that falls squarely within the sort of national domestic regulation that is at the heart of the dispute over administrative power."); see also Wurman, *supra* note 7, at 1494, 1503, 1538–55.

<sup>555</sup> Posner & Vermeule, *supra* note 35, at 1735–36.

<sup>556</sup> Mortenson & Bagley, *supra* note 5, at 366.



delegation take solace in these jurisdictional exceptions, on the strained assumption they show a general acceptance of delegated legislative power. But these difficult questions at the edges should not be confused with national domestic regulation.

For example, in cross-border matters, Congress could employ regulatory licensing. Notably, in 1790, Congress set up a licensing system that imposed administratively stated regulatory conditions on Indian traders.<sup>557</sup> Mortenson and Bagley protest that the affected tribal settlements included those surrounded by U.S. citizens and, on this basis, claim that the licensing of Indian traders is at least partly a precedent for domestic regulation.<sup>558</sup> But that misses the point. For one thing, the statute aimed mostly at trade with tribes settled in or beyond the territories—so even if the statute reached some tribes within the United States, it substantially, even if not entirely, concerned conduct reaching outside the boundaries of the United States. More to the point—and it is odd that Mortenson and Bagley miss this—tribes were nations. So, even when their settlements were within the United States or its territories, the affected trade was cross-border conduct.<sup>559</sup> The licensing of Indian traders is therefore unrevealing about national domestic regulation. Instead, it merely shows that there could be some nearly binding executive lawmaking in cross-border matters.

Another jurisdictional line concerned enemy aliens.<sup>560</sup> Being without allegiance to the United States, they were outside the protection of

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<sup>557</sup> HAMBURGER, *supra* note 6, at 104–05.

<sup>558</sup> The federal statute required persons trading with Indian tribes to get a license, and Mortenson and Bagley note that the statute authorized the President “if he may deem it proper,” to permit “intercourse without a license” with “tribes surrounded in their settlements by the citizens of the United States.” Mortenson & Bagley, *supra* note 35, at 2358 n.169 (quoting Act of July 22, 1790, ch. 33, § 1, 1. Stat. 137, 137). On this basis, they conclude that the regulated trade included trade with tribes located within the borders of the United States and that “Hamburger’s characterization of the law as regulating ‘cross-border conduct’ . . . is false.” *Id.* at 2358.

<sup>559</sup> For contemporary recognition that the Indian Trade Statute dealt with Indian nations, see *Samuel Street to Jeremiah Wadsworth*, reprinted in 20 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, 4 MARCH 1789–3 MARCH 1791, at 2346 (Charlene Bangs Bickford et al. eds., 2012) (suggesting that the Trade Act will bring about peace with the “five Nations”); *William Samuel Johnson and Oliver Ellsworth to Governor Samuel Huntington*, reprinted in 20 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA, *supra*, at 2377 (same as to peace with “Indian Nations”).

Of course, the situation of different Indian nations varied, and the nuances were complex. Some of the tribes that were “surrounded in their settlements by the citizens of the United States” were distinct nations but also were much integrated with the surrounding population. Mortenson & Bagley, *supra* note 35, at 2358 n.169 (quoting Act of July 22, 1790). So it made sense to authorize the President, where he deemed it proper, to permit trade without a license. *Id.* at 2358 n.169. But just because some tribes were surrounded by U.S. citizens, or even within the United States, does not mean that trade with them was not a cross-border issue.

<sup>560</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 104.

its laws. But they could be permitted to stay in the United States subject to executive license.<sup>561</sup>

Yet another jurisdictional limit involved the District of Columbia and the territories. In such spaces, the Constitution provided for Congress to have general regulatory power. So in these distinctive places, Congress could authorize the executive to make some binding regulations.<sup>562</sup>

In addition to these jurisdictional exceptions, congressionally imposed duties could rest on factual determinations by the president about foreign duties.<sup>563</sup> These determinations could be strained to create something close to delegated legislation or adjudication, but that was not ideally how they were to work or how they could be justified.

Delegationists protest that these exceptions are merely “special pleading.”<sup>564</sup> But the exceptions, whether jurisdictional or otherwise, had constitutional and other deep foundations, and the protests to the contrary are at times nearly comic.<sup>565</sup> So there is nothing of special pleading about the exceptions. On the contrary, being qualifications at the edges, they recognized the central principle that national domestic regulation generally belonged to Congress and could not be delegated.

