

NONDELEGATION MISINFORMATION: A REPLY TO THE SKEPTICS

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Within the past few years, several law-review articles have attempted to cast doubt on the historical legitimacy of the Nondelegation Doctrine—a long-neglected principle of constitutional law that forbids Congress from delegating authority so sweeping as to be “legislative” in nature. Perhaps the most notable of these is Delegation at the Founding, in which Julian Mortenson and Nicholas Bagley argue that the Nondelegation Doctrine has no basis in the Constitution as originally understood. “[T]he Constitution at the Founding contained no . . . prohibition on delegations of legislative power,” the two authors claim, and at any rate, the Framers would have considered any “rulemaking pursuant to statutory authorization,” no matter how broad the authorization, to be “an exercise of executive Power.” Another recent article taking a similar position is Nicholas Parrillo’s ambitious piece on the federal direct tax legislation of 1798, which he uses as the centerpiece of his own historical argument that the Constitution enshrined no meaningful nondelegation principle.

As a target of these and other anti-nondelegation polemics, I am unconvinced. I remain of the opinion that, as I argued in a prior article, the Nondelegation Doctrine has a firm foundation in the Constitution’s original meaning. Despite their best efforts, Mortenson and Bagley fail to call that conclusion into doubt. And Parrillo’s argument, while stronger than Mortenson and Bagley’s, ultimately does not undermine the Doctrine’s constitutional bona fides, either. This Article advances a reinforced argument that the Nondelegation Doctrine is amply justified under an originalist reading of the Constitution while highlighting the flaws in recent scholarly arguments to the contrary, especially those made by Mortenson, Bagley, and Parrillo.

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Over the last century, Congress has entrusted regulatory agencies with an ever-greater share of policymaking power at the federal level—a phenomenon difficult to square with a principle of constitutional law known as the Nondelegation Doctrine. Derived from Article I’s command that “[a]ll legislative Powers herein granted shall be vested in . . . Congress,”¹ the Nondelegation Doctrine holds that Congress may not delegate its core

¹U.S. CONST. art. I, § 1.

lawmaking functions to other branches of government (or to anyone else). In theory, this rule forbids Congress from enacting a law that authorizes another official or agency to exercise power that is quintessentially “legislative” in nature.² In practice, however, modern federal courts invariably uphold even the most open-ended statutory delegations of rulemaking authority. But not everyone is on board with this lax judicial approach. A growing number of jurists and scholars advocate a reinvigoration of the Nondelegation Doctrine on originalist grounds.³ They argue that modern federal courts, in adopting a toothless conception of nondelegation that has allowed Congress to vest regulators with authority to make pivotal policy decisions that partake of legislative power, have failed to uphold the scheme of separation of powers devised by the Framers.

Within the past few years, however, an onslaught of law-review articles have been published insisting that, on the contrary, the Nondelegation Doctrine lacks historical justification.⁴ The apparent catalyst for this trend was *Delegation at the Founding*, in which Julian Mortenson and Nicholas Bagley argue that the “original public meaning of the Constitution did not include anything like the modern nondelegation doctrine.”⁵ According to Mortenson and Bagley, the Framers believed that legislative power “could be

²See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529 (1935).

³See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); see also *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 76–77 (2015) (Thomas, J., concurring); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 330 (2002); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY* (1993). “Originalism” refers to the notion that the words of a legal text should be interpreted according to “the meaning they had when the text was adopted.” ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 78 (1st ed. 2012).

⁴See, e.g., Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); 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) [hereinafter Parrillo, *Critical Assessment*]; 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”*, SSRN (May 14, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902 [hereinafter Parrillo, *Supplemental*]; Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243 (2021); Kurt Eggert, *Originalism Isn’t What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707 (2021).

⁵Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 366 (2021).

delegated by whoever happened to hold it.”⁶ Furthermore, the two authors contend, under the “constitutional grammar of the Founding,” “[a]ny action authorized by law”—including “coercive administrative rulemaking”—merely constituted an “exercise of the ‘executive power.’”⁷

As one of Mortenson and Bagley’s less illustrious targets,⁸ I beg to differ. In a prior article, I argued that the Nondelegation Doctrine has a firm foundation in the Constitution’s original meaning; statutory “grants of rulemaking power to agencies very often constitute delegations of legislative authority, and such delegations violate the Constitution.”⁹ I concluded that the historical evidence favored a more robust conception of this principle than that of the modern Supreme Court—which since the mid-1930s has maintained that the Nondelegation Doctrine is not violated so long as Congress, in entrusting administrators with policymaking authority, sets forth an “intelligible principle” to guide the exercise of delegated power (even a “principle” as nebulous as a power to fix “fair and equitable” prices, or to regulate radio stations “as public interest, convenience or necessity requires”).¹⁰ Nothing in Mortenson and Bagley’s lengthy polemic calls these conclusions into doubt; if anything, the pair’s unsound analysis should leave readers more convinced of the Nondelegation Doctrine’s constitutional bona fides.

In this Article, I reaffirm that the Nondelegation Doctrine is amply justified under an originalist reading of the Constitution, while also highlighting the flaws in recent scholarly arguments to the contrary—especially Mortenson and Bagley’s. *Delegation at the Founding* repeatedly “misreads the very sources on which it most relies” and overlooks “the strongest . . . arguments on the other side,”¹¹ and Mortenson and Bagley do themselves no favors by couching their claims in emphatic language (e.g., “[t]here was no nondelegation doctrine at the founding, and the question isn’t close”¹²).

There are a few overarching errors that characterize Mortenson and Bagley’s account. First, the two rely heavily on pre-1776 British

⁶*Id.* at 290.

⁷*Id.* at 313, 281, 280, 315.

⁸*See id.* at 280 n.11 (citing my article, *Nondelegation*, *infra* note 9, negatively).

⁹Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 729 (2019).

¹⁰*Yakus v. United States*, 321 U.S. 414, 427 (1944); *see* Gordon, *supra* note 9, at 724, 779.

¹¹Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88, 88, 96, 118 (2020).

¹²Mortenson & Bagley, *supra* note 5, at 367.

Parliamentary practice as evidence that the U.S. Constitution placed no limits on congressional delegations of lawmaking power. This reliance, however, is unsound, as Congress's circumscribed powers of legislation were different in kind from the absolute authority enjoyed by Britain's Parliament—a difference that reflected the divergent theories of sovereignty on which the two countries' systems of government were founded. Mortenson and Bagley, in treating British practice as precedent, forget a piece of time-honored wisdom: "History began on July 4th, 1776. Everything before that was a mistake."¹³

Second, Mortenson and Bagley survey the period of United States history from the Declaration of Independence up to the ratification of the Constitution, favorably citing instances in which state legislatures delegated legislative powers to administrative officials.¹⁴ Once again, however, the authors fail to recognize that the Constitution of 1787 strongly reflected *disapproval* of existing state constitutions, which the Framers felt had made inadequate provision for the separation of powers. Properly understood, pre-Ratification history of state governance, far from supporting Mortenson and Bagley's contention that the U.S. Constitution places no constraints on congressional delegations of authority, actually favors the opposite conclusion.

Third, Mortenson and Bagley insist that in the years immediately following the Constitution's ratification, Congress enacted numerous statutes that would have violated the Nondelegation Doctrine, thus evincing an understanding among the Framing generation that the Constitution did not enshrine any such rule.¹⁵ But Mortenson and Bagley's argument to this effect fails, for they cite example after example of laws that either fall into one of the well-established "exceptions" to the nondelegation rule or that are obviously not delegations of legislative power at all.

Finally, the most serious shortcoming of *Delegation at the Founding* is the authors' near-failure to identify any antebellum sources endorsing their core claims (namely, that Congress may delegate its legislative power, or that officials acting pursuant to statutory grants of authority are always exercising

¹³*Parks and Recreation: London: Part 1* (NBC television broadcast Sept. 26, 2013) (Ron Swanson).

¹⁴See Mortenson & Bagley, *supra* note 5, at 302.

¹⁵See *id.* at 281–82.

executive power).¹⁶ And against the virtually-nonexistent affirmative case Mortenson and Bagley put forth for their position is the mountain of evidence directly undercutting it—evidence with which they mostly fail to engage. To avoid similar errors of omission, I have proceeded line by line through Mortenson and Bagley’s analysis, responding to every claim made therein, building on Ilan Wurman’s¹⁷ and Philip Hamburger’s¹⁸ first-rate responses to *Delegation at the Founding*, and addressing some additional contentions advanced by Mortenson and Bagley in a follow-up piece replying to criticism of their article.¹⁹

This Article also undertakes to respond to other recent scholarship that has challenged the Nondelegation Doctrine’s historical legitimacy. In particular, I engage at length with Nicholas Parrillo’s ambitious article in which he argues that the Constitution enshrined no meaningful nondelegation principle.²⁰ The centerpiece of his account is Congress’s 1798 delegation of broad powers to administrators of the 1798 direct tax.²¹ I conclude that Parrillo’s argument, while stronger than Mortenson and Bagley’s, ultimately does not undermine the Nondelegation Doctrine’s constitutional bona fides, either. All things considered, I continue to believe that, for the reasons set forth in the pages that follow, a robust nondelegation principle has a firm foundation in the Constitution’s original meaning.

I. THE AFFIRMATIVE CASE FOR THE NONDELEGATION DOCTRINE

To provide context for this Article’s itemized response to *Delegation at the Founding*, it is helpful to first outline the historical argument that Mortenson and Bagley’s paper attacks. I will therefore begin by summarizing my affirmative originalist case for a reinvigorated nondelegation rule, as well as the proposed judicial test derived therefrom for identifying unconstitutional delegations.²²

¹⁶There is perhaps a single exception: an isolated statement made by a single congressman in 1791, but even this offhanded remark is at best weak support for Mortenson and Bagley’s view. *See infra* note 278.

¹⁷Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

¹⁸Hamburger, *supra* note 11.

¹⁹Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022).

²⁰*See* Parrillo, *Critical Assessment*, *supra* note 4.

²¹*See id.* at 1302.

²²A detailed form of this historical argument appears in Gordon, *supra* note 9, at 737–78.

Consider, first, the concept of “legislative Power[.]” vested by the Constitution in Congress. The original meaning of “legislative power” was the authority to issue “rule[s] of civil conduct . . . commanding what” a polity’s citizens “are to do, and prohibiting what they are to forbear”²³—a definition broad enough to encompass a great deal of modern administrative rulemaking. The historical sources undercut the claims of contemporary nondelegation skeptics who have posited that a statutory grant of authority can never amount to a delegation of legislative power; in actuality, at the Founding, a legislative act that prescribed no rules of conduct for society, but instead merely empowered another entity to do so, was not only considered invalid—it was not considered a “law” at all.²⁴ What is more, the Framing generation presumed that the legislature could *not* delegate legislative power without explicit constitutional authorization.²⁵ Ultimate sovereignty, it was believed, is vested in the People; “when the People delegated legislative power . . . to an arm of the state, the grant did not come with implicit permission to delegate that power to another governmental department.”²⁶

Congressional practice from the several decades following the Constitution’s ratification also supports the view that the Constitution, as originally understood, enshrined a nondelegation principle.²⁷ In many instances, legislative proposals were defeated at least in part due to concerns that, in conferring excessively broad discretionary powers on executive officials, they would run afoul of that principle.²⁸ At times, legislation was enacted despite concerns that it unconstitutionally delegated legislative power, but in all such instances supporters of the challenged measures secured their passage by merely arguing that the specific proposals did not delegate legislative power; never once did any lawmaker suggest that Congress was permitted to delegate its legislative power, or that no statutory delegation of authority could ever amount to such a delegation.²⁹ Generally speaking, the acts of early Congresses were very detailed and left little to administrators. There are examples of what may at first seem to be exceptions

²³ NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (New York, S. Converse 1828) (defining “law”).

²⁴ *Id.*

²⁵ *See* Gordon, *supra* note 9, at 742.

²⁶ *Id.*

²⁷ *See id.* at 744–50.

²⁸ *See id.*

²⁹ *See id.* at 749–50.

to this practice, but, as I have explained elsewhere, they are, in fact, consistent with a constitutional nondelegation principle.³⁰

Moreover, although no federal court in antebellum America invalidated a statute as an unconstitutional delegation of legislative power, the handful of federal cases that did address the issue recognized the Nondelegation Doctrine's constitutional validity.³¹ For instance, in 1825, the Supreme Court wrote that Congress could not "delegate to the Courts, or to any other tribunals, powers which are . . . exclusively legislative."³² And in 1838, a circuit court decision penned by Justice Story adopted a particular reading of a federal statute out of concern that a different construction would render the act an unconstitutional delegation of legislative power.³³ That holding had been prefigured by dictum in an 1836 Supreme Court case, which had also condemned congressional delegations of lawmaking authority as unconstitutional.³⁴

To the same effect is the state-court jurisprudence from the early Republic interpreting provisions in state constitutions (and, in one case, the federal Constitution) vesting the "legislative" and "executive" powers in separate departments.³⁵ This caselaw suggests that the analogous separation-of-

³⁰See *id.* at 782–87, 792–98.

³¹See *id.* at 751–57.

³²*Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

³³See *United States v. Knight*, 26 F. Cas. 793 (C.C.D. Me. 1838) (No. 15,539). Mortenson and Bagley's response to their critics dismisses *Knight* as irrelevant, asserting that "[i]t was the purported delegation to states that worried Story," as opposed to delegation per se. Mortenson & Bagley, *supra* note 19, at 2361 n.191. Yet this miserly interpretation of the decision is undercut by Story's broad language: "I entertain very serious doubts, whether congress does possess a constitutional authority to adopt prospectively state legislation on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power." *Knight*, 26 F. Cas. at 797. The prohibition on Congress delegating legislative power to states, in other words, was merely an incident of the general prohibition on delegation of legislative power. This understanding is reinforced by Story's favorable citation of *Wayman* for the proposition just quoted—a case in which the Court unequivocally stated that Congress could not "delegate to the Courts, or to any other tribunals, powers which are . . . exclusively legislative." *Wayman*, 23 U.S. at 42.

³⁴See *Hobart v. Drohan*, 35 U.S. (10 Pet.) 108, 120 (1836) (recognizing that a federal statute that adopts "future [state] laws" is "unconstitutional," as "congress cannot delegate their powers of legislation to the states").

³⁵See Gordon, *supra* note 9, at 757–64. Since my prior article's publication, I have identified another case from this era that supports the Nondelegation Doctrine's constitutional underpinnings. See *Kennedy v. Sowden*, 26 S.C.L. (1 McMul.) 323, 325 (1841) (remarking that "[i]t would not be competent for the Legislature to delegate general powers of legislation to any other body than itself").

powers provisions of the U.S. Constitution, as originally understood, also incorporated a strong nondelegation principle.³⁶ Likewise, reputable treatises and other writings of preeminent commentators dating from the Republic's early years further bolster the originalist case for a robust Nondelegation Doctrine.³⁷ These authorities show, among other things, that at the time of the framing, it was an accepted principle of jurisprudence that *delegatus non potest delegare* ("one to whom power is delegated cannot further delegate that power"); and that this maxim was often invoked in support of the view that legislatures could not delegate their lawmaking authority to other entities.³⁸

In sum, the historical sources thoroughly undermine both the view that statutory grants of authority can never amount to delegations of legislative power and the contention that legislative power may be delegated. Moreover, the modern Supreme Court's position (that the nondelegation rule is not violated so long as a statute includes an 'intelligible principle,' even a vague one, to guide rulemaking) is also unsupportable. "[T]he question [i]s whether the legislature had authorized another agent to issue general rules governing private conduct and made the content or effectiveness of such rules dependent on the agent's policy judgment."³⁹ If so, then the delegation in question is likely unconstitutional.