The core of administrative power is national domestic regulation that binds Americans—that defines their rights and duties. And this is precisely the sort of delegated legislative power that is missing from the early evidence. No instance of delegated legislative power has yet been found in which Congress authorized the executive to make binding national domestic rules. Not one.<sup>566</sup>

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<sup>561</sup> Hamburger, *supra* note 90, at 1932–33.

<sup>562</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 210; U.S. CONST. art. IV, § 3 (“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”); *id.*, art. I, § 8 (“To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States.”); Eli Nachmany, *supra* note 353.

<sup>563</sup> HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 107–10.

<sup>564</sup> Mortenson & Bagley, *supra* note 35, at 2354.

<sup>565</sup> For example, they protest that trade with Indian tribes was not cross-border trade—as if oblivious to the status of tribes as nations. See *id.* at 2358. And they write, “Hamburger identifies no contemporary statement that territorial and municipal delegations were thought to be constitutionally distinct from more conventional delegations to the executive branch.” *Id.* at 2357. But of course the Constitution had something to say about territories and the District of Columbia. See Nelson, *supra* note 353. Does the Constitution not count as a “contemporary statement”?

<sup>566</sup> It has been objected that the 1798 Valuation Act, as interpreted by Nicholas Parrillo, is a counter example. See Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021) (regarding commissioners’ revisions of assessments under the 1798 Act); Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, 84 U. PITT. L. REV. ONLINE, no. 5, 2023, at 3 (suggesting that Parrillo’s evidence conflicts with my

*Evidence Below the Level of Statutes.* Even when one moves down the food chain from statutes to departmental rules and other instructions, there is no evidence that binding national domestic lawmaking was delegated. Although my 2014 book is often disparaged for not including much American evidence, it rested on detailed examination of manuscript and printed departmental communications from the founding up through the 1830s.<sup>567</sup> This is a massive and critical body of evidence. If there were early federal regulations that were binding, this is where they are likely to be found. Yet none of the scholarship advocating delegated lawmaking seem to have examined such evidence, and none of the evidence, to my knowledge, reveals that Congress authorized the executive to make binding national domestic rules.<sup>568</sup>

Perhaps I missed something. But the internal government communications disclose no power to make such regulations.<sup>569</sup> Government regulations did not ordinarily bind even government officers, who could be fired for noncompliance, but generally had no legal obligation to obey.<sup>570</sup>

Indeed, some early Treasury communications to customs collectors noted that there was no power to bind—as when the Comptroller wrote to the collectors and other officers in 1798 to remind them of their statutory duties.<sup>571</sup> They were required by statute to send the Treasury Secretary a quarterly return of the sums they collected from masters of ship to provide for sick and disabled seamen.<sup>572</sup> The underlying information about the number of seamen on board each ship—as well as a contribution for each—was to come from the ships’ masters.<sup>573</sup> But the statute did not require the masters to supply the information in the same format as was required from the customs collectors.<sup>574</sup> Recognizing this difficulty, the Comptroller supplied a form that collectors could give the masters as a “guide” to them in making their returns: “Your trouble in forming the returns . . . will be considerably diminished if the Masters or Captains conform their reports to the form, and although

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argument). But these objections assume that the revisions made by commissioners were examples of delegated legislative power. In fact, they clearly were not understood to be legislative in nature, and they therefore cannot be taken as showing an acceptance of delegated legislative power. See *infra* Appendix.

<sup>567</sup> HAMBURGER, *supra* note 6, at 87–95.

<sup>568</sup> Even Jennifer Mascott’s valuable contribution focuses only on the statutes, not the Treasury’s internal communications. Jennifer Mascott, *Early Customs Law and Delegation*, 87 GEO. WASH. L. REV. 1388, 1394 (2019).

<sup>569</sup> See HAMBURGER, *supra* note 6, at 87–95.

<sup>570</sup> *Id.* at 90, 93–95. See *infra* Appendix.

<sup>571</sup> Circular from John Steele, Comptroller’s Office, to Collectors, Naval Officers, and Surveyors (Sept. 19, 1798) (on file with author).

<sup>572</sup> An Act for the Relief of Sick and Disabled Seamen, ch. 77, §§ 2–3, 1 Stat. 605, 606 (1798).