On that score, I proposed a historically-grounded judicial test for identifying unconstitutional delegations: "a statute unconstitutionally delegates legislative power when it (1) allows the agent . . . to issue general rules governing private conduct that carry the force of law and (2) makes the

³⁶I confess error on my part in citing *Commonwealth v. Peters*, 3 Mass. 229 (1807), in support of this claim. I wrote that the opinion in that case, "in a lone footnote . . . offered in-depth *dicta*" commenting on a nondelegation issue that was implicated, but not raised, by the litigation. Gordon, *supra* note 9, at 758. I have since discovered that the text I quoted was not, in fact, from the court's opinion but rather had been appended as an editor's note in an 1851 compendium of Massachusetts cases. See OCTAVIUS PICKERING, 3 REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME JUDICIAL COURT OF MASSACHUSETTS 199 n.1 (3d ed. 1851). The Westlaw version of the case included this text (perhaps mistakenly) as a footnote to the court's opinion. The decision, properly read, simply addressed a procedural question regarding joinder of necessary parties and did not speak to the nondelegation issue either way.

³⁷See Gordon, *supra* note 9, at 769–78.

³⁸My prior article also devoted a section to explaining why the phenomenon of common law during the early Republic was not understood to be in tension with the nondelegation principle, see *id.* at 764–69; but since neither Mortenson and Bagley nor the other recent scholarship following in their footsteps discusses this issue, I do not recapitulate my prior analysis of it here.

³⁹*Id.* at 778–79.

content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency."⁴⁰ There are, however, some qualifications. First, Congress may delegate to various governmental departments the authority to make rules concerning matters of their internal administration, even if Congress could have made such rules itself.⁴¹ Second, "Congress has broad license to delegate rulemaking authority" to the executive "in the area of foreign affairs," since "legislative power and

⁴⁰ *Id.* at 781. I offered some explanation of how courts might distinguish policy judgments from factual contingencies. *See id.* at 788–89. Some further clarification is needed on this point. I cited as an example of a permissible conditional statute an 1810 enactment providing that an embargo against Great Britain and France would take effect three months after the president proclaimed that either of the two countries had modified its "edicts, as that they shall cease to violate the neutral commerce of the United States." An Act concerning the commercial intercourse between the United States and Great Britain and France, and their dependencies, and for other purposes, 2 Stat. 606 (1810). The Supreme Court upheld this law against a nondelegation challenge, reasoning that, as the clerk's headnote put it, Congress "did not transfer any power of legislation to the President. They only prescribed the evidence which should be admitted of a fact, upon which the law should go into effect." *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 387 (1813). Most other nineteenth-century authorities, notwithstanding their overwhelming acceptance of the Nondelegation Doctrine's validity, agreed that the Court properly upheld the 1810 embargo statute as a conditional law. *See Rice v. Foster*, 4 Del. (4 Harr.) 479, 494 (1847); *Parker v. Commonwealth*, 6 Pa. 507, 526 (1847). But, some might reply, characterizing the embargo law as merely depending on a factual contingency is not without logical wrinkles; "After all, . . . Congress was in one sense 'delegating' the determination of the statute's effective date to the British"; that being so, "why can't Congress simply let the President, or someone else, directly determine a law's effective date?" Lawson, *supra* note 3, at 391.

The answer rests on the distinction between a provision (like the embargo act) that takes effect as a collateral consequence of a third party's unrelated action (like the British or French government's violation of the United States' "neutral commerce"), and a provision that "take[s] effect, upon [the] decision of this . . . extraneous power upon the expediency of the [provision] itself." *Bradley v. Baxter*, 15 Barb. 122, 124 (N.Y. Gen. Term 1853). The former would be a valid conditional law, even if the condition involved a third party's exercise of "will." By contrast, it was agreed on all hands that the 1810 act would have been an unconstitutional delegation of legislative power if, for instance, it had empowered the president to "create . . . law, by the exercise of his will, and to announce his decision by a proclamation." *Rice*, 4 Del. at 494. In that scenario, the "event" causing the act to take effect would be the president's naked determination of "the identical question which the constitution makes it the duty of the legislature itself to decide." *Barto v. Himrod*, 8 N.Y. 483, 491 (1853); *accord Santo v. State*, 2 Iowa 165, 203 (1855). A court's inquiry into whether the legislature has "call[ed] into operation the will or agency of any other power for th[e] purpose" of lawmaking, *Rice*, 4 Del. at 500 (Harrington, J., concurring), and thereby unconstitutionally delegated its legislative power; or has instead merely provided that a law shall take effect as a collateral consequence of a third party's unrelated action, should depend on whether that action had any substantial purpose or effect other than triggering the conditional provision.

⁴¹ *See* Gordon, *supra* note 9, at 782.

foreign-relations powers . . . were viewed as distinct,” though sometimes overlapping, forms of authority.⁴² Finally, Congress’s plenary power over territories and the District of Columbia permits it to establish subordinate legislative bodies for those regions.⁴³

II. “LEGISLATIVE POWER”

Mortenson and Bagley kick off their historical narrative with their own discussion of the Constitution’s references to “legislative” and “executive” powers.⁴⁴ The authors’ targets are the many modern originalist arguments for resuscitating the Nondelegation Doctrine, including my own, that support that position by pointing out that the “legislative power” that the Constitution vested in Congress was originally understood as referring to “the power to make general rules governing private conduct”—a power that did *not* encompass the authority to delegate to another governmental department the power to formulate such rules.⁴⁵

Mortenson and Bagley disagree, countering that the Framers’ understanding of “legislative power” was, in Montesquieu’s words, “no more than the general will of the state.”⁴⁶ “[E]xecutive power,” the pair further assert, had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.⁴⁷ In support of these claims, Mortenson and Bagley rely primarily on the aforementioned quotation from Montesquieu, as well as on Rousseau’s similarly generic observation: “Every free action is produced by two causes . . . the volition that determines the act” and “the power that carries that act out. . . . The body politic has the same motive powers . . . , will is called ‘legislative power’ and force is called ‘executive power.’”⁴⁸ And if legislative power is nothing more than expressing the will of the state and executive power nothing more than putting that will into effect, Mortenson and Bagley reason, then statutory grants of regulatory authority to the executive *never* violate the separation of powers. Not even the formality of

⁴²*Id.* at 782–84.

⁴³*Id.* at 772–73.

⁴⁴Mortenson & Bagley, *supra* note 5, at 293–94.

⁴⁵*See* Gordon, *supra* note 9, at 738; Rice, 4 Del. at 492.

⁴⁶BARON DE MONTESQUIEU, *THE SPIRIT OF THE LAWS* 175 (Raymond Geuss & Quentin Skinner eds., Anne M. Cohler et al., trans., Cambridge Univ. Press 1989) (1748).

⁴⁷Mortenson & Bagley, *supra* note 5, at 313–14.

⁴⁸JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 29 (Jonathan Bennett ed., 2017) (1762).

an “intelligible principle” guiding executive discretion is constitutionally required. If it is the “will” of the legislature that some other body be given free rein to formulate the rules governing citizens’ lives, then so be it.

There are obvious problems with basing such bold conclusions about the U.S. Constitution’s original meaning so heavily on stray remarks from Montesquieu and Rousseau, two continental philosophers who wrote decades before the Framing and had nothing to do with that process. For one, the snippets of language Mortenson and Bagley quote do not purport to be comprehensive definitions of “legislative” and “executive” power of the kind a court might rely upon in interpreting a legal document and therefore are simply too vague to recommend one understanding of “legislative power” over the other. More importantly, these mid-eighteenth-century European writings are of dubious relevance in interpreting the U.S. Constitution. The quotation from Montesquieu, for example, appears in the chapter of his 1748 work *The Spirit of the Laws* entitled “Of the Constitution of England.”⁴⁹ It is therefore unremarkable that Montesquieu defines “legislative power” as merely “the general will of the state,” since the British Parliament’s authority was “absolute and without control.”⁵⁰ Needless to say, the idea of a legislature with “absolute” power was *not* one that America’s Framers incorporated into the U.S. Constitution, as will be discussed in detail in Part III. For the same reasons, Mortenson and Bagley’s citations of Blackstone and Thomas Hobbes’s 1651 *Leviathan* on the scope of legislative power are equally irrelevant.

Mortenson and Bagley selectively quote several other writers’ observations on legislative power, neglecting to mention that those same writers elsewhere endorse the narrower understanding of that term favored by modern Nondelegation proponents. For instance, Mortenson and Bagley point to the thirty-third *Federalist*, where Hamilton rhetorically asked, “[w]hat is a legislative power, but a power of making laws?”⁵¹ Reliance on this vague statement not only begs the question of what it means to “make laws,” but also overlooks Hamilton’s more detailed explications of the terms “legislative power” and “laws” in subsequent *Federalist* essays—including number seventy-eight, where he wrote that legislative power “prescribes the

⁴⁹ See MONTESQUIEU, *supra* note 46, at 156.

⁵⁰ 1 WILLIAM BLACKSTONE, COMMENTARIES *162.

⁵¹ Mortenson & Bagley, *supra* note 5, at 295 n.95 (quoting THE FEDERALIST NO. 33, at 202 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

rules by which the duties and rights of every citizen are to be regulated”⁵²; and seventy-five, where he wrote that “[t]he essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society.”⁵³ Hamilton’s conception of “legislative power” sounds more like that of Gorsuch and Gordon than that of Mortenson and Bagley.

The latter duo applies the same tunnel-vision approach to English philosopher Thomas Rutherford’s 1754 work *Institutes of Natural Law*, quoting his remark that “the legislative power” is “the common understanding, or jo[i]nt sense of the body politic, . . . determin[e] and direct[s] what is right to be done.”⁵⁴ But Mortenson and Bagley’s discussion of *Institutes* ignores Rutherford’s more detailed definition of “legislative power” from the same work: the “right to prescribe such rules for . . . [e]very man[‘s] . . . conduct”; or, said otherwise, the “power, in [a] society, to settle or ascertain . . . the several rights and duties of those; who are members of it.”⁵⁵ “[T]he external, as well as the internal, obligation of civil laws arises

⁵²THE FEDERALIST NO. 78, at 465 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵³THE FEDERALIST NO. 75, at 450 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁵⁴2 THOMAS RUTHERFORTH, *INSTITUTES OF NATURAL LAW* 63 (Cambridge, J. Bentham 1756).

⁵⁵*Id.* at 216, 43–44. One might wonder what basis there is for rejecting Blackstone’s musings about legislative power while favorably citing those of Rutherford (another British writer). The difference is that Blackstone was offering commentary on *the laws of England*, and so his statement that “Sovereignty and legislature” were “convertible terms” must be understood in the context of a country where the legislature’s power was “absolute and without control.” BLACKSTONE, *supra* note 50, at *46, *161–62. By contrast, Rutherford was writing a philosophical tract, “mark[ing] out distinctly” the “provinces of [the ‘legislative’ and ‘executive’] powers . . . abstractedly”; he was careful to observe the “distinction between the legislative power of civil society in general, and the legislative body of any particular society,” and the “like distinction between the executive power” generally and a particular country’s executive branch. RUTHERFORTH, *supra* note 54, at 63–64. Rutherford’s abstract definitions of “legislative” and “executive” powers were in no way confined to Britain, and indeed were often cited in antebellum America, see 1 JAMES WILSON, *THE WORKS OF THE HONOURABLE JAMES WILSON* 220 (Bird Wilson ed., Philadelphia, Lorenzo Press 1804); *State ex rel. Gentry v. Fry*, 4 Mo. 120, 189–90 (1835); 14 *PROCEEDINGS AND DEBATES OF THE CONVENTION OF THE COMMONWEALTH OF PENNSYLVANIA* 18 (Harrisburg, Packer Barrett, and Parke 1839) (statement of Mr. Ingersoll); where his work “had prestige . . . , and helped shape . . . constitutional ideas.” Thomas C. Gray, *Origins of the Unwritten Constitution*, 30 *STAN. L. REV.* 843, 860 (1978). A preeminent law textbook from the early Republic said of Rutherford’s *Institutes*, “the logical clearness with which this very sensible work is written” gives it “a decided preference to any other work on [the same] subject.” DAVID HOFFMAN, *A COURSE OF LEGAL STUDY; RESPECTFULLY ADDRESSED TO THE STUDENTS OF LAW IN THE UNITED STATES* 59 (Baltimore, Coale and Maxwell 1817).

from the legislator,” who “enacts a law, when he requires the subjects to do or to avoid this or that.”⁵⁶

Mortenson and Bagley misread *Institutes* in other ways, as well. The authors seize on Rutherford’s statement that “the executive power . . . carr[ies] what is . . . determined [by the legislature] into execution”⁵⁷ in order to drive home their contention that “agency rulemaking pursuant to statutory authorization” always “qualif[ied] as an exercise of executive power.”⁵⁸ But Rutherford elsewhere *rejects* the view that officials acting pursuant to statutory authorization are always exercising executive power. In discussing the British concept of “prerogative” authority, for example, he writes,

[I]t [is] difficult to explaine rightly, what is meant by prerogative. *It cannot properly be called discretionary executive power; because the executive power in the nature of the thing is not discretionary in any part Where the person, so entrusted with the executive power, is left by the legislative . . . to direct by his own understanding the public force, . . . such a discretionary power in him is called prerogative.* Thus . . . , if the legislative, instead of reserving to itself the right of judging, whether such legal punishment is to be suspended, or whether the criminal is to be wholly pardoned, leaves it to [the executive] . . . , such a discretionary power . . . is called prerogative. . . . [I]n . . . societies, where the legislative and executive power are lodged in different hands, it is usual . . . to allow . . . the executive power, to act discretionally in some cases; . . . such a discretionary power . . . is called prerogative.⁵⁹

“[I]f the executive . . . has only the executive power,” Rutherford explained in another passage, “it is under the restraints of the law,” and can “not punish” or “pardon at discretion,” but “only . . . under the directions of the legislative body”; “for the executive power in itself is not a discretionary power in any respect, but is either to act or not to act, as the common understanding speaking by the laws directs.”⁶⁰ Rutherford, then, would have characterized modern administrative rulemaking not as the mere exercise of “discretionary

⁵⁶RUTHERFORTH, *supra* note 54, at 225.

⁵⁷*Id.* at 63.

⁵⁸Mortenson & Bagley, *supra* note 5, at 315.

⁵⁹RUTHERFORTH, *supra* note 54, at 61–63 (emphasis added).

⁶⁰*Id.* at 195–96.

executive power,” but instead as “prerogative” authority⁶¹—in that agencies, generally “entrusted with the executive power, [are] left by the legislative to act” in some circumstances “at [their] own discretion.”⁶²

This “prerogative” power was a distinct form of authority in Anglo-American political theory, the exercise of which was not countenanced by the Constitution of 1787. St. George Tucker’s 1803 edition of Blackstone’s *Commentaries* colorfully described the aversion to prerogative that predominated in America, where such “powers of the crown” had been “annihilated . . . by our . . . constitutions”—and where the mere mention of those powers was “enough to make a citizen . . . shudder.”⁶³ It is true, of course, that the president enjoyed the constitutional authority to issue pardons,⁶⁴ which was a species of prerogative. But this authority was explicitly conferred by Article II because it represented an *exception* to the Constitution’s general denial of prerogative power to the executive. Notably, in discussing this topic in *Federalist No. 74*, Hamilton rejected the argument some at the time had made that constitutionalizing the pardon power was unnecessary because a statute could “confer[] upon the President” a “discretionary power [to pardon],” explaining that it was “questionable, whether, in a limited Constitution, that power could be delegated by law.”⁶⁵ That Hamilton doubted the permissibility of such a delegation bolsters the constitutional case for the Nondelegation Doctrine.⁶⁶

⁶¹ See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 5 (2014).

⁶² RUTHERFORTH, *supra* note 54, at 62.