<sup>573</sup> *Id.*

<sup>574</sup> Circular, *supra* note 569.

its adoption cannot be enjoined, it will doubtless be pursued, whenever it is recommended [to them].”<sup>575</sup> This is telling. Even when information was statutorily required from ships’ masters, a convenient form or format for reporting it “cannot be enjoined.”<sup>576</sup>

*Discretion and Policymaking.* Recognizing the difficulty of showing any delegated binding national domestic regulation, the prodelegation scholarship evades the problem by reframing the question. Rather than dispute the claim about binding regulation, it points out that there was much delegation of discretion and policymaking. That’s true. But it also is unremarkable and unresponsive.

Scholarship by Mortenson and Bagley, for example, assumes the issue in dispute is delegated discretion or policymaking discretion: “The First Congress passed dozens of laws delegating wide discretion to the President, cabinet secretaries, federal judges, territorial governors, and tax officials.”<sup>577</sup> Elsewhere, it treats the question as “whether a delegation of policymaking discretion is constitutional.”<sup>578</sup>

Along similar lines, a recent piece by Professor Kevin Arlyck finds congressional delegation of “policymaking” in the 1790 Remission Act,<sup>579</sup> which authorized the Secretary of the Treasury to remit statutory penalties for violations of federal law.<sup>580</sup> Professor Christine Chabot finds important delegated “policymaking” in legislation that authorized the President and the Sinking Fund Commission to make important financial decisions and in legislation that supposedly authorized executive officers to establish rules for grants of patents.<sup>581</sup>

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<sup>575</sup> *Id.*

<sup>576</sup> Well into the nineteenth century, references to regulations do not support contemporary assumptions. For example, in Boston, what were called “Customs-House Regulations” consisted of federal and state statutes, Treasury circular letters giving the Treasury’s interpretation of the statutes, the local Boston customs interpretations of all of the above, local instructions to customs officers (for example, when to let pickled fish be put on board a ship), generic advice for merchants, and instructions to merchants on how to navigate the local customs system. P.P.F. DEGRAND, *TARIFF OF DUTIES, ON IMPORTATIONS INTO THE UNITED STATES; AND REVENUE LAWS AND CUSTOMS-HOUSE REGULATIONS* 107 (Boston, Bellamy 1821). Some of the instructions to merchants concerned the use of customs house facilities—such as that ad-valorem goods, owned by persons abroad, which arrive without a certified invoice, “will not be allowed, by our Custom House, to be stored provisionally, in the Custom House stores, until a certified Invoice be sent for; but will be subject to appraisement and to the payment of the duty on the additional 50 per cent.” *Id.* at 31. Other such instructions concerned how to navigate the offices, as when merchants were told: “Let the Exporter go to the Collector’s Room in the Custom House, with an ‘Outward-Foreign-Entry, or the benefit of Drawback;’ get the Importer to swear to it; then hand the Entry to the Debenture Clerk . . .” *Id.* at 103.

<sup>577</sup> Mortenson & Bagley, *supra* note 35, at 2326–37; *see also id.* at 2345, 2348.

<sup>578</sup> *Id.* at 2349 n.125.

<sup>579</sup> Act of May 26, 1790, ch. 12, 1 Stat. 122.

<sup>580</sup> Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243, 243, 266–73 (2021).

<sup>581</sup> Christine Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81, 81, 109–10, 128–30 (2021) (“In the first Patent Act, for example, Congress delegated its Article I,

It is revealing that these articles emphasize early executive “discretion” or “policymaking.” These terms obfuscate the lack of evidence for delegated lawmaking—in particular, the making of binding rules or regulations. Unable to point to early delegated legislative power, the articles rely on other early executive policymaking as if it were the same thing. But the important federal policymaking in financial transactions and grants of privileges—whether in remitting penalties or issuing patents—was within executive power and was not the same as making binding rules, let alone those that are national and domestic.<sup>582</sup>

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Section 8 power to grant exclusive patent rights to a Patent Board. This statute left many important questions unanswered, and Bagley and Mortenson recount how it required the Board to establish rules requiring that inventions be nonobvious.”). In fact, as Bagley and Mortenson themselves recognize, the statute said nothing about such rules. Mortenson and Bagley, *supra* note 5, at 339. For the patent board’s rules, see P.J. Federico, *Operation of the Patent Act of 1790*, 72 J. PAT. & TRADEMARK OFF. SOC’Y 373, 378–79 (1990).

<sup>582</sup> For the sense in which grants of patents were understood as nonbinding, see HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 198–202.