⁶³ 1 BLACKSTONE’S COMMENTARIES 237–38 n.1, 239 n.2 (St. George Tucker ed., Phila., William Young Birch and Abraham Small 1803) [hereinafter TUCKER, BLACKSTONE’S COMMENTARIES]; see also JOHN MILTON GOODENOW, HISTORICAL SKETCHES OF THE PRINCIPLES AND MAXIMS OF AMERICAN JURISPRUDENCE 394–95 (Steubenville 1819) (“Although the King’s Bench exercises a prerogative power . . . of guarding the public morals; [and] of . . . determining . . . what the safety [and] welfare . . . of the kingdom requires; . . . yet,” this is a “legislative power, expressly prohibited, by our constitution, to be exercised by any but the legislature.”); Thomas Jefferson, *Notes on Virginia*, in 8 THE WRITINGS OF THOMAS JEFFERSON 369 (H.A. Washington ed., Washington, D.C., Taylor & Maury 1854) (explaining that Virginia’s constitution “proscribes under the name of *prerogative* the exercise of all powers undefined by the laws”).

⁶⁴ U.S. CONST. art. II, § 2.

⁶⁵ THE FEDERALIST NO. 74, at 449 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

⁶⁶ See *id.* While Hamilton did not explicitly characterize the power that he doubted could be delegated as “legislative,” context suggests that he regarded it as such. His “principal argument for reposing” the pardon in the president alone was that, in times of unrest, “there are often critical moments when a well-timed offer of pardon . . . may restore . . . tranquility,” but “[t]he dilatory process of convening the legislature” in order to “obtain[] its sanction to the measure, would . . . let[] slip the golden opportunity.” *Id.* Hamilton’s assumption that, without Article II’s pardon clause,

The broader point, moreover, is that Rutherford's *Institutes* not only does not support, but, in actuality, flatly contradicts the proposition for which Mortenson and Bagley cite it: that "[e]ven if 'rulemaking power originates in the Legislative Branch' it 'becomes an executive function' at the moment it is 'delegated by the Legislature.'"⁶⁷

Besides failing to engage with the foregoing sources, Mortenson and Bagley overlook nearly all of the other evidence that the Framing-era definition of legislative authority was "the power to make general rules governing private conduct,"⁶⁸ a claim my prior article supported with a long string of citations.⁶⁹ The list surely would have been longer but for my assumption that this definition of "legislative power" was so thoroughly supported by history that no modern commentator could continue clinging to the belief that the Framers understood "legislative power" to mean merely "the general will of the state." To the list of early American authorities rejecting that view can be added many others, but as a lover of mercy I shall relegate them to a footnote.⁷⁰

pardons would require the legislature's approval indicates that he saw the pardon power as at least partly legislative in nature.

⁶⁷Mortenson & Bagley, *supra* note 5, at 315 (quoting *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989)).

⁶⁸Gordon, *supra* note 9, at 738.

⁶⁹*See, e.g.*, THE FEDERALIST Nos. 75, 78 (Alexander Hamilton); TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 63, eds. app. note d at 127; *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810); WEBSTER, *supra* note 23 (defining "Legislative" as "[c]apable of enacting laws"; and "Law" as (1) "A rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions," or (2), as "a rule of civil conduct prescribed by the supreme power of a state, commanding what its subjects are to do, and prohibiting what they are to forbear.").

⁷⁰For instance, according to "the most widely used English law dictionary in the early republic," GARY L. MCDOWELL, THE LANGUAGE OF LAW AND THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 172 (2010) (internal quotation marks omitted), a "law" was a "rule and bond of men's actions: or . . . a rule for the well-governing of Civil Society, . . . *establishing* and *ascertaining* what is right or wrong." 4 GILES JACOB, THE LAW-DICTIONARY 87–88 (T.E. Tomlins ed., 1811). Likewise, when one surveys Framing-era state-court cases interpreting analogous separation-of-powers provisions in state constitutions (an accepted method of interpreting the federal Constitution, see *Ex parte Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839)), one finds the same uniform agreement among state high court judges that "legislative power" was the authority to make general rules governing private conduct. *See, e.g.*, *Merrill v. Sherburne*, 1 N.H. 199, 212 (1818) (To fall under the banner of "legislative power," statutes "must in *substance* be of a legislative character . . . They must be *laws*," or "rules prescribed for civil conduct to the whole community."); *Jones v. Crittenden*, 4 N.C. 55, 63 (1814) (similar); *Lewis v. Webb*, 3 Me. 326, 333 (1825) (similar); *Ward v. Barnard*, 1 Aik. 121, 128 (Vt. 1825) (similar); *Davis v. Ballard*, 24 Ky. (1

Mortenson and Bagley ultimately conclude their own review of historical definitions of “legislative power” without contending with many of the writings modern Nondelegation advocates have identified. And it would seem that those writings are entitled to much greater weight in interpreting the U.S. Constitution than are Mortenson and Bagley’s sources, which are much more temporally removed from the document’s ratification—and which, despite purporting to show “what the Founders said,” overwhelmingly consist of commentary on the *British* constitution.⁷¹ Justice Gorsuch can therefore rest easy, for he was entirely correct in stating that “the framers understood [‘the legislative power’] to mean the power to adopt generally applicable rules of conduct governing future actions by private persons.”⁷²

III. (NON)DELEGABILITY OF LEGISLATIVE POWER

A. Sovereignty and Agency Law

The next stage of Mortenson and Bagley’s analysis aims to defend the following chain of interrelated assertions:

Eighteenth-century legal discussions regularly evince the presumption that competent persons and institutions could delegate their authorities to agents Where a limitation on delegation existed, it was noted with particularity and explained by some specific justifying consideration relevant to the circumstance. . . . For the Founders, in other words, government’s very existence meant that the ‘original legislative power’ had already been delegated. . . . [T]he Founders’ account of government itself belies flattened modern claims that there was anything intrinsically nondelegable about legislative power. The people already delegated it once.⁷³

To understand why this syllogism fails, let us first consider the concept of sovereignty as it was understood by the Framing generation. Mortenson and Bagley get this issue right, at least nominally, noting that “[c]onventional

J.J. Marsh.) 563, 577 (1829) (similar); *State ex rel. Gentry v. Fry*, 4 Mo. 120, 189–90 (1835) (similar).

⁷¹Mortenson & Bagley, *supra* note 5, at 301.

⁷²*Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

⁷³Mortenson & Bagley, *supra* note 5, at 295–96.

wisdom held that ‘all lawful authority, legislative, and executive, originates from the people.’”⁷⁴

The undoing of the authors’ reasoning, however, is that it aggressively misunderstands the law of agency in the early Republic. At that time, “it was an accepted principle of jurisprudence . . . that *delegatus non potest delegare* (‘one to whom power is delegated cannot further delegate that power’).”⁷⁵ In the words of Kent’s *Commentaries*, “agency is generally a personal trust and confidence which cannot be delegated.”⁷⁶ To the same effect is Story’s treatise on agency, wherein he wrote:

[O]ne, who has a bare . . . authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger, whose ability and integrity might not be known to the principal, or, if known, might not be selected by him for

⁷⁴ *Id.* at 296 (quoting JAMES BURGH, POLITICAL DISQUISITIONS, bk. I, ch. II, at 3–4 (London, printed for E. & C. Dilly 1774)).

⁷⁵ Gordon, *supra* note 9, at 770.

⁷⁶ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 495 (New York, O. Halsted 1827). One nondelegation skeptic incorrectly asserts that “the *Delegata* maxim, as understood in the Founding Era, . . . only bar[red] the transfer of the whole powers of a governmental officer or entity.” Eggert, *supra* note 4, at 747. His only support for this claim is an 1809 case where a court noted that “[a] deputy has general powers, which he cannot transfer; but he may constitute a servant, or bailiff, to do a particular act.” *Id.* at 747–48 (quoting *Hunt v. Burrell*, 5 Johns. 137, 137 (N.Y. Sup. Ct. 1809)). However, as subsequent New York cases clarify (and as other sources from this era demonstrate in spades, see *infra* notes 77–82), the meaningful distinction was not between re-delegating some of one’s delegated power and re-delegating all of it, but rather between re-delegating ministerial duties (which was permissible) and re-delegating duties calling for the agent’s “judgment and discretion” (which was not). *Berger v. Duff*, 4 Johns. Ch. 368, 369 (N.Y. Ch. 1820) (per Kent, Ch.); *accord Lyon v. Jerome*, 26 Wend. 485, 493 (N.Y. 1841) (Walworth, Ch.); *id.* at 494–96 (Verplanck, Senator); *id.* at 499 (Bradish, President). The application of this principle in *Hunt* might have meant that the deputy could re-delegate power to do “a particular act,” but the case does not support the absurd conclusion that the *Delegata* maxim, as understood at the Founding, permitted any re-delegation of power by an agent short of a “transfer of [his or her] whole powers.” The same commentator also goes on to suggest that the *Delegata* principle at that time simply meant that “delegated authority cannot be re-delegated unless there is some reason why it should be.” Eggert, *supra* note 4, at 749 (quoting Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 CORNELL L.Q. 168, 169 (1929)). Again, he offers no support for this outlandish proposition (other than the quoted article), and the antebellum American sources uniformly reject it.

such a purpose. . . . [H]ence is derived the maxim of the common law; *Delegata potestas non potest delegari*.⁷⁷

The crucial point here is that, as a glut of early American authority confirms, this maxim prohibited one *to whom power is delegated* from *further* delegating such power; principals may delegate their authority to agents, but agents may not turn around and re-delegate power delegated to them.⁷⁸ And of course this rule applied with equal force in both the governmental and the private-law contexts.⁷⁹

Thus, so far as the Framers were concerned, the reason the People were permitted to delegate legislative power to Congress in the first instance by adopting the Constitution was that the People were the ultimate source of this and all other forms of governmental authority.⁸⁰ They were the principal, not the agent. But Congress, in exercising its constitutional powers, acted as a mere trustee of the People,⁸¹ who had delegated to it powers of legislation

⁷⁷JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY 14–15 (Boston, Charles C. Little and James Brown 1839).

⁷⁸See *Shankland v. Washington*, 30 U.S. (5 Pet.) 390, 395 (Baltimore 1831) (“[T]he general rule of law is, that a delegated authority cannot be delegated.”); 1 SAMUEL LIVERMORE, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 54 (1818) (“An authority given to one person cannot in general be delegated by him to another; . . . if there be such a power to one person, to exercise his judgment and discretion, he cannot say, that the trust and confidence reposed in him shall be exercised at the discretion of another person.”); WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 148 (2d Am. ed. 1822); *Wills v. Cowper*, 2 Ohio 124, 127 (1825); *Brewster v. Hobart*, 32 Mass. (15 Pick.) 302, 307 (1834); *Emerson v. Providence Hat Mfg. Co.*, 12 Mass. 237, 241–42 (1815); *Wilson v. York & Md. Line R.R. Co.*, 11 G. & J. 58, 74 (Md. 1839); *Mason v. Wait*, 5 Ill. (4 Scam.) 127, 132–33 (1842).

⁷⁹See, e.g., Thomas Jefferson, *Notes on Virginia*, in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 63, at 369 (“[T]hose who are but delegates themselves [can]not delegate to others powers which require judgment and integrity in their exercise.”); *Lyon*, 26 Wend. at 496 (Verplanck, Senator); *Inhabitants of Stoughton v. Baker*, 4 Mass. 522, 530–31 (1808); *Carlisle v. Carlisle*, 2 Del. (2 Harr.) 318, 321–22 (Super. Ct. 1837).

⁸⁰It is this original delegation of power from the People to the government that Wilson had in mind when he remarked, “these powers” of governance “cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation. One of those powers and rights is to make laws for the government of the nation. This power and right may be delegated for a certain period, on certain conditions” WILSON, *supra* note 55, at 190. Mortenson and Bagley triumphantly quote this excerpt, incorrectly reading it as an endorsement of the view that Congress can *re-delegate* the legislative powers with which the People had entrusted it.

⁸¹See, e.g., NATHANIEL CHIPMAN, PRINCIPLES OF GOVERNMENT: A TREATISE ON FREE INSTITUTIONS, INCLUDING THE CONSTITUTION OF THE UNITED STATES 152 (Burlington, Edward Smith 1833) (“[T]hose who administer the government . . . are only trustees for the people, exercising a delegated power”); *Proprietors of Charles River Bridge v. Proprietors of Warren*

that Congress could not further delegate, lest it violate the maxim *delegatus non potest delegare*—and, of course, the Constitution. Innumerable sources from the early Republic applied this tenet of agency law to the constitutional distribution of powers and derived therefrom a nondelegation rule.⁸²

Mortenson and Bagley are thus altogether incorrect that nondelegation proponents “cannot point to *any* evidence” that the *delegatus* principle “govern[ed] constitutional interpretation” or extended beyond the private-law

Bridge, 24 Mass. (7 Pick.) 344, 452 (1829); (Morton, J.), *aff'd*, 36 U.S. 420 (1837); Jones’ Heirs v. Perry, 18 Tenn. (10 Yer.) 59, 74 (1836).

⁸²See, e.g., Moore v. Allen, 30 Ky. (7 J.J. Marsh.) 651, 652 (1832) (“The legislative authority of congress can not be delegated . . . [It] is a personal trust, which can not be transferred by them.”); City Council v. Pinckney, 1 Tread. 42, 49–50 (S.C. Const. Ct. App. 1812) (Nott, J.) (“The [U.S.] constitution . . . authorises Congress to pass laws for the regulation of commerce,” but arguing that, in light of the *delegata* rule, “a law authorising the secretary of the treasury to regulate commerce, would not be thought constitutional.”); JOHN TAYLOR, CONSTRUCTION CONSTRUED, AND CONSTITUTIONS VINDICATED 320 (Richmond, Shepherd & Pollard 1820) (“The people, by . . . our constitution[], have delegated to their representatives a power of legislation; but” not “a power to delegate legislative powers to persons.”); 8 Reg. Deb. 3846 (1832) (statement of Rep. Barbour) (“[I]f we have this power to tax, can we . . . transfer it at our pleasure? I rely upon that salutary principle which is engrafted into our system of jurisprudence . . . *Delegatus non potest delegare*.”); Louisville, Cincinnati and Charleston R.R. Co. v. Chappell, 24 S.C.L. (Rice) 383, 390 (1838); Parker v. Commonwealth, 6 Pa. 507, 515 (1847) (“[D]elegata potestas non potest delegari. . . . [T]he legislative function . . . cannot . . . be transferred by the representative”); Rice v. Foster, 4 Del. (4 Harr.) 479, 489 (1847) (same); W.M. Corry, *Review of the Decisions of the Court in Bank, 1846–7*, W.L.J., Oct. 1846–Oct. 1847 at 460, 464 (“[T]he Legislature . . . cannot impart their function to another body ‘*Delegatus non potest delegare*’”).