Nonetheless, there has been a complaint that my arguments about patent law “ignore” the constraining effect of patents. Mortenson & Bagley, *supra* note 35, at 2357 (saying that my arguments “ignore the fact that issuing a patent does not merely confer a public privilege on a patent holder, but also prohibits infringement by private parties—a clear infringement on private rights”). In fact, my argument recognizes and explains this limiting effect of patents:

Of course, when a patent granted what was within the rights of others, it strayed into imposing constraints on subjects, and patents therefore had to be drafted carefully to avoid this danger. To begin with a simple example, after the Crown had granted a patent of office or land, it could not grant the same office or land to another. In such instances, the courts on both sides of the Atlantic would regularly hold the second patent void.

When the Crown or the federal executive granted patents for trades or manufactures, it similarly had to worry about imposing a constraint, for like office and land patents, patents for activities could easily end up granting what was within the rights of others. It already has been noted how an overly broad second patent for office or land could infringe on particular property rights, and this also was true of overly broad patents for trade or manufactures, where a prior patent had granted the same activity. Even more fundamentally, patents for trades or manufactures could stray into granting what all persons had been free to do, thus violating the general liberty or common right of the subject. For example, if subjects already practiced a lawful trade or manufactured a lawful product, a patent for this conduct would constrain them, thus depriving them of their liberty without an act of Parliament or a court decision. In this way, patents for activities that were not novel had much in common with lawmaking proclamations, and there thus was good reason to consider them unlawful.

If patents were to sidestep this danger, they had to be drafted to avoid constraining the preexisting liberty of subjects, and this is why the Crown often took care to grant patents for trades and manufactures only as to invented or newly imported matters. In retrospect, it has been assumed that patents for inventions developed as a means of encouraging national prosperity, and there is some truth to this; but the framing of patents in terms of new inventions and imports arose from the legal problem that the Crown by itself could not bind its subjects. Although the Crown’s immediate purpose in granting patents for trades and manufactures was to elicit payments from the grantees, it traditionally had to draft its patents in a way that did not impinge on the liberties of the subject, and it

Even when such policymaking found expression in rules, such as those regarding grants of patents, this does not mean they were early examples of delegated legislation.<sup>583</sup> Rather, they were simply the patent board's attempt, within its executive power, to regularize its decisions—to make them more efficient and evenhanded.

The evidence of early delegated discretion and policymaking reveals congressional authorization for executive exercises of executive power, not legislative power. Such evidence is simply unresponsive to the point that Congress could not constitutionally delegate binding national domestic regulation.

*Undelegated Rulemaking.* Interestingly, although some statutes authorized executive officers to make rules instructing subordinates on the distribution of privileges, officers could make many such rules without statutory authorization.

The Mortenson and Bagley article and the Arlyck article find evidence of delegated legislative power in statutes authorizing the rules on the distribution of financial privileges.<sup>584</sup> But what needs to be recognized is that Congress generally did not bother to authorize the Secretary of the Treasury to make rules instructing his subordinates.<sup>585</sup> He was free to make such rules without congressional authorization.<sup>586</sup>

Similarly, the Mortenson and Bagley article and the Chabot article rely on the rules made by the patent board as evidence of delegated legislative power.<sup>587</sup> But Congress never actually authorized such rulemaking.<sup>588</sup>

These instances of unauthorized rulemaking cannot easily be understood as examples of congressionally delegated legislative power.

therefore, in theory, had to confine its trade and manufacturing patents to matters that were new to the kingdom, whether inventions or imports.

HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 198–200. That is three pages explaining the constraining effect of patents. It would have been perfectly reasonable for Mortenson and Bagley to question the old patent doctrine. Instead, oddly, they leave it unmentioned and say I “ignore” the underlying problem of patent constraints. Mortenson & Bagley, *supra* note 35, at 2357.

<sup>583</sup> Federico, *supra* note 579, at 378–79.

<sup>584</sup> See Mortenson & Bagley, *supra* note 5, at 345; Arlyck, *supra* note 578, at 274.

<sup>585</sup> See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 86.

<sup>586</sup> See *id.*

<sup>587</sup> Mortenson & Bagley, *supra* note 5, at 339 (sidestepping the absence of congressional authorization by claiming that the rules were “the creations of a patent board that crafted general rules in response to a broad congressional delegation”); Chabot, *supra* note 579, at 109–110 (“Bagley and Mortenson offer examples that do not present this concern. In the first Patent Act, for example, Congress delegated its Article I, Section 8 power to grant exclusive patent rights to a Patent Board. This statute left many important questions unanswered, and Bagley and Mortenson recount how it required the Board to establish rules requiring that inventions to be nonobvious.”).

<sup>588</sup> For the underlying patent statutes, see Federico, *supra* note 579.

Mortenson and Bagley try to wiggle out of this problem by quietly assuming that the delegation of rulemaking authority could be implicit and thus silent.<sup>589</sup> But that is improbable. The reality, as noted in Section VIII.E, is that the instances of executive rulemaking recited here were already within executive power. Rather than evidence of delegation, these instances are proof that the executive already had sufficient authority under its own power to make rules instructing its subordinates.

*Rulemaking under the 1798 Valuation Act.* The most detailed study of early federal practices comes from Nicholas Parrillo.<sup>590</sup> His article focuses on the 1798 valuation statute in which the Fifth Congress required a valuation of real estate and slaves to lay the foundation for a federal tax on such property.<sup>591</sup> Under section 22 of the statute, assessors and principal assessors were to make the initial valuations, and then commissioners could revise valuations for purposes of equalization.<sup>592</sup> The Parrillo thesis is that these revisions by commissioners were early examples of delegated domestic rulemaking and suggests that they are precedents for contemporary administrative regulation.<sup>593</sup>

His treatment of the historical evidence is as interesting as tax history can be. But does his evidence really support his claims about delegated legislative power?<sup>594</sup>

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<sup>589</sup> See Mortenson & Bagley, *supra* note 5, at 339 (arguing that the patent board's rules were "the creations of a patent board that crafted general rules in response to a broad congressional delegation").

<sup>590</sup> See Parrillo, *supra* note 564.

<sup>591</sup> Although the 1798 statute was merely a valuation statute and merely established commissioners with powers of valuation, the Parrillo article calls them "tax commissioners." *Id.* at 1304, 1313, 1327, 1354, 1356, 1421–23 ("tax commissioners"). For the relevant taxing officials, one must consult a statute adopted five days later, not the statute relied upon by the Parrillo article. See An Act to Lay and Collect a Direct Tax within the United States, ch. 75, § 2, 1 Stat. 597, 598 (1798).

<sup>592</sup> See Parrillo, *supra* note 564, at 1324, 1334–35 (relying on An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 22, 1 Stat. 580, 589 (1798)).

<sup>593</sup> *Id.* at 1455 ("The willingness of the Constitution's earliest lawmakers to rely upon administrators for rulemaking encompassed not only the international and military realm but also the domestic one—not only the realm of benefits and privileges, but also the realm of private rights. Foreign or domestic, public or private, rulemaking has been with us since the beginning.").

<sup>594</sup> The Parrillo article carefully speaks about the commissioners' decisions as examples of early coercive domestic rules that made "policy" rather than as binding lawmaking. *Id.* at 1314–15 n.102. This is very nearly an admission that the article's evidence doesn't directly engage with the debate over delegated legislative power. Nonetheless, the article claims that the commissioners' decisions offer a "major counterexample missed by the literature on nondelegation." *Id.* at 1302. So, the article ultimately claims that its evidence suggests the constitutionality of delegated legislative power.

The article tries to bridge the gap between determinations of fact and delegated binding lawmaking by strangely relying on twentieth-century caselaw. It argues that the valuation decision in *Bi-Metallic Inv. Co. v. State Bd. of Equalization of Colo.*, 239 U.S. 441 (1915) "has long been

An initial reason for skepticism is that when the 1798 statute authorized regulations, it did so expressly. Section 8 authorized the commissioners to issue “regulations.”<sup>595</sup> These regulations were to be “binding” on the commissioners themselves and on the assessors, not the public.<sup>596</sup>

When a statute in one section so expressly authorizes commissioners to make “regulations” (even specifying who will be bound) and in another section authorizes the commissioners to “revise” assessments, does it really make sense to say that the commissioners’ revisions of assessments amounted to delegated rulemaking?<sup>597</sup> Possibly. But not obviously. The statute’s distinction between the authority to make

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administrative law’s touchstone for defining rulemaking. Thus, the 1798 direct tax provides a clear Founding-era example of congressional delegation of rulemaking authority in a context that was both coercive and domestic.” Parrillo, *supra* note 564, at 1304–05. Well, not really. Sure, twentieth-century court cases relied upon determinations of facts to justify what in reality is delegated legislative power. But that doesn’t mean eighteenth-century tax valuations were examples of delegated legislative power or that they could justify it, whether then or now.