Also noteworthy is the argument of James L. Petigru—a legendary lawyer and politician who served as attorney general of South Carolina—in an 1831 case (*Walker v. City Council of Charleston*, 8 S.C. Eq. (Bail. Eq.) 443 (S.C. Ct. App. 1831)) that the legislature cannot “delegate its authority to take private property without compensation. . . . Public functionaries are trustees, and have but *delegatam potestatem, quae non potest delegari*. . . . [I]n no case ought this principle to be enforced more rigidly, than in the exercise of the right of the State to take private property for the use of the public. The legislature holds but a delegated authority to do so, and that authority cannot be again delegated.” *Id.* at 452. The chancellor (trial judge) in the case ruled against Petigru’s client on other grounds, but said approvingly of “the argument . . . that the State cannot delegate . . . the right of taking away private property” that, “I should be disposed to agree . . . I do not, however, enter [upon] . . . this question, because it does appear to me, that [plaintiff] . . . voluntarily submitted his right[] to” challenge the compensation. *Id.* at 447 (De Saussure, Ch.). On appeal, the court above called the chancellor’s opinion “very full and satisfactory,” agreeing that the issue of the legislature’s power, “under the constitution . . . to delegate” its eminent-domain authority was not “really involved in [the case],” since Walker waived his objection by consenting to it: “The legislature may certainly propose to any citizen, whose property it takes . . . to join in the appointment . . . arbitrators, to assess his compensation: and if he accepts such terms, . . . he will be . . . bound.” *Id.* at 453–54 (Harper, J.).

context to “question[s] of delegated governance authority.”⁸³ And instead of engaging with the evidence against their position, the duo flood the margins of *Delegation at the Founding* with British sources dealing with subjects unrelated to the separation of governmental power—all of which are irrelevant, as they involve principals delegating powers that rightfully belong to them to designated agents, not agents *re-delegating* the powers delegated to them.⁸⁴

Mortenson and Bagley anticipate the foregoing criticisms of their agency-law analysis, remarking, “[o]riginalists must therefore be arguing for a non-redelegation principle: Once conveyed to a representative agent, the argument must go, the legislative power cannot then be passed further down the line.”⁸⁵ Yes, that is precisely how the argument goes. But, Mortenson and Bagley smugly reply, “It is hard to overstate the ahistoricity of this claim”; in fact, the Framers believed “that legislative power could be redelegated.”⁸⁶ And like clockwork, the pair proceed to support that claim mostly with inapposite seventeenth- and eighteenth-century British texts.⁸⁷ Locke, the

⁸³ Mortenson & Bagley, *supra* note 5, at 297–98.

⁸⁴ E.g., BLACKSTONE, *supra* note 50, at *153 (“[T]he father . . . may also delegate part of his parental authority . . . to the tutor or schoolmaster of his child, who is then in *loco parentis* . . .”).

⁸⁵ Mortenson & Bagley, *supra* note 5, at 296–98.

⁸⁶ *Id.* at 297, 299.

⁸⁷ The only American authority Mortenson and Bagley cite for the proposition that legislatures exercising delegated powers from the People may re-delegate such powers is James Wilson. See Mortenson & Bagley, *supra* note 5, at 299. But the passage of Wilson’s the authors quote says absolutely nothing of the sort. Wilson, in arguing for the superiority of the U.S. Constitution over the British Constitution, points out that in Britain, “the principle of representation is confined” to “a narrow corner of . . . government”: the House of Commons, the only elected branch of the British regime. WILSON, *supra* note 55, at 430. By contrast,

[t]he American States . . . diffuse[e] this vital principle throughout all the different . . . departments of the government. *Representation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of public[] affairs. This chain may consist of one link, or of more links than one; but it should always be sufficiently strong and discernible.*

Id. (emphasis added). Mortenson and Bagley, quoting only the italicized portion, misinterpret Wilson’s reference to a “chain . . . of more links than one” as an endorsement of the view that the several branches of government may re-delegate the powers delegated to them by the People. See Mortenson & Bagley, *supra* note 5, at 299. That is absurd. Wilson is simply saying that the principle of representation does not require that every branch be chosen by direct popular election. This is what he meant when he said in the preceding sentence that the People are represented “throughout all the different divisions and departments of the government”; neither judges nor presidents, for

authors note, wrote that one vested with the executive power may delegate to “inferior magistrates . . . powers” to assist with carrying out the laws; and Blackstone wrote that the king may “delegat[e]” his “judicial power to the judges of their several courts.”⁸⁸ As to the limited relevance of such English texts to the issue of delegation of legislative powers under the American Constitution, nothing more needs to be said.

Furthermore, Mortenson and Bagley’s attempt to analogize Locke’s and Blackstone’s examples of re-delegations to Congress’s delegation of its legislative power is logically infirm. An executive officer’s delegation of authority to his or her subordinates is unproblematic because the officer retains control over the exercise of delegated authority. So, too, does a judge on an appellate court retain supervision over inferior tribunals, for he or she may reverse a lower court’s decision. When Congress delegates by statute its legislative power, however, the agent is not (and cannot be) subject to ongoing congressional superintendence; Congress’s only means of controlling the agent’s exercise of delegated power is enacting new legislation.⁸⁹ Such statutory delegations thus invert the lawmaking process: a legislative rule may go into effect unless a sufficiently broad consensus *disapproves*; whereas, were that same rule subject to constitutional requirements of bicameralism and presentment, it could go into effect only if an equally broad consensus *approved*. Likely due to these structural considerations, countless early American courts and commentators invoked the *delegatus-non-potest-delegare* maxim in condemning legislatures’ statutory delegations of their powers. Why Mortenson and Bagley think quotations discussing completely different sorts of delegations written centuries before the Framing on another continent are better evidence of the Framers’ views is a puzzlement.

instance, are chosen by direct popular election (nor were senators, at least in Wilson’s day), but presidents were chosen by electors appointed by elected state legislatures, and judges were appointed by presidents and confirmed by the Senate. Hence, says Wilson, the People are represented in government, though the “chain” consists “of more links than one.” The chain metaphor does not at all suggest that those branches could re-delegate their constitutionally conferred powers to others.

⁸⁸ JOHN LOCKE, TWO TREATISES OF GOVERNMENT 368 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); BLACKSTONE, *supra* note 50, at *267.

⁸⁹ See *INS v. Chadha*, 462 U.S. 919, 954–55 (1983).

B. Delegation vs. Alienation

Mortenson and Bagley, however, recognize one limitation on legislatures' "disposition of rulemaking authority, . . . albeit one different . . . from the modern nondelegation doctrine": legislatures were "prohibited . . . [from] *permanent[ly] alienati[ng]*" their "power without right of reversion."⁹⁰ Right. That proposition was a corollary of the commonsense rule that "one legislature cannot abridge the powers of a succeeding legislature."⁹¹ Even the British Parliament's otherwise "uncontrollable authority" was subject to this single constraint.⁹²

Mortenson and Bagley rely on the prohibition against a legislature's permanent alienation of its powers in attempting to explain away a passage from Locke's *Second Treatise on Government* often favorably cited by today's nondelegation advocates.⁹³ "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. . . . The power of the *Legislative* . . . [is] only to make *Laws*, and not to make *Legislators* . . ."⁹⁴ Mortenson and Bagley argue that modern originalists "misread[] this passage as an endorsement of the modern nondelegation principle Locke consistently uses 'transfer' in the . . . sense of permanent alienation. In contrast, he uses 'delegation' in connection with powers which the delegating principal may . . . at some point resume."⁹⁵ The passage above, we are told, is really just Locke's way of saying that "a legislative body cannot part with its powers . . . so as not to be able to continue the exercise of them."⁹⁶

I am not sure if that is what Locke himself intended to say (though I doubt it, given that elsewhere in his *Second Treatise* he refers to revocable delegations of power as "transfers"⁹⁷); but, at any rate, what matters here is

⁹⁰Mortenson & Bagley, *supra* note 5, at 307 (emphasis added).

⁹¹Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810)

⁹²BLACKSTONE, *supra* note 50, at *160–62, *90 ("Acts of parliament derogatory from the power of subsequent parliaments bind not.").

⁹³See Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 73 (2015) (Thomas, J., concurring); Gundy v. United States, 139 S. Ct. 2116, 2133–34 (2019) (Gorsuch, J., dissenting); Gordon, *supra* note 9, at 739.

⁹⁴LOCKE, *supra* note 88, at 362–63.

⁹⁵Mortenson & Bagley, *supra* note 5, at 307–08 (footnote omitted).

⁹⁶Town of E. Hartford v. Hartford Bridge Co., 51 U.S. (10 How.) 511, 535 (1850).

⁹⁷Locke's *Second Treatise*, in "talking about the initial transfer of power from the people to the legislator," "uses the word 'transfer' to mean 'delegate' Mortenson and Bagley's entire

how this passage was understood by the generation of Americans that adopted the Constitution in 1787. Locke's condemnation of delegation was frequently cited by American statesmen and commentators of that period,⁹⁸ some of whom were unmistakably invoking Locke in arguing against run-of-the-mill statutory delegations—*not* permanent alienations—of legislative power.⁹⁹ Mortenson and Bagley write that “late eighteenth-century writers, lawyers, and politicians repeatedly” made the “distinction between . . . alienation and . . . delegation.”¹⁰⁰ But the two do not cite any American sources using “transfer” in contradistinction with “delegate” in the separation-of-powers context, and for good reason: evidence from the early Republic indicates that these terms (and sometimes “alienate”) were used interchangeably when discussing statutory grants of authority.¹⁰¹

argument . . . is that [Locke] was arguing that the people *delegated* their power to the legislature but did not *alienate* their power”; yet “when Locke is talking about this original delegation (not alienation), he uses the word ‘transfer’”; it thus seems that the word “transfer” in his discussion of legislative power in Section 141 means “delegation”—*not* permanent alienation. Wurman, *supra* note 17, at 1519 n.151.

⁹⁸See Gordon, *supra* note 9, at 770 (citing, e.g., JAMES OTIS, THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED (1763); JOHN ADAMS, *Letter to William Wirt (Quincy, 7 March, 1818)*, in THE WORKS OF JOHN ADAMS 293 (Charles Francis Adams ed., 1856)).

⁹⁹See John Rutledge, Speech Before the South Carolina General Assembly & Legislative Council, (March 5, 1778), in 1 DAVID RAMSAY, THE HISTORY OF THE REVOLUTION IN SOUTH CAROLINA 133 (Trenton, Isaac Collins 1778) (“The people by that delegated to us a power of making laws, not of creating legislators”; Rutledge cited as a “violation[.]” of this principle “parliament[’s] [1539] law empowering the King . . . to set forth proclamations.”); THOMAS COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 116–17 (Boston, Little, Brown & Co. 1868).

¹⁰⁰Mortenson & Bagley, *supra* note 5, at 309, 311.

¹⁰¹See, e.g., Thomas Jefferson, *Notes on Virginia*, in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 63, at 369 (condemning statutory delegation in part on the ground “that those who are but delegates themselves [can]not *delegate* to others powers which require judgment and integrity in their exercise” or otherwise “*transfer* . . . their powers into other hands” (emphases added)); James Madison, *The Report of 1800 [7 January] 1800*, NAT’L ARCHIVES: FOUNDERS ONLINE <https://founders.archives.gov/documents/Madison/01-17-02-0202> (“If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, . . . it would follow, that the whole power of legislation might be *transferred* A *delegation* of power in this latitude, would not be denied to be a union of the different powers.” (emphases added)); CIVIS, REMARKS ON THE EMBARGO LAW 7–8 (New York, Porcupine Press 1808) (calling a statutory delegation of law-suspension authority an example of “congress *transferring* their powers to the president,” and declaring that “this *delegation* of power from congress to the president, is a nullity” (emphases added)); *Moore v. Allen*, 30 Ky. (7 J.J. Marsh.) 651, 652 (1832) (“The legislative authority of congress can not be *delegated* The power confided to members of congress is a personal trust,

IV. PRE-RATIFICATION PRACTICE

A. *British Practices*

Mortenson and Bagley, further defending their claim that the Framers considered legislative power delegable, next attempt to argue for the constitutional permissibility of such delegations based on the pre-Framing practice of the *British* Parliament. Yet the analogy between that body's powers and those of Congress under the U.S. Constitution is deeply flawed. Congress is not Parliament, and the United States is not Britain. The Revolution established as much. That conflict, as leading Revolutionary and later Supreme Court Justice James Iredell explained in 1786, was in part fueled by colonial distaste for British constitutional theory: "We had . . . been sickened and disgusted for years with . . . impious language from Great

which can not be *transferred* by them." (emphases added)); 3 ANNALS OF CONG. 238–39 (1791) (ed. 1849) (statement of Rep. Madison) (objecting to bill that would have granted the president authority to establish post roads on ground that "*alienating* the powers of the House . . . would be a violation of the Constitution" (emphases added)); *id.* at 229–30 (statement of Rep. Livermore) (recognizing it was "clearly [Congress's] duty to designate the roads as to establish the offices; and he did not think they could with propriety *delegate* that power, which they were themselves appointed to exercise" (emphasis added)); *id.* at 235 (statement of Rep. Vining) ("The Constitution has certainly given us the power of establishing posts and roads, and it is not even implied that it should be *transferred* to the President . . ."); 5 ANNALS OF CONG. 1525 (1798) (statement of Rep. Nicholas) (objecting to a bill that would have granted the president broad authority to raise an army on the ground that "[t]he highest act of Legislative power was, by it, proposed to be *transferred* to the Executive" (emphasis added)); *id.* at 1526–27 (statement of Rep. Gallatin) ("[I]f they could *delegate* the power of raising an army to the President, why not do the same with respect to the power of raising taxes?" (emphasis added)); *id.* at 1638 (statement of Rep. Brent) ("[I]f Congress have the power of *divesting* themselves of this right, and transferring it for six years, they may do it for ten years or for a term equal to the existence of the Constitution. But he did not believe they had the power of making this *transfer*." (emphasis added)); *id.* at 1535 (statement of Rep. McDowell) (stating that the bill "would be unconstitutional" because "it *delegated* Legislative powers to the President" (emphasis added)); 21 ANNALS OF CONG. 2022 (1810) (statement of Rep. Jackson) (objecting successfully a bill that would have empowered the president to issue proclamations with force of law, on the ground that "[a]ll legislative power is by the Constitution vested in Congress. They cannot *transfer* it." (emphasis added)); CONG. GLOBE, 27th Cong., 2nd Sess. 510 (1842) (statement of Rep. J.Q. Adams) (objecting successfully to a statutory grant to the president of rulemaking power on the grounds that "it was a *transfer* of legislative power to a board of officers, which he doubted whether Congress had the power to make" (emphasis added)); *Rice v. Foster*, 4 Del. (4 Harr.) 479, 490 (1847) (declaring statutory delegation "unconstitutional" because it "*transfers* or *delegates* legislative power" (emphasis added)); *Parker v. Commonwealth*, 6 Pa. 507, 515 (1847) (noting that "legislative function . . . cannot . . . be *transferred* by the representative" (emphasis added)).

Britain, of the omnipotent power of the British Parliament When we were at liberty to form a government as we thought best, without regard to that . . . principle, . . . we decisively gave our sentiments against it.”¹⁰² The “principle” to which Iredell alludes in disgust was that the Parliament’s authority was “absolute and without control”—save for the lone limitation that “[a]cts of parliament derogatory from the power of subsequent parliaments bind not.”¹⁰³

Note the stark contrast between the theory of the British Constitution and that of its U.S. counterpart; pursuant to the latter document, Congress had only *legislative* power, while ultimate sovereignty remained with We the People. Britain’s Parliament, by comparison, had not only legislative power but also ultimate *sovereignty*. Indeed, in British constitutional discourse, said Blackstone, “[s]overeignty and legislature are . . . convertible terms.”¹⁰⁴ So when Parliament passed the Statute of Proclamations in 1539, empowering King Henry VIII to “set forth proclamations under such penalties and pains as to him . . . seem necessary,”¹⁰⁵ such a delegation of legislative power was permissible for the same reason that the People’s original delegation of legislative power to Congress under the U.S. Constitution was permissible: the ultimate source of sovereign authority was delegating a portion thereof to a designated agent. James Wilson made this point in a speech during Pennsylvania’s ratifying convention; the British Parliament’s “transfer[] [of] legislative authority to Henry VIII . . . could not, in the strict acceptance of the term, be called unconstitutional,” Wilson said, since “in Britain . . . the Parliament[’s] . . . power is absolute, without control.”¹⁰⁶

Mortenson and Bagley cite the foregoing remarks by Wilson as evidence that similar delegations of legislative power by Congress were permissible under the U.S. Constitution, completely overlooking the fact that Wilson was

¹⁰² James Iredell, *To the Public* in LIFE AND CORRESPONDENCE OF JAMES IREDELL 145, 146 (Griffith J. McRee ed., New York, D. Appleton and Company 1858).