<sup>595</sup> An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 8, 1 Stat. 580, 585 (1798) (“[T]he commissioners for each state . . . shall be, and hereby are authorized and required to establish all such regulations, as . . . shall appear suitable and necessary, for carrying this act into effect; which regulations shall be binding on each commissioner and assessor, in the performance of the duties enjoined by, or under this act; and also to frame instructions for the said assessors, informing them, and each of them, of the duties to be by them respectively performed under this act . . .”).

<sup>596</sup> *Id.* Even merely in making the commissioners’ regulations legally binding on the commissioners and the assessors, the 1798 statute seems to have been an outlier. That was not the standard approach. HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 87–88, 93–95. Alexander Hamilton had an expansive view of executive power, but as even he pointed out when serving as Secretary of the Treasury, the remedy for a subordinate’s disobedience was the threat of dismissal. *Id.* at 90. This assumption persisted until at least the middle of the nineteenth century.

As I have noted elsewhere, Congress around 1842 moved toward making some Treasury decisions binding on Treasury officers in the performance of their duties. *Id.* at 96; *see also id.* at 94. But removal remained the conventional response to noncompliance. *See* Circular from R. J. Walker, Secretary of the Treasury to Registers and Receivers of the Public Money (June 17, 1847), *reprinted in* CIRCULAR LETTERS OF THE SECRETARY OF THE TREASURY (T SERIES) 1789–1878, *microformed on* Microfilm No. 735, Reel 3, Vol. 3, 306–07 (Nat’l Archives) (“Any omission on the part of the officers before referred to, to comply strictly with the above instructions, and not satisfactorily explained, will be made the ground of a report to the President for the removal of the delinquent.”).

Clearer examples of binding executive rules are apparent in the last half of the century—as when the 1864 Internal Revenue Act provided that the Internal Revenue Commissioner’s instructions, regulations, and directions “shall be binding” on revenue officers “in the performance of the duties enjoined by or under this act.” Act of June 30, 1864, § 12, *reprinted in* J.B.F. DAVIDGE & I.G. KIMBALL, *A COMPENDIUM OF INTERNAL REVENUE LAWS* 13 (1871); *see also* HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 96. For a judicial opinion recognizing the binding effect of such regulations on officers, *see In re Huttman*, 70 F. 699, 701 (D. Kan. 1895). But these clear and judicially accepted examples are very late.

<sup>597</sup> *See* An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, §§ 8, 22, 1 Stat. 580, 585, 589 (1798).



“regulations” and the authority to “revise” suggests that the revisions were not regulations.<sup>598</sup>

Second, as a matter of common law, assessments were not considered legislative. Determinations of facts, including assessments, were understood at common law to be judicial in nature, not legislative.<sup>599</sup> Although not actually exercises of judicial power, they were expected to mimic judicial decisions at least in being exercises of judgment—this being how they avoided any exercise of legislative power.<sup>600</sup> The Parrillo article would have been entirely correct if it had said that assessments and other determinations of fact have often been misused to exercise a disguised legislative power. My scholarship has repeatedly made that point.<sup>601</sup> But as matter of long-standing common law doctrine, such determinations were expected to be done in a judicial rather than a legislative spirit precisely to avoid having them become illicit delegated legislation.<sup>602</sup>

Third, the text of the 1798 statute expressly recognized the judicial nature of what it authorized, for it required the commissioners to act “as shall appear to be just and equitable.”<sup>603</sup> The Parrillo article preserves its claim about delegated legislative power by suggesting (on the basis of a word search) that this phrase merely “connoted discretion” and lacked a “more specific meaning”—indeed, that it was a “broad power” of “rulemaking.”<sup>604</sup> But this is mistaken.

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<sup>598</sup> See *id.*

<sup>599</sup> See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 97–100.

<sup>600</sup> *Id.*

<sup>601</sup> *Id.* at 101 (regarding “the tension between American constitutional principles and the local determinations that easily could wander into legislative territory”); *id.* at 203; Hamburger, *supra* note 152, at 963–65.

<sup>602</sup> The statute did not tell the commissioners how to define the value of real estate or what method to use in evaluating it. See An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70. On this basis, the Parrillo article claims that the statute asked them not merely to make factual determinations but more broadly to make policy decisions of a sort that serve as a precedent for contemporary delegated lawmaking. See Parrillo, *supra* note 564, at 1314 n.102. But most eighteenth-century valuations by assessors were done without direction about definition or method and still were considered determinations rather than exercises of legislative power. See An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70. And in any case, although decisions about defining value and about methods of valuation can be affected by political preferences, this is not to say that they were legislative decisions or that they are persuasive early precedents for overtly regulatory rulemaking by contemporary agencies.

<sup>603</sup> An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 22.

<sup>604</sup> Parrillo, *supra* note 564, at 1309, 1339, 1455. Parrillo reports,

I examined all uses of “just and equitable” in Westlaw searches of the English Reports for the period 1740–1816 and of all U.S. federal and state cases through 1816 and found

Although the phrase *just and equitable* was widely familiar in many contexts as a generic measure of justice, the authorization to officers to act *as shall appear to be just and equitable*—the statute’s phrase—was a familiar measure of the conduct of government officials making judicial or judicial-like determinations, including assessments.<sup>605</sup>

This limited meaning is clear even from the text of the 1798 statute. The act provided for appeals from assessors to the principal assessor in each assessment district, who was to “re-examine and equalize the valuations as shall appear just and equitable”—this being equalization within the district.<sup>606</sup> Afterward, the commissioners were to adjust valuations in any district by adding or deducting “such a rate per centum, as shall appear to be just and equitable”—this being equalization across districts.<sup>607</sup> The statute thus applied the phrase “as shall appear to

nothing to suggest the phrase was a term of art implying any specific definition or method that would be applicable to valuation or taxation.

*Id.* at 1369.

<sup>605</sup> For the use of the phrase as to assessments, see, for example, An Act for Dividing, Allotting, Inclosing, Draining, and Improving the Commons and Waste Grounds, 35 Geo. 3. c. 107, at 17–18 (Gr. Brit. 1795) (authorizing the making of “such Rates and Assessments to be paid by all Persons having Right of Common upon the said Commons and Waste Grounds, in such Sums as the said General Commissioners shall think most just and equitable”); see also An Act for Preventing an Illicit Trade and Intercourse Between the Subjects of this State and the Enemy, ch. 317 (1782), in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 287, 297 (Peter Wilson ed., 1784) (authorizing a justice of the peace to “make such Allowance to the Re-captors, not exceeding one Half of the Value of such re-captured Property as he shall in his discretion think just and equitable”). This was discretion in the sense of discernment, as laid out in the old cases. See HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 97–100.

The standard probably had been drawn long before from Continental civil law, including the law merchant. See, e.g., NICOLAS MAGENS, 1 AN ESSAY ON INSURANCES, EXPLAINING THE NATURE OF THE VARIOUS KINDS OF INSURANCE PRACTISED BY THE DIFFERENT COMMERCIAL STATES OF EUROPE 3 (London, J. Haberkorn 1755) (regarding the duty of Florentine deputies in the early sixteenth century to give their sentence “according to what they shall think just and equitable in such cases”).

Note that the phrase was sometimes used in relation to rulemaking—for example, in connection with enclosures. See, e.g., An Act in Addition to an Act Intituled “An Act for Regulating of Fences, Cattle &c.,” 1758–1759 Mass. Province Laws, ch. 33 (1759) (rules for inclosing land to be made as “as they shall think just and equitable”). But even rules adopted by commissioners were to be made in a way that avoided legislative will—this being the lesson of the old precedents developed earlier in connection with commissioners of sewers. HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL?, *supra* note 6, at 99 (regarding rules made by commissioners of sewers).

<sup>606</sup> An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States, ch. 70, § 20.

<sup>607</sup> *Id.* § 22. That this was equalization across districts is clear from the proviso that “the relative valuations of the different lots or tracts of land, or dwelling-houses, in the same assessment district, shall not be changed or affected.” *Id.*

Incidentally, the judicial character of assessments was probably why the commissioners in most states did not issue binding rules prior to the assessments. Parrillo observes that when commissioners in one state, South Carolina, jumped the gun by issuing rules setting standards prior to the assessments, the rules carefully stated that they were merely what the commissioners “recommend,” not what they required. Parrillo, *supra* note 564, at 1373. Although Parrillo does not

be just and equitable” both to the principal assessors and to the commissioners. It already is improbable that valuation commissioners exercised something akin to legislative power.<sup>608</sup> It is even more improbable that mere assessors enjoyed such a power. The statute itself thus shows that the phrase “just and equitable” could not have had the legislative-like meaning that the Parrillo article attributes to it.