¹⁰³ BLACKSTONE, *supra* note 50, at *160–62, *90.

¹⁰⁴ *Id.* at *46.

¹⁰⁵ 1539 Proclamation by the Crown, 31 Hen. 8 c. 8 (Eng. & Wales).

¹⁰⁶ 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 432 (Jonathan Elliot ed., 2d. ed., Phila., J.B. Lippincott 1901) [hereinafter ELLIOT’S DEBATES]. A slightly different transcription of the same speech by Wilson appeared in a pamphlet published shortly after the speech was delivered, though the differences in phraseology are immaterial for present purposes. See James Wilson, *Speech on Nov. 24, 1787*, in PENNSYLVANIA AND THE FEDERAL CONSTITUTION, 1787–1788, at 217 n.*, 229–30 (John Bach McMaster & Frederick D. Stone eds., 1888).

citing Parliament's 1539 Statute of Proclamations as a point of *contrast* between the American and British Constitutions. In fact, Wilson, in the very same speech, remarked that "[t]he idea of a constitution, limiting . . . legislative authority, seems not to have been accurately understood in Britain. . . . [t]he British constitution is just what . . . Parliament pleases," giving the Statute of Proclamations as an example, and then observing that "[t]o control the . . . conduct of the legislature, by an overruling constitution, was an improvement in the science and practice of government reserved to the American states."¹⁰⁷ Indeed, Wilson's writings often emphasized the differences between the two countries' forms of government: "[C]an we subscribe to the doctrine of [Blackstone's] Commentaries—that the authority, which is legislative must be supreme? . . . *Certainly not. This definition is not calculated for . . . the United States.*"¹⁰⁸

Wilson's views on this matter were in no way idiosyncratic in his day. "The essential difference between the British government, and the American constitutions," wrote Madison, was that "[i]n the British government, . . . the parliament . . . is omnipotent"; whereas "[i]n the United States, . . . [t]he people . . . possess the absolute sovereignty."¹⁰⁹ Indeed, expressions of this exact sentiment from American writers were so common in the decades following the Constitution's ratification that any modern commentators who rely on British Parliamentary practice to delimit the scope of Congress's constitutional authority commit nothing short of historical malpractice.

In fact, for the American Framers, part of the clean break from the past effected by the Constitution was the restriction on Congress's power to delegate its legislative authority. As Mortenson and Bagley admit, many revolutionary "commentators criticiz[ed] particular delegations of avowedly legislative authority" by Parliament or pre-Ratification state governments,¹¹⁰ quoting language from Richard Price and James Otis to that effect.¹¹¹ Examples of similar critiques abound. Thomas Jefferson, in a 1774 tract, denounced a parliamentary law closing the Massachusetts Bay to maritime commerce, but providing that "[t]wo wharfs are to be opened again when his

¹⁰⁷ *Id.*

¹⁰⁸ WILSON, *supra* note 55, at 191 (emphasis omitted and added).

¹⁰⁹ Madison, *supra* note 101.

¹¹⁰ Mortenson & Bagley, *supra* note 5, at 300.

¹¹¹ RICHARD PRICE, OBSERVATIONS ON THE IMPORTANCE OF THE AMERICAN REVOLUTION 113, 116 (London 1785); James Otis, *Rights of British Colonies Asserted and Proved*, in THE AMERICAN REPUBLIC: PRIMARY SOURCES 119, 121 (Bruce Frohnen ed., 2002) (1763) ("The legislature cannot transfer the power of making laws to any other hands.").

Majesty shall think proper”; on the ground that the law improperly delegated legislative authority: “This little exception [allowing reopening of wharves when the King thinks proper] . . . set[s] a precedent for investing hi[m] with legislative powers.”¹¹² James Kent, too, condemned broad delegations of policymaking power to the executive, writing in a 1787 essay that “the people . . . under Henry the 8th were insensible to the importance of their voice in parliament, . . . who by a single act the most extraordinary that ever was recorded, conferred on the King’s proclamations the force of law.”¹¹³ Constitutional Convention delegate John Rutledge declared in a 1778 speech that “[t]he people . . . delegated to [the legislature] a power of making laws, not of creating legislators”; and condemned the various “violations” of this principle that “ha[d] been committed” in Britain, such as when “parliament enacted a law empowering the King . . . to set forth proclamations” with the force of law.¹¹⁴ The Statute of Proclamations earned some similarly dishonorable mentions during the ratification debates, as well.¹¹⁵

Incredibly, Mortenson and Bagley think these criticisms of Parliamentary delegations of power are evidence for such delegations’ *legality* under the U.S. Constitution, since the critics “cast[] aspersions on the particular policy without ever suggesting that it was impermissible for a legislature” to delegate its authority.¹¹⁶ Well, of course they did not suggest it was impermissible, for under the British Constitution, virtually anything was permissible as long as an act of Parliament authorized it. If anything, the widespread pre-Framing condemnations of delegations of legislative power *reinforce* the view that the Constitution was meant to repudiate such practices.

Moreover, Mortenson and Bagley even cite a 1755 essay by Benjamin Franklin, in which he *did* suggest that delegations of legislative authority

¹¹²THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA 24 (London 1774).

¹¹³*A Country Federalist*, POUGHKEEPSIE COUNTRY JOURNAL, Dec. 19, 1787.

¹¹⁴John Rutledge, Speech Before the South Carolina General Assembly & Legislative Council, (March 5, 1778), in 1 RAMSAY, *supra* note 99, at 133–34.

¹¹⁵See 4 ELLIOT’S DEBATES, *supra* note 106, at 266 (statement of Hon. Rawlins Lowndes) (opposing constitution due to fears president would have powers like that of the “tyrannical Henry VIII . . . to issue proclamations that should have the same force as laws,” an “unconstitutional privilege [that] had been justly reprobated”); *id.* at 280 (statement of Gen. Charles Cotesworth Pinckney) (dismissing Lowndes’s concerns about the Constitution but agreeing that “the power vested by Parliament in the proclamations of Henry VIII” was “dangerous”).

¹¹⁶Mortenson & Bagley, *supra* note 5, at 300.

were generally *ultra vires*, long before the U.S. Constitution had established as much:

Y. But can it be right in the Legislature by any Act to delegate their Power of making Laws to others?

X. *I believe not, generally*; but certainly in particular Cases it may. Legislatures may, and frequently do give to Corporations, Power to make By Laws for their own Government. And in this Case, the Act of Parliament gives the Power of making Articles of War for the Government of the Army to the King alone¹¹⁷

Far from supporting Mortenson and Bagley's position, Franklin's views cut decisively against it. Franklin believed that legislative power was "generally" non-delegable but that there are exceptions—namely, the legislature's powers to delegate to subordinate bodies the authority to legislate within localities¹¹⁸ and to delegate discretion over national-security matters and military governance to the executive.¹¹⁹ Both exceptions correspond neatly to historical qualifications on the nondelegation principle.

This revolutionary commentary criticizing Parliament's delegations of legislative power also refutes another of Mortenson and Bagley's central arguments: that any "rulemaking pursuant to statutory authorization would qualify as an exercise of executive power."¹²⁰ If that was so, then how could Wilson, Jefferson, and Franklin (as well as countless other writers, for that matter¹²¹) have characterized acts of Parliament that conferred open-ended discretion upon the King as delegations of legislative authority?

For what it is worth, Parliament's 1539 Statute of Proclamations delegating power to the King to issue proclamations with the force of law

¹¹⁷Ben Franklin, *A Dialogue Between X, Y, and Z*, 18 December 1755, NAT'L ARCHIVES: FOUNDERS ONLINE <https://founders.archives.gov/documents/Franklin/01-06-02-0131> (emphasis added).

¹¹⁸This is presumably what Franklin means by "giv[ing] to Corporations, Power to make By Laws for their own Government"; delegations of power to local governments were frequently justified on the ground that that municipal governments were "corporate" bodies and their ordinances "bylaws." See *Corp. of Wash. v. Eaton*, 29 F. Cas. 345, 348 (C.C.D.D.C. 1833) (No. 17,228).

¹¹⁹*Id.*

¹²⁰Mortenson & Bagley, *supra* note 5, at 315.

¹²¹See, e.g., CIVIS, *supra* note 101, at 8 ("Parliament gave to the proclamations of [Henry VIII], the force of laws, and thus invested their executive with legislative powers . . .").

pushed the limits even of that body's "omnipotent" authority. The Statute "faced considerable opposition, . . . both within and outside Parliament, resulting in [its] repeal . . . soon after Edward VI's coronation in 1547."¹²² Blackstone later called the 1539 act "a statute . . . calculated to introduce the most despotic tyranny."¹²³ David Hume went further, declaring the 1539 Statute "a total subversion of the English constitution."¹²⁴ If British constitutional theorists, steeped in doctrines of Parliament's sovereignty and omnipotence, thought the 1539 statute "despotic," "tyrannical," and perhaps even violative of the *British* Constitution, how much more constitutionally objectionable would a similar act of Congress have been in the eyes of the American Framers?

B. Articles of Confederation

Mortenson and Bagley next attempt to defend the proposition that the "legislative act of passing statutes could accurately be described as an exercise of executive power" by pointing to the Articles of Confederation: "Like the federal government that later emerged under the U.S. Constitution, the national government under the Articles of Confederation was commonly understood to possess all three powers of a complete government—albeit in notoriously ineffective form."¹²⁵ The authors, in an apparent effort to show that passing a statute was an "executive" act in Framing-era parlance, cite a handful of quotations referring to the Articles Congress as an "executive" body.¹²⁶ Yet they cite several other sources from that period firmly declaring that the Articles Congress had *no* executive power.¹²⁷ Either way, references

¹²²Noga Morag-Levine, *Agency Statutory Interpretation and the Rule of Common Law*, 2009 MICH. ST. L. REV. 51, 58 (2009).

¹²³BLACKSTONE, *supra* note 50, at *271.

¹²⁴DAVID HUME, 3 HISTORY OF ENGLAND § 32.13 (London, T. Cadell 1778) (1759).

¹²⁵Mortenson & Bagley, *supra* note 5, at 316 (stylization removed).

¹²⁶*See, e.g.*, A Democratic Federalist, PA. HERALD, Oct. 17, 1787; Federal Farmer, *Letter X to the Republican*, N.Y., May 2, 1788; Letter from Thomas Burke to the N.C. Assembly (Oct. 25, 1779), in 14 LETTERS OF DELEGATES TO CONGRESS, 1774-1789, at 108-09 (Paul H. Smith et al. eds., 1987).

¹²⁷*See* James Wilson, *Debates of the Convention Pennsylvania Ratification Convention* (Dec. 4, 1787), in 1 DEBATES OF THE CONVENTION, OF THE STATE OF PENNSYLVANIA, ON THE CONSTITUTION 65 (Thomas Lloyd ed. 1788) (Continental Congress had "some legislative, but little executive and no effective judicial power."); *Dialogue*, POUGHKEEPSIE COUNTRY JOURNAL, Mar. 11, 1788 (Articles Congress "had no judicial nor executive, no way to enforce their discretionary requisitions"); *see also* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED

to the Articles Congress's "executive" prerogatives are best "read as references to its foreign affairs competences" (a reading that Mortenson and Bagley, without explanation, call "mistaken[]"),¹²⁸ or perhaps to its "authority to appoint a committee, to sit in the recess of congress . . . for managing the general affairs of the united states."¹²⁹ Indeed, save for its foreign-affairs authority,¹³⁰ the Articles Congress was otherwise so impotent that it was difficult to categorize any of its functions as exercises of governmental power in *any* form, as Story's *Commentaries* explained: "[C]ongress in peace was possessed of but a . . . shadowy sovereignty, with little more, than the empty pageantry of office. They . . . possessed not the power . . . to enforce any law[, but instead] . . . only . . . of recommendation[s] . . . Congress had no power to exact obedience . . . to its ordinances."¹³¹ Expressions of the same view abound in Framing-era writings, including those of Washington, Madison, and the Supreme Court's Justice Paterson, among others.¹³²

STATES §§ 247, 252 (Cambridge, Brown, Shattuck, and Co. 1833); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Paterson, J.).

¹²⁸ Mortenson & Bagley, *supra* note 5, at 318 n.201.

¹²⁹ ARTICLES OF CONFEDERATION of 1781, art IX.

¹³⁰ *See id.*

¹³¹ 1 STORY, *supra* note 127, §§ 245–52.

¹³² George Washington, *From George Washington to James Warren, 7 October 1785*, NAT'L ARCHIVES: FOUNDERS ONLINE <https://founders.archives.gov/documents/Washington/04-03-02-0266> (calling Articles Congress "a nugatory body"); 1 ANNALS OF CONG. 812 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) ("Under the late confederation, it could scarcely be said that there was any real Legislative power—there was no Executive branch, and the Judicial was so confined as to be of little consequence . . ."); *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 178 (1796) (Paterson, J.). This discussion of the Articles Congress's extreme impotence also thoroughly answers Mortenson and Bagley's other nondelegation-related claim based on the Articles: that the state legislatures, in adopting the Articles of Confederation, "expressly delegated to the national government" a "broad array of unequivocally legislative powers," thus demonstrating that legislatures' delegation of legislative power were considered unproblematic. Mortenson & Bagley, *supra* note 5, at 306. The first obvious flaw in this argument is that it attempts to infer a conclusion about the 1787 Federal Constitution's meaning by direct analogy to pre-ratification state practices. *See infra* notes 174–186 and accompanying text. A further problem with Mortenson and Bagley's inference based on the Articles' adoption is that, given the Articles Congress's near-complete lack of coercive authority, states that adopted the Articles were not really delegating any of their legislative power at all, since, "[i]n truth, congress possessed only the power of recommendation," and further action by state legislatures was almost always needed to effectuate congressional declarations. 1 STORY, *supra* note 127, §§ 247, 252. As Madison observed in a congressional debate, "[u]nder the late confederation, it could scarcely be said that there was any real Legislative power." 1 ANNALS OF CONG. 812 (1789) (Joseph Gales ed., 1834). Still, Mortenson and Bagley attempt to argue otherwise, writing, "The Continental Congress had some legislative power in the traditional

The lesson to be gleaned from all of this is that there is no lesson to be gleaned from all of this. The 1787 Constitution's separation of powers was in no way modeled after the Articles of Confederation, which had no real executive (save for a ceremonial "president" with so little authority that John Hancock, upon election to the office in 1785, never showed up for the job¹³³), and a "congress" that was never described as a "legislative" body. It was widely lamented that, per Kent's 1826 *Commentaries*, the Articles Congress's powers were not "distributed among the departments of a well-balanced government"; and that, "[h]ad there been sufficient energy in th[at] [Congress] . . . to have enforced [its] requisitions, it might have proved fatal to public liberty"; for the Articles Congress was a "single body" with a "complicated mass of jurisdiction."¹³⁴

It is also perhaps worthy of note that the Articles of Confederation had an explicit nondelegation provision: while the Articles Congress could "appoint a committee, to sit in the recess of congress,"¹³⁵ and vest said Committee with such powers as Congress thought "expedient," the Articles qualified Congress's power of delegation by "provid[ing] that no power be delegated to the said committee, for the exercise of which . . . the voice of nine states, in the congress . . . assembled, is requisite."¹³⁶ It is arguable that this restriction supports the view that aversion to legislatures' delegation of their powers was enshrined in the Constitution of 1787. Mortenson and Bagley, however, infer the opposite: in their view, the Articles' nondelegation provision suggests that "[w]here a derogation from the presumptive delegability of legislative power was called for, it was specified," and such

sense of the authority to promulgate instructions . . . with the force of law." Mortenson & Bagley, *supra* note 5, at 317. Even if that is correct, however, the examples the authors identify are Articles provisions authorizing Congress to issue such binding declarations concerning states' external (or "foreign") affairs (i.e., those involving relations with other sovereigns, including other states). See ARTICLES OF CONFEDERATION of 1781, art IX (explaining that Congress has powers of, e.g., "determining on peace and war . . . sending and receiving ambassadors," and "entering into treaties and alliances"). And power over these subjects was not *purely* "legislative" in nature. See Gordon, *supra* note 9, at 783; *infra* Section IV.C.