Fourth, and more generally, it is difficult to accept the Parrillo thesis that the tax assessment imposed by the Fifth Congress is evidence of what was constitutional in the eyes of “the Constitution’s earliest lawmakers.”<sup>609</sup> The earliest lawmakers were in the First Congress. And their approach to taxation was the opposite of that chosen by the Fifth Congress. As explained long ago by Leonard White, the First Congress carefully set up “a revenue system which for some years avoided the necessity of discretionary valuation of property.”<sup>610</sup> So, given the different approach taken by the First Congress, how can one rely on the Fifth Congress to show the Constitution’s meaning? Perhaps the Fifth Congress offers a better understanding of the Constitution than the First, but that is not intuitive.

So, there are at least four reasons to question the Parrillo interpretation of the 1798 valuation statute. By the statute’s own terms, the commissioner’s revisions were not regulations. In common law, executive assessments were to be done in imitation of judging precisely to avoid coming close to legislating. This tradition was reinforced by the statute’s express “just and equitable” standard for the commissioner’s revisions. And the practices authorized by the Fifth Congress don’t reveal much when the First Congress adopted very different practices. So the commissioners’ power to revise assessments under the 1798 statute does not reveal delegated legislative power or even delegated judicial power.

As for the section of the statute authorizing binding regulations, it shows some acceptance of executive rules binding subordinate officers. But even this limited conclusion is unclear, because the 1798 statute offers only one instance, which deviated from the common assumption that the only way of ultimately controlling subordinate executive officers was to remove them.<sup>611</sup> So, that portion of the 1798 statute may just show that Congress did not always live up to the Constitution. Either

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recognize as much, this is exactly what one would expect from commissioners whose determinations were meant to be made in a judicial rather than legislative spirit.

<sup>608</sup> See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 97–100.

<sup>609</sup> Parrillo, *supra* note 564, at 1455.

<sup>610</sup> LEONARD D. WHITE, *THE FEDERALISTS: A STUDY IN ADMINISTRATIVE HISTORY 1789–1801*, at 451 (Collier-Macmillan Ltd., 1st ed. 1965) (1948); *see also id.* at 452. Of course, this is not to suggest that tax assessments were unconstitutional at the local level.

<sup>611</sup> See HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?*, *supra* note 6, at 90.

way, it obviously is not evidence that the executive could be authorized to impose binding regulations on the public.

*Never Mind.* A recent supplement to Professor Parrillo's article does not dispute these challenges to his account of the 1798 act. Instead, it retreats to cautioning against drawing conclusions from federal practices:

Even assuming the early Congresses made no delegations of rulemaking authority on domestic private rights, we must realize how little occasion Congress had to decide whether to make such delegations. The early Congresses passed relatively little legislation of any kind that reached private rights while not touching foreign or military affairs, whether the legislation delegated power or not. Thus, the absence of such legislation delegating power to administrators may result simply from the paucity of such legislation, not from any supposed belief that delegation was peculiarly improper when it came to such legislation . . . .<sup>612</sup>

Professors Mortenson and Bagley concur, citing Parrillo's work to argue that "early Congresses passed relatively few laws of any kind directly regulating private persons."<sup>613</sup>

All of this is remarkable. For more than two decades, prodelegationist scholars pointed to early federal statutes as crucially important evidence of delegated legislative power.<sup>614</sup> Now, suddenly, they are shifting gears into reverse. They sound like Emily Litella saying, "Never mind."<sup>615</sup>



None of the early federal practices touted as instances of delegated legislative power reveal a congressional transfer of binding national domestic rulemaking. Nor do they reveal a congressional transfer of binding national domestic adjudication. Although such evidence may exist, it thus far seems elusive.

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<sup>612</sup> Nicholas R. Parrillo, *Supplemental Paper to: "A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s,"* at 21, <https://ssrn.com/abstract=3696902> [<https://perma.cc/S23G-G8M2>] (footnote omitted).

<sup>613</sup> Mortenson & Bagley, *supra* note 35, at 2348.

<sup>614</sup> See work of Professors Posner, Vermeule, Mortenson, and Bagley *supra* notes 553–54 and accompanying text.

<sup>615</sup> Emily Litella, WIKIPEDIA, [https://en.wikipedia.org/wiki/Emily\\_Litella](https://en.wikipedia.org/wiki/Emily_Litella) [<https://perma.cc/NPF8-CXP4>].