¹³³ JAMES Q. WILSON ET AL., *AMERICAN GOVERNMENT: INSTITUTIONS AND POLICIES* 19 (13th ed. 2016).

¹³⁴ 1 KENT, *supra* note 76, at 199–200 (1826); *accord* PROCEEDINGS AND DEBATES OF THE CONVENTION OF NORTH CAROLINA 95 (Univ. of N.C. at Chapel Hill 2002) (1788) (statement of James Iredell) ("One great alteration proposed by the constitution," which "improve[d] on the Articles" was "that the executive, legislative, and judicial powers should be separate and distinct.").

¹³⁵ ARTICLES OF CONFEDERATION of 1781, art IX.

¹³⁶ *Id.* art. X

specifications imply that delegations of legislative power were otherwise allowed, QED.¹³⁷ That inference may be sound with respect to the Articles of Confederation, which had no “vesting clauses” or other general provisions for separation of powers of the kind found in the 1787 Constitution. The explicit nondelegation provision was therefore necessary, since without it there was no structural division of authority from which to infer a nondelegation rule. But all this is obviously worlds away from the Constitution of 1787, which *did* have vesting clauses allocating the various forms of authority among three branches, a consequence of which was that Congress was forbidden from delegating its legislative power, even without a constitutional provision specifically prohibiting such delegations.

All told, Mortenson and Bagley’s discussion of the Articles does not even come close to supporting the authors’ assertion that the “legislative act of passing statutes could accurately be described as an exercise of executive power.”¹³⁸ The pair’s attempt to define the bounds of Congress’s “legislative powers” under the Constitution of 1787 by analogy to the Articles Congress is fundamentally misguided.¹³⁹

C. Treaty-Making

Mortenson and Bagley next proceed to argue based on pre-Ratification sources that the “legislative act of treaty-making could accurately be described as an exercise of executive power.”¹⁴⁰ That is true. At the Framing, the “legislative . . . and foreign-relations powers (including the treaty power) were viewed as distinct, though occasionally overlapping, spheres of authority.”¹⁴¹ “[I]t belongs to the ‘Executive Power,’” Hamilton wrote in 1793, to represent the county “in the intercourse of the U[nited] States with foreign Powers.”¹⁴² For this reason, Congress has broader “license to delegate rulemaking authority to the president in the area of foreign affairs, even if such rules incidentally affect private actors domestically.”¹⁴³ An 1825 treatise observed as much: “Among other incidents arising from foreign relations, . . .

¹³⁷Mortenson & Bagley, *supra* note 5, at 305.

¹³⁸*Id.* at 316.

¹³⁹*See* *Martin v. Hunter’s Lessee*, 14 U.S. (1 Wheat.) 304, 331–32 (1816) (per Story, J.).

¹⁴⁰Mortenson & Bagley, *supra* note 5, at 324 (stylization removed).

¹⁴¹Gordon, *supra* note 9, at 783–84.

¹⁴²Alexander Hamilton, *Pacificus No. I*, [29 June 1793], NAT’L ARCHIVES: FOUNDERS ONLINE <https://founders.archives.gov/documents/Hamilton/01-15-02-0038>.

¹⁴³Gordon, *supra* note 9, at 782.

congress . . . may devolve on the president, duties that at first view seem to belong only to themselves.”¹⁴⁴ To the same effect are many other contemporaneous writings.¹⁴⁵

Where Mortenson and Bagley go wrong, however, is in inferring from such writings a Framing-era understanding that *any* time regulatory agencies issue regulations pursuant to statutory authority, they exercise “executive” power, no matter how open-ended Congress’s instructions might be. On the contrary, the additional latitude Congress enjoyed in delegating discretionary power to the Executive in the foreign-affairs realm was understood as a kind of exception to the general rule that Congress was forbidden from delegating its legislative power¹⁴⁶—though in truth it is perhaps better characterized not as an “exception” to the nondelegation principle, but instead as an area in which the executive and legislative competencies happened to overlap such that many policy choices could be either made by Congress *or* committed to the executive without offending the separation of powers. It was agreed on all hands that, while “the internal executive power”—the “force employed to maintain justice within the society”—“is under the constant and uniform control of the legislative . . . , in most civil societies there is some[.] . . . discretionary power joined with the external executive,” a “consequence of which is, that . . . the military force, or force employed against injuries from without, may, in some instances, be a discretionary force, not guided so much by the legislative body, as by the judgment” of the executive.¹⁴⁷

The proposition that, as a matter of original meaning, greater delegations are permitted in the foreign- than in the domestic-affairs sphere has been controversial. Nicholas Parrillo, for instance, criticizes this view, remarking that it “is textually awkward to read . . . ‘legislative powers’” at the start of Article I to refer only to some of the powers famously listed in Article I, Section 8, and not others.¹⁴⁸ This mischaracterizes the originalist position. Of course the term “legislative Powers” at the start of Article I encompasses

¹⁴⁴ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 185 (Phila., Philip H. Nicklin 1825).

¹⁴⁵ See Gordon, *supra* note 9, at 782–86 (citing sources); see also 1 KENT, *supra* note 76, at 266–67 (1826).

¹⁴⁶ See Gordon, *supra* note 9, at 782.

¹⁴⁷ RUTHERFORTH, *supra* note 54, at 65; accord RAWLE, *supra* note 144, at 182–83 (explaining that the president’s powers “are of more importance in respect to foreign relations than the internal administration of government”; with respect to the former, “the president . . . chiefly act[s] on his own independent judgment,” whereas “[a]t home, his path . . . is narrow”).

¹⁴⁸ Parrillo, *Supplemental*, *supra* note 4, at 4 n.7.

every specific grant of authority enumerated in Section 8. What makes the foreign affairs powers different from some of the others listed in Section 8, however, is that the former represent an area of *overlap* with executive power. And this overlap is what affords Congress greater latitude in conferring discretionary authority upon the executive in this area.

In addition, a recently published note argues in much the same manner as Parrillo does that “a principled theory” of nondelegation requires that any nondelegation rule “be applied . . . to domestic and foreign affairs-related delegations alike.”¹⁴⁹ Focusing almost entirely on congressional debates on legislation delegating broad foreign-affairs authority to the executive, the note argues, “[n]o one [in Congress] suggested the delegations were permissible solely by virtue of their foreign affairs subject matter.”¹⁵⁰ This claim, besides overlooking the sources from that period outside of Congress that made such arguments,¹⁵¹ is inaccurate even on its own terms. In particular, the note’s author acknowledges the lengthy statement by Pennsylvania Congressman William Findley during debate on what became the 1809 embargo law, in which Findley relied on the domestic/foreign distinction in defending the bill’s delegation of authority—but ultimately dismisses Findley’s invocation of that distinction as a mere policy argument.¹⁵² This is incorrect: according to Findley (in part of his statement *not* quoted by the note), his purpose was “to prov[e] . . . *the constitutionality*

¹⁴⁹ *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, *supra* note 4, at 1139.

¹⁵⁰ *Id.* at 1140.

¹⁵¹ Arlyck criticizes my prior citation of *United States v. The William*, 28 F. Cas. 614 (D. Mass. 1808) (No. 16,700), in support of my argument regarding the special status of foreign affairs for nondelegation purposes: The case “was not about whether Congress could permissibly delegate authority to the President,” says Arlyck; rather, “[t]he constitutional issue . . . was whether Congress had the power under Article I to institute such broad restrictions on foreign commerce” imposed as part of “the Jeffersonian embargo.” Arlyck, *supra* note 4, at 290 n.303. Arlyck’s criticism is fair. While my earlier article correctly characterized the case as “uph[old]ing the embargo law” “against constitutional attack,” I followed that observation up with remarks that impliedly created the incorrect impression that the case upheld the law against a *nondelegation* attack specifically (which it did not). I admit fault for overstating the degree to which the case supported my position. In truth, the case supports my argument regarding the special status of foreign affairs only in that the court recognized that “the sphere of legislative discretion” to enact “national regulations relative to commerce” is “wide[.] . . . [C]ases may occur, in which the indefinite character of a law”—such as “the authority given to the president to suspend the [embargo] acts, upon the contingency of certain events”—“may be essential to its efficacious operation.” *The William*, 28 F. Cas. at 622.

¹⁵² Arlyck, *supra* note 4, at 291 n.312.

and expediency of the proposed transfer of the provisional suspending power to the Executive.”¹⁵³ On that score, Findley explained that:

The common theory that though Executive power may be transferred, Legislative power cannot, has also its limitation in practice; these theories are good general rules, but like all other general rules, *they have their exceptions in practice*. . . . [S]uspending or changing the embargo, as it changed the rule of conduct, was a legislative act, *but not in the full sense of that term*. . . . Laws for the internal government of a nation seldom require large portions of discretion to be vested in the Executive; but regulations of commerce with foreign nations always do This is not strictly transferring a legislative power, but a latitude of discretion in the execution of the law, a latitude which *arises solely from the nature and necessity of the case*¹⁵⁴

This seems a clear articulation of the position espoused by modern originalists—that is, that certain broad delegations may be constitutionally permissible by virtue of their foreign affairs subject matter (and that this was a kind of “exception” to the “general rule” of nondelegation).¹⁵⁵ What is more, Findley continued, he was not alone among statesmen of the day in holding this view: “During the early period . . . of the Government,” Findley, “along with his then political friends, voted for the law vesting the Executive with . . . extensive discretion respecting the embargo They distinguished [that law from one] vesting the Executive with power to make or supply the defects of *general laws for the government of the citizens*,” in part on the ground that the embargo law “depended solely on measures of foreign nations, to negotiate with whom the President was the Constitutional organ of the Government.”¹⁵⁶

A final thought on this topic: critics of reviving the Nondelegation Doctrine are fond of pointing out that few Framing-era sources defended the constitutionality of broad statutory delegations of discretion in the foreign-

¹⁵³ 18 ANNALS OF CONG. 2224 (1808) (emphasis added).

¹⁵⁴ *Id.* at 2228–29 (emphases added).

¹⁵⁵ This passage, along with other sources mentioned thus far, also undercuts a similar critique of my position in a recent piece that “proponents of this proposed [1808] legislation did not defend it on grounds of a delegation exception for military and foreign affairs.” Arlyck, *supra* note 4, at 291.

¹⁵⁶ 18 ANNALS OF CONG. 2230–31 (1808) (emphasis added).

affairs realm by arguing that such breadth was permissible by virtue of the subject matter being regulated. Yet even assuming this characterization of the evidence is accurate (which is doubtful), it is worth keeping in mind that neither did any contemporaneous defenders of these sweeping delegations argue for their constitutionality on the ground that either (a) statutory delegations of authority never violate the separation of powers (as Mortenson and Bagley contend), or (b) such delegations are okay so long as some vague “intelligible principle” guides the exercise of the delegated power (as Parrillo and a few others contend¹⁵⁷). Hence, if the foreign affairs “exception” is the proverbial “dog that did not bark,” the exact same can be said of the theories of that “exception’s” critics.

D. Pre-Ratification State Practices

Mortenson and Bagley also survey the period of United States history from the Declaration of Independence up to the ratification of the Constitution, pointing to various instances in which American state legislatures delegated legislative powers to administrative officials. This, the authors believe, demonstrates that Congress may likewise delegate its powers without offending the U.S. Constitution.¹⁵⁸ But as a way of determining the extent of Congress’s constitutional authority, the pre-Ratification practices of state governments, much like British Parliamentary practice, are essentially worthless. The Constitution of 1787 was strongly influenced by *disapproval* of existing state constitutions, which the Framers felt had made inadequate provision for the separation of powers.¹⁵⁹ Properly understood, the pre-Ratification history of state governance, far from supporting Mortenson and Bagley’s contention that the U.S. Constitution places no constraints on congressional delegations of authority, actually favors the opposite conclusion.

The 1770s and ‘80s were, from a separation-of-powers perspective, a chaotic period. That principle had yet to fully take root in the various states’ constitutions, which generally gave broad authority to legislatures and recognized few distinctions between the different forms of governmental authority.¹⁶⁰ This blending of powers was widespread because, as Madison

¹⁵⁷Parrillo, *Critical Assessment*, *supra* note 4, at 1293.

¹⁵⁸See Mortenson & Bagley, *supra* note 5, at 303–07.

¹⁵⁹See *infra* notes 160–173.

¹⁶⁰See GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787*, at 447 (1969).

explained, “all the existing constitutions were formed in the midst of a danger,” and “of an enthusiastic confidence of the people in their patriotic leaders.”¹⁶¹ The problem with constitutions drafted under such conditions, however, was that those documents failed to “maintain[] the constitutional equilibrium of the government.”¹⁶² Madison lamented that these pre-Framing state constitutions

carr[ied] strong marks of the haste, and . . . inexperience, under which they were framed. It is but too obvious that in some instances the fundamental principle [of separation of powers] has been violated by too great a mixture . . . of the different powers; and that in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.¹⁶³

Madison’s views were by no means unusual; across the new nation, “Federalists in the late 1780s surveyed the scene with dismay. . . . [E]arly Revolutionary constitutions,” they believed, “had created grossly imbalanced regimes.”¹⁶⁴

As the 1780s wore on, however, a national understanding emerged that a more robust separation of powers was necessary to maintain a free polity: “the powers of government should be so divided and balanced among several bodies.”¹⁶⁵ To that end, the Constitution produced by the 1787 Philadelphia Convention aimed “to provide some practical security for each” of “the several classes of power, as they may in their nature be legislative, executive, or judiciary, . . . against the invasion of the others” beyond the mere “parchment barriers against . . . encroach[ments] relied on by . . . most of the American constitutions.”¹⁶⁶ The Convention’s work inspired state-level efforts at reform across the country. A “sweeping process of state constitutional revision began in 1787–88 . . . prompted by the Philadelphia plan,” with “the federal Constitution . . . offer[ing] a visible and validated template for states to copy.”¹⁶⁷

¹⁶¹ THE FEDERALIST NO. 49, at 315 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶² *Id.*

¹⁶³ THE FEDERALIST NO. 47, at 307–08 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶⁴ AKHIL REED AMAR, AMERICA’S CONSTITUTION: A BIOGRAPHY 59 (2005).

¹⁶⁵ THE FEDERALIST NO. 48, at 311 (James Madison) (Clinton Rossiter ed., 1961).

¹⁶⁶ *Id.* at 308.

¹⁶⁷ AMAR, *supra* note 164, at 139.

The case of Pennsylvania is especially illustrative. The Commonwealth's first constitution was adopted in 1776.¹⁶⁸ Yet by the mid-1780s, it was increasingly apparent "that the constitution of 1776, did not meet the full approbation of the people."¹⁶⁹ In response to the chorus of calls for change, the Assembly, in a 1789 resolution, provided for the election of a constitutional convention, which would "possess every advantage which . . . experience have unfolded, from the forms of government in other states, and the examples of improvement they have shewn, as well as from the excellent model . . . [of] the constitution of the United States."¹⁷⁰ Among the many abuses that Pennsylvanians sought to repudiate in adopting a new constitution was that of the Assembly delegating its lawmaking authority to others. In 1777, the Assembly passed a measure establishing the Council of Safety, conferring upon that body "full power to . . . provide for the preservation of the Commonwealth by such regulations and ordinances as seemed best to [the Council]."¹⁷¹ This enactment drew widespread criticism. In 1784, a legislative committee tasked with "enquir[ing] whether the constitution has been preserved inviolate" issued a damning report concluding that "the legislative body of this state" was indeed responsible for "various and multiplied instances of departure from the frame of government."¹⁷² One such departure was a violation of the nondelegation principle: "The act of assembly constituting a council of safety, passed Oct. 13, 1777, in as much as it . . . transferred . . . legislative authority to the council of safety, w[as] [an] infringement[]" of the constitution.¹⁷³

Many states during this era had their own counterparts to Pennsylvania's Council of Safety. Mortenson and Bagley mention one such body, noting that Virginia's legislature during the 1770s "'delegated many special powers' to the governor and Council of State, including the authority 'to direct recruiting . . . and utilization of troops' . . . and even 'to maintain fair

¹⁶⁸ THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, at iv (Harrisburg, John S. Wiestling 1825).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 134.

¹⁷¹ AGNES HUNT, THE PROVINCIAL COMMITTEES OF SAFETY OF THE AMERICAN REVOLUTION 95 (1904).

¹⁷² THE PROCEEDINGS RELATIVE TO CALLING THE CONVENTIONS OF 1776 AND 1790, *supra* note 169, at 83.

¹⁷³ *Id.* at 108.

prices.”¹⁷⁴ These councils, however, “were regarded merely as a temporary and abnormal expedient”—a deviation from the principle of separation of powers that was never to be repeated.¹⁷⁵

Other attempts by state legislatures during this period at delegating their lawmaking powers prompted similar objections. New York’s Council of Revision (the state’s executive branch) vetoed a 1780 proposal by the legislature that would have established another council tasked with “assist[ing] in the administration of the government during the recess of the Legislature.”¹⁷⁶ Among the Revision Council’s objections were that the proposed administrative body would “exercise the powers of legislation; which by the Constitution is vested in the Senate and Assembly, and cannot by them be delegated to others.”¹⁷⁷ In an essay published in 1785, Thomas Jefferson recounted a proposal introduced in Virginia’s House of Delegates in 1776 that would have vested a single official “with every power legislative, executive, and judiciary, . . . over our persons and over our properties”¹⁷⁸; and a similar measure proposed in 1781.¹⁷⁹ Jefferson asked rhetorically, “from whence have [the legislature] derived th[e] power” to pass such an act?¹⁸⁰ “Is it from any principle in our new constitution expressed or implied?”¹⁸¹ No, he wrote, because that document “proscribes under the name of prerogative the exercise of all powers undefined by the laws Our ancient laws expressly declare, that those who are but delegates themselves shall not . . . transfer . . . their powers into other hands”¹⁸² Revolutionary Richard Price wrote along the same lines in 1785 that he was

¹⁷⁴Mortenson & Bagley, *supra* note 5, at 302 (quoting Session of Virginia Council of State (Jan. 14, 1778) (editorial note), available at NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/01-01-02-0065>).

¹⁷⁵HUNT, *supra* note 171, at 157.

¹⁷⁶ALFRED B. STREET, THE COUNCIL OF REVISION OF THE STATE OF NEW YORK 234 (Albany, William Gould 1859) (italics omitted).

¹⁷⁷*Id.*

¹⁷⁸Thomas Jefferson, *Notes on Virginia*, in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 63, at 368.

¹⁷⁹*See id.*

¹⁸⁰*Id.* at 369. The precise nature of the power the 1776 and 1781 proposals purported to delegate is somewhat unclear. *See* Parrillo, *Supplemental*, *supra* note 4, at 35–42. However, the general point still holds that pre-ratification legislation of the kind that Mortenson and Bagley rely on was controversial even back then, often specifically because it delegated legislative power.

¹⁸¹Thomas Jefferson, *Notes on Virginia*, in 8 THE WRITINGS OF THOMAS JEFFERSON, *supra* note 63, at 369.

¹⁸²*Id.*

“not satisfied” with the extant state constitutions, which had not been “sufficiently careful . . . to separate the objects of legislation from those of the general administration”; as an example, Price disapprovingly cited state legislatures’ delegations of “authority to executive bodies, and to Governors, to prohibit the exportation of certain commodities on certain occasions.”¹⁸³ And while Mortenson and Bagley claim that the nondelegation rule “[went] unmentioned in the state ratification debates,”¹⁸⁴ that is not quite accurate. During Virginia’s debate, Madison voiced disagreement with another delegate’s claim “that there was no instance of power once transferred being voluntarily renounced,” asking, “have we not seen already, in seven states, (and probably in an eighth state,) legislatures surrendering some of the most important powers they possessed?”—an allusion to the aforementioned Revolution-era delegations of authority to councils.¹⁸⁵ But not to worry, Madison reassured the other delegates; the proposed federal Constitution would not allow such abuses.¹⁸⁶

When viewed in historical context, then, the pre-Ratification practices cited by Mortenson and Bagley do more to undercut their claim that the Constitution of 1787 places no constraints on congressional delegations of authority than they do to support it.¹⁸⁷ It simply makes no historical sense to say that, because state legislatures engaged in certain practices during the pre-Ratification era, the U.S. Constitution must allow Congress to engage in the same activities. Mortenson and Bagley, with equal (im)propriety, could have argued that, since southern states enacted discriminatory “Black Codes”

¹⁸³ PRICE, *supra* note 111, at 113, 115–16.

¹⁸⁴ Mortenson & Bagley, *supra* note 19, at 2347.

¹⁸⁵ 3 ELLIOT’S DEBATES, *supra* note 106, at 90 (statement of James Madison).

¹⁸⁶ *Id.* (“But . . . by this government, powers are not given to any particular set of men; they are in the hands of the people; delegated to their representatives chosen for short terms: to representatives responsible to the people As long as this is the case we have no danger to apprehend.”).

¹⁸⁷ Parrillo also criticizes my and other originalists’ reliance on the pre-Ratification sources cited herein. See Parrillo, *Supplemental*, *supra* note 4, at 35–42. He offers reasons for each source as to why the views expressed by the author may not have been shared by a majority of that person’s contemporaries. In many cases, Parrillo is probably right that pre-Ratification articulations of the nondelegation rule did not represent the prevailing view at the time, but he misses the larger point—which is that the practices Mortenson and Bagley cite in arguing against a nondelegation doctrine were contested at the time of their adoption by the country’s leading statesmen, and likely were among the practices that the Framers sought to repudiate in adopting the Constitution of 1787 and the stricter separation of powers established thereby.

shortly before the adoption of the Fourteenth Amendment, that provision must be read as allowing states to enact Black Codes.

V. POST-RATIFICATION PRACTICE

Mortenson and Bagley continue their chronological analysis with a discussion of the First Congress, which they claim often “delegated virtually unguided discretion on major policy questions . . . without betraying a hint of concern that doing so might violate the Constitution.”¹⁸⁸ This practice, Mortenson and Bagley inform us, reflects a rejection by the Framing generation of a constitutional nondelegation principle. Yet none of the legislation cited by the authors shows any such thing, as every enactment they discuss either falls into one of the well-established “exceptions” to the principle of nondelegation or is obviously not a delegation of legislative power at all.

A. Delegations to Regional Governments

Mortenson and Bagley begin with a four-page review of the First Congress’s many delegations of power to regional governments in the federal territories and the District of Columbia.¹⁸⁹ As my prior article conceded, there was a well-established exception to the nondelegation principle that permitted Congress, by virtue of its constitutional grants of plenary power over territories and D.C.,¹⁹⁰ to delegate legislative power within those areas to local legislatures.¹⁹¹ Although that claim was correct, it was perhaps inartful to characterize this as an exception to the Nondelegation Doctrine, when, in fact, Congress’s power to govern the Territories and the District is not bound by *any* of the Vesting Clauses of Articles I, II, or III.¹⁹² Congress

¹⁸⁸Mortenson & Bagley, *supra* note 5, at 333.

¹⁸⁹*Id.* at 334–38.

¹⁹⁰U.S. CONST. art. IV, § 3, cl. 2; art. I, § 8, cl. 17.

¹⁹¹In this regard, Congress’s powers over federal *territory* and federal *property* are analytically distinct. Congress may delegate management of federal property not because of some “exception” to the Nondelegation Doctrine but because management of government property is not the exclusive province of the legislature; that is, executive regulations respecting federal lands are “mere[ly] rules prescribed by an owner of property for its disposal,” and in that sense are “not of a legislative character.” *Butte City Water Co. v. Baker*, 196 U.S. 119, 126 (1905); *see also* Gordon, *supra* note 9, at 775 n.195, 782.

¹⁹²*See* *Ortiz v. United States*, 138 S. Ct. 2165, 2196 (2018) (Alito, J., dissenting); *Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850); *Am. Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 546 (1828).

may enact organic statutes pursuant to which territorial or District residents establish their own legislative, executive, and judicial branches.

As a matter of logic, Mortenson and Bagley have a point here: the substantive scope of a congressional grant of power should not bear on that power's delegability: "If originalists are right that Congress can't delegate its Article I authority to 'regulate Commerce,' it should follow that Congress also can't delegate" its plenary power over territories.¹⁹³ Perhaps that conclusion *should* follow, but it does not—at least not as a matter of history. Congress's authority over federal territories and D.C. was always understood as *sui generis*, in that it was not bound by the vesting clauses.¹⁹⁴

A few attempts at explaining the local-governance carve-out from nondelegation norms have been made over the years. Some sources from the early Republic reasoned that, because local governments were corporations, the legislature could delegate to them powers to regulate within their limits, "for it is, by common law, incident to every corporation aggregate to make by-laws for the government of its own members"; and so long as "those by-laws extend only to those . . . within the jurisdiction of the corporation," the grant of authority to enact local ordinances is not "a delegation of the power of . . . legislation."¹⁹⁵ Other authorities from that era, such as one 1828 Louisiana Supreme Court decision, reasoned that while the "legislative power" referenced in the constitution was indeed non-delegable, that power referred to that "of the state government only" to legislate "over every part of [the state]"; but, "the legislature, in establishing corporations, may enable them to exercise subordinate legislation . . . over their members."¹⁹⁶ That is, a local or territorial government was exercising the legislative power of the locality or territory, not of the state or country as a whole.

At the end of the day, however, most nineteenth-century authorities that weighed in on this issue explained the local-governance exception to the vesting clauses with a shrug, concluding (somewhat unsatisfyingly) that delegations of authority to local governments were validated by antiquity and "grandfathered in," notwithstanding the general principle of nondelegation. The great Thomas Cooley expressed the prevailing attitude succinctly: "the bestowal of" "powers of legislation . . . upon" "municipal corporations . . . is

¹⁹³ Mortenson & Bagley, *supra* note 5, at 336.

¹⁹⁴ *Ortiz*, 138 S. Ct. at 2196 (Alito, J., dissenting).

¹⁹⁵ *Corp. of Wash. v. Eaton*, 29 F. Cas. 345, 348 (C.C.D.D.C. 1833) (No. 17,228); *Parker v. Commonwealth*, 6 Pa. 507, 521 (1847); *Rice v. Foster*, 4 Del. (4 Harr.) 479, 497 (1847).

¹⁹⁶ *City of New Orleans v. Morgan*, 7 Mart. (n.s.) 1, 2–5 (La. 1828); *accord Rice*, 4 Del. at 497.

not to be considered as trenching upon the maxim that legislative power is not to be delegated, since that maxim is to be understood in the light of the immemorial practice . . . recogniz[ing] the propriety of vesting in the municipal organizations certain powers of local regulation . . .”¹⁹⁷ But this exception—which, to reiterate, was an exception to all three constitutional vesting clauses, not merely that of Article I—was just that: an *exception*, and for Mortenson and Bagley to zero in on these sorts of congressional delegations and infer therefrom an absence of any constitutional nondelegation rule is historically myopic.

It is worth noting, too, that there appear to have been some limitations on legislatures’ power to delegate authority to local bodies. For one, this exception to the nondelegation principle applied only where the subordinate body entrusted with powers of local governance was answerable to residents of the region for which it legislated¹⁹⁸ since the exception was founded upon the theory that corporations may make bylaws for their own members. “[B]y-laws,” explained one court in 1841 as it upheld a state legislative delegation of power to municipal authorities, are by nature “the rules of action which the inhabitants of a place prescribe for their own government.”¹⁹⁹ A congressional delegation to a federal executive (whose constituency is national) the power to legislate over a given region would thus likely fall outside the exception.²⁰⁰ Additionally, at the federal level, Congress’s limited

¹⁹⁷ COOLEY, *supra* note 99, at 118; *accord* State v. Field, 17 Mo. 529, 533 (1853); *Parker*, 6 Pa. at 528; *Santo v. State*, 2 Iowa 165, 204 (1855); *Kennedy v. Sowden*, 26 S.C.L. (1 McMul.) 323, 325 (1841); *Moore v. Allen*, 26 Ky. (3 J.J. Marsh.) 612, 616 (1830).

¹⁹⁸ *See, e.g.*, *Marr v. Enloe*, 9 Tenn. (1 Yer.) 452, 453 (1830) (statute empowering county judges to set tax rates in each county did not fall under the local-governance exception to nondelegation because it vested taxing power “not [in] [citizens’] representatives” but in officials “holding permanent offices”); *In re Borough of W. Phila.*, 5 Watts & Serg. 281, 283–84 (Pa. 1843); *Wells v. City of Weston*, 22 Mo. 384, 389 (1856).

¹⁹⁹ *City of Mobile v. Yuille*, 3 Ala. 137, 143 (1841), *overruled on other grounds*, *Town of Huntsville v. Phelps*, 27 Ala. 55 (1855).

²⁰⁰ Or at least it would seem so, based on early state-court decisions considering nondelegation issues arising under state constitutions—which derived such a restriction on delegations to local governments from the general principle that a municipality, like other corporations, has the right to enact bylaws for the “government of its members,” *Rice*, 4 Del. at 496; and early federal decisions held that, much like a municipal or county government established by a state legislature, a “territorial government” established by Congress pursuant to its Article-IV power “[wa]s a corporate body,” *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 422 (1819); as was the local legislature Congress created for D.C., see *Eaton*, 29 F. Cas. at 348. Given the similar corporate nature of municipal and county governments to those of federal territories and D.C., it follows that Congress could likewise only invoke the local-governance exception to the federal nondelegation

constitutional powers (in contrast to those of state legislatures) allowed it to establish subordinate local legislatures only within regions over which it had plenary authority²⁰¹: federal territories and D.C.

B. Other Early Federal Statutes

Mortenson and Bagley, straining to identify early congressional enactments that should have been unconstitutional delegations of legislative power per my conception of the nondelegation rule, cite a number of early statutes dealing with public finance and budgets. None support the pair's position.

The first of these is a law allowing the president to “borrow[] on behalf of the United States, a sum . . . not exceeding . . . twelve million of dollars; and that so much of this sum as may be necessary to the discharge of the said arrears and instalments,” and to “ma[ke] such other contracts respecting the said debt as shall be found for the interest of the said States.”²⁰² This measure, while admittedly a grant of substantial executive discretion, is not a delegation of legislative power. For one, insofar as it leaves “the choice of prioritization among lenders . . . entirely up to [the president],”²⁰³ it merely delegates to the executive a discretion in the foreign-affairs realm, which—just to reiterate—is permissible under the Framing-era conception of the separation of powers. As for the presidential discretion over the borrowing of funds to be used in paying foreign debts, “Congress may delegate the power to issue such rules” because the president, in exercising this discretion, is acting as a contractor “rather than a legislator.”²⁰⁴ Such proprietary powers over government borrowing, while Congress could undoubtedly exercise them itself using its Necessary-and-Proper-Clause authority,²⁰⁵ are not *purely*

rule when delegating to a legislature answerable to the electorate of the region for which it legislated. Madison, after all, reassured the Nation before Ratification that D.C. residents would elect “the government . . . exercis[ing] authority over them; as a municipal legislature for local purposes, derived from their own suffrages, will of course be allowed them.” THE FEDERALIST No. 43, at 272 (James Madison) (Clinton Rossiter ed., 1961).

²⁰¹ See, e.g., *Parker*, 6 Pa. at 528; cf. TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 63, eds. app. note d at 278 (contemplating that Congress's “power to exercise exclusive legislation in all cases” for D.C. may “comprehend[] an authority to delegate . . . to another subordinate body.”).

²⁰² Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 139.

²⁰³ Mortenson & Bagley, *supra* note 5, at 344 (citing Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 139).

²⁰⁴ Gordon, *supra* note 9, at 782.

²⁰⁵ See U.S. CONST. art. I, § 8, cl. 18.

legislative; they no more partake of sovereignty than the prerogatives exercised by any private person in borrowing money.²⁰⁶ Ditto for the other 1790 statute cited by Mortenson and Bagley, which provided that surplus revenue from federal exercises and duties would be used to repurchase federal debt.²⁰⁷

To see this principle in action, consider the Supreme Court's 1825 decision *Wayman v. Southard*, where the Court, speaking through Chief Justice Marshall, upheld a statute authorizing federal courts "to make all necessary rules for the orderly conducting business in the said Courts."²⁰⁸ While conceding that the Constitution prohibited Congress from delegating legislative authority, the Court upheld the statute against a nondelegation challenge, explaining that the power delegated to the courts

is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution. To vary the terms on which a sale is to be made, . . . whether . . . on credit, or for ready money, is . . . of the same principle. It is . . . the regulation of . . . the Court in giving effect to its judgments. A general superintendence over this subject seems to be properly within the judicial province, and has been always so considered.²⁰⁹

If the power to "vary the terms on which a sale is to be made" is incidental to the judiciary's inherent power over the means of executing its judgments, it stands to reason that similar proprietary powers over federal debts, contracts, and property are incidental enough to the executive power that

²⁰⁶ See Andrew Jackson, President, Protest to the Senate (Apr. 15, 1834) ("Public money is but a species of public property. . . . The legislative power may undoubtedly . . . prescribe in what place . . . the public property shall be kept and for what reason it shall be removed . . . ; yet will the custody remain in the executive . . . [F]rom [the Government's] first organization the . . . Treasury . . . made contracts . . . in relation to the whole subject-matter, which was . . . committed to [executive] direction . . .").

²⁰⁷ Act of Aug. 12, 1790, ch. 47, 1 Stat. 186. This also explains why the statute allowing the Treasury to remit statutory fines in some instances (discussed in note 235, *infra*), on which Arlyck's argument relies so heavily, does not undercut the historical case for nondelegation. The act was not only justifiable as delegating authority incidental to the pardon power, see Gordon, *supra* note 9, at 794, but also because it merely conferred upon the Secretary a kind of proprietary power to return specified sums of government money (a form of federal property) in certain circumstances.

²⁰⁸ 23 U.S. (10 Wheat.) 1, 22–23 (1825) (quoting Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83).

²⁰⁹ *Id.* at 45.

discretion in this area may be committed by law to executive officials without offending the nondelegation rule. Still, Marshall cautioned, Congress may not “delegate . . . to any other [body], powers which are strictly and exclusively legislative.”²¹⁰ And what were these “exclusively” legislative powers? According to another of Marshall’s majority opinions, “[i]t is the *peculiar* province of the legislature to prescribe general rules for the government of society.”²¹¹ *That* power, unlike proprietary control over federal property, is non-delegable.

The characterization of the powers delegated by the laws discussed above as mere powers over “proprietary concerns” has been criticized recently by some scholars. Parrillo, for instance, argues that the distinction between “governmental engagement in voluntary contracts” and other proprietary matters on the one hand, and “coercive exercises of sovereignty” on the other, “does not have a textual basis” unless one implausibly reads the term “‘legislative power’ . . . to refer exclusively to making rules of private conduct.”²¹² This criticism misunderstands the originalist argument. *Of course* the power to make rules for the government’s internal proprietary affairs and contracting is a legislative power, in the sense that it may be validly done by legislation. But it is not a *purely* legislative power; it overlaps with the inherent powers of the executive and judiciary to make rules governing their own operations, including rules governing property entrusted to their control.²¹³ It is because of this overlap that greater congressional delegation of authority is tolerated with regard to these subjects.

None of this is to say, of course, that delegations of contracting powers to the executive never violate the Nondelegation Doctrine. When the executive agrees to exercise its purely *sovereign* authority (as opposed to merely its prerogatives as a borrower, employer, or proprietor) in a certain manner as consideration for entering into a contract, nondelegation concerns arise. If, for example, a federal agency were to agree not to pursue enforcement action against a regulated party for any future unlawful acts, that agreement probably could not be enforced against the agency in the future, for Congress cannot delegate to the executive the power to suspend the laws.²¹⁴ To be sure,

²¹⁰ *Id.* at 42.

²¹¹ *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) (emphasis added).

²¹² Parrillo, *Supplemental*, *supra* note 4, at 18–19; *see also* Chabot, *supra* note 4, 107–08.

²¹³ *See Bank of U.S. v. Halstead*, 23 U.S. (10 Wheat.) 51, 61–62 (1825).

²¹⁴ *See United States v. Smith*, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (Paterson, J.) (“[A] pardon may be granted; but th[is] . . . [is] very different from a power to dispense with the law.”).

where the penalties for unlawful conduct are criminal, and where the agreement only shields the signatory from prosecution for *past* conduct, Congress may authorize executive officials to enter into non-prosecution agreements that bind future administrations, since this limited authority is an incident of the pardon power constitutionally entrusted to the president.²¹⁵ But a pardon shields the recipient only from criminal penalties, not from other non-criminal legal obligations.²¹⁶ Nor can a pardon “restore offices forfeited, or property or interests” lost “in consequence of [a criminal] conviction,”²¹⁷ or immunize the recipient from prosecution for acts committed after the pardon is issued.²¹⁸ Any contract pursuant to which the executive purports to relieve private actors of legal duties or liabilities beyond those of which a pardon could relieve them is thus an attempt by the executive to suspend the laws, an unconstitutional exercise of legislative power.

The next set of enactments Mortenson and Bagley discuss are those providing for collection of imposts and other taxes.²¹⁹ In the maritime context, for instance, “port-of-entry collectors were authorized to put inspectors on arriving ships ‘to examine the cargo or contents’ and ‘to perform such other duties according to law, as they shall be directed by the said collector . . . to perform for the better securing the collection of the duties.’”²²⁰ To the same effect, Mortenson and Bagley cite statutes empowering those same collectors to seize or open packages when they were

²¹⁵U.S. CONST. art. II, § 2, cl. 1. This power may be exercised conditionally, see *United States v. Padelford*, 76 U.S. (9 Wall.) 531, 542 (1869); as well as by presidential subordinates, see 3 STORY, *supra* note 127, § 1498.

²¹⁶See *United States v. Wilson*, 32 U.S. (7 Pet.) 150, 160 (1833); *Young v. United States*, 97 U.S. 39, 66 (1877) (“He was no offender, in a criminal sense. . . and could not be, included in the pardon . . .”); *Smith*, 27 F. Cas. at 1230 (noting that “a pardon . . . presume[s] criminality”); *In re Nevitt*, 117 F. 448, 453 (8th Cir. 1902); *Ex parte Grossman*, 267 U.S. 87, 111 (1925); *Pardon Information and Instructions*, U.S. DEP’T OF JUST. (Nov. 23, 2018), <https://www.justice.gov/pardon/file/898541/download> (detailing that “only federal criminal convictions . . . may be pardoned”); Samuel T. Morison, *Presidential Pardons and Immigration Law*, 6 STAN. J. C.R. & C.L. 253, 278–79 (2010).

²¹⁷*Ex parte Garland*, 71 U.S. (4 Wall.) 333, 381 (1866).

²¹⁸See *Grossman*, 267 U.S. at 121; William F. Duker, *The President’s Power to Pardon: A Constitutional History*, 18 WM. & MARY L. REV. 475, 525–26 (1977).

²¹⁹Mortenson & Bagley, *supra* note 5, at 345.

²²⁰*Id.* at 345–46 (alteration in original) (quoting Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164).

“suspicious of fraud”²²¹ and to search ships “if they shall have cause to suspect a concealment,”²²² another conferring upon the officers of revenue cutters the “authority to go on board of every ship or vessel which shall arrive within the United States . . . and to search and examine the same,”²²³ and yet another allowing “officers of inspection” tasked with carrying out the federal whiskey tax, “upon request, to enter into . . . buildings . . . , and by tasting, gauging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also to take samples thereof, paying for the same the usual price.”²²⁴

None of these statutes are delegations of legislative power, however, for none of them empower executive officials to formulate “rule[s] of civil conduct . . . commanding what [citizens] are to do, and prohibiting what they are to forbear.”²²⁵ The statutory text resolved all such questions; all that was delegated to executive officials was discretion in their exercise of quintessentially law-execution functions.

Mortenson and Bagley nonetheless insist that “[i]n none of these statutes did Congress lay down any meaningful guidance about the circumstances in which ships ought to be searched or the type of evidence that ought to make collectors think that fraud or smuggling was afoot.”²²⁶ Perhaps so, but however little guidance these statutes gave executive officers in the exercise of their enforcement discretion, that discretion was nonetheless substantially constrained by constitutional protections against unreasonable search or seizure.²²⁷ In carrying out the excise laws (or any other laws, for that matter), an official’s search or seizure of private property was permissible only “if he appears to have acted reasonably, and on probable grounds of belief that the laws had been violated.”²²⁸ The Supreme Court, in an 1813 case concerning condemnation of a ship’s cargo, explained that “the term ‘probable cause,’ according to its usual acceptation, means less than evidence which would justify condemnation; and, in all cases of seizure, has a fixed and well known meaning. It imports a seizure made under circumstances which warrant

²²¹ Act of July 31, 1789, ch. 5, § 22, 1 Stat. 29, 42.

²²² *Id.* § 24, 1 Stat. at 43.

²²³ Act of Aug. 4, 1790, ch. 35, § 64, 1 Stat. 145, 175.

²²⁴ Act of Mar. 3, 1791, ch. 15, § 29, 1 Stat. 199, 206.

²²⁵ *Law*, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828).

²²⁶ Mortenson & Bagley, *supra* note 5, at 346.

²²⁷ U.S. CONST. amend. IV.

²²⁸ *United States v. The Reindeer*, 27 F. Cas. 758, 768 (C.C.D.R.I. 1848) (No. 16,145).

suspicion.”²²⁹ Whether the “combined circumstances furnish . . . just cause to suspect that the goods, wares, and merchandize” seized by executive officials “have incurred the penalties of the law” was ultimately left to “the opinion of the [c]ourt” reviewing the challenged action.²³⁰

Mortenson and Bagley also point to a provision of the Whiskey tax statute that established fourteen tax districts, which were “subject to alterations by the President . . . by adding to the smaller such portions of the greater as shall in his judgment best tend to secure and facilitate the collection of the revenue.”²³¹ But the president’s discretion under this measure is plainly limited to matters of administrative convenience in collecting excises, the rates and objects of which had already been determined by Congress.²³² It is absurd to suggest that the Framing generation, because they apparently considered this provision constitutional, would have no problem with, say, the modern Federal Trade Commission’s statutory power to “prescribe rules prohibiting” whatever it deems “abusive telemarketing acts or practices.”²³³

Finally, Mortenson and Bagley argue that “through[out] the 1790s . . . Congress delegated wide authority to the executive,”²³⁴ citing the following enactments as supposed illustrations: the embargo acts passed during the “Quasi-War” with France, the 1790 patent statute, a 1790 law giving the president discretionary power to regulate trade with Indian tribes, a 1789 law dealing with military pensions, a 1790 statute allowing the Treasury Secretary to remit fines at his discretion, a 1798 law giving the president power to raise an army of up to 10,000 in certain national-security emergencies, as well as a similar statute from 1791.²³⁵

That these laws were not delegations of legislative power has been demonstrated in detail elsewhere.²³⁶ For now, here are the cliff notes of the explanations for each enactment. The embargo acts and other statutes

²²⁹ *Locke v. United States*, 11 U.S. (7 Cranch) 339, 348 (1813).

²³⁰ *Id.*

²³¹ Act of Mar. 3, 1791, ch. 15, § 4, 1 Stat. 199, 200.

²³² *Id.* § 1, 1 Stat. at 199.

²³³ 15 U.S.C. § 6102(a)(1).

²³⁴ Mortenson & Bagley, *supra* note 5, at 356.

²³⁵ In order: Act of June 13, 1798, ch. 53, 1 Stat. 566 (embargo); Act of Feb. 9, 1799, ch. 2, § 1, 1 Stat. 613, 613–14 (similar); Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (patents); Act of July 22, 1790, ch. 33, 1 Stat. 137 (trade with Indians); Act of Sept. 29, 1789, ch. 24, 1 Stat. 95 (pensions); Act of May 26, 1790, ch. 12, 1 Stat. 122, 123 (remission of fines); An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, 1 Stat. 558 (1798).

²³⁶ See Gordon, *supra* note 9, at 782–86, 792–98, 747–50.

delegating generous rulemaking authority to the president in the foreign-affairs realm were justified by reference to the principle that Congress has broader “license to delegate rulemaking authority to the president in the area of foreign affairs, even if such rules incidentally affect private actors domestically.”²³⁷ The 1790 patent law is likewise weak evidence against the Nondelegation Doctrine; for one, the law may not have been an unconstitutional delegation in the first place, and its provision supposedly delegating improper powers was quickly repealed precisely because many felt it vested too much discretion in those officers charged with executing the law.²³⁸ The 1790 Nonintercourse Act, which delegated to the president discretionary power over trade with Indian tribes, was equally unproblematic. “[T]he . . . government, at that time, generally dealt with . . . tribes using the treaty power, as they were considered sovereign entities in some respects,”²³⁹ and so the Constitution tolerated broader delegations to the executive in this area just as it tolerated them in the realm of foreign affairs. The 1789 military pension law was obviously not a delegation of legislative power, either; the act itself determined the amounts and recipients of those pensions, leaving to presidential discretion only the details of how to disburse payments (which was incidental to the President’s power to overseeing internal military administration, anyway).²⁴⁰ The 1790 statute authorizing the Treasury Secretary to “direct [a] prosecution . . . to cease,” and to “mitigate or remit” a fine if he believes it was “incurred without wilful negligence or . . . fraud,” likewise raised no nondelegation concerns; the decision to discontinue a prosecution was functionally no different from an ordinary exercise of prosecutorial discretion, and his delegated authority to mitigate or remit a fine was understood as an incident of the pardon power.²⁴¹

²³⁷ *Id.* at 782; *see also id.* at 786.

²³⁸ *Id.* at 795–99. Arlyck quibbles with my account of the patent law’s repeal, claiming that I wrongly asserted that Congress repealed that statute “out of concern that the 1790 Act unconstitutionally delegated legislative authority to the executive branch.” Arlyck, *supra* note 4, at 309. That is *not* what I said. Rather, I merely noted (accurately) that the law was repealed in part because some thought “that it vested too much discretion in those . . . charged with executing” it. Gordon, *supra* note 9, at 798.

²³⁹ Gordon, *supra* note 9, at 794–95 (footnote omitted) (citing, e.g., *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831)).

²⁴⁰ *See id.* at 793.

²⁴¹ *Id.* at 794 (second alteration in original); *see also* RAWLE, *supra* note 144, at 165; 3 STORY, *supra* note 127, § 1498.

Finally, there is the 1798 law authorizing the president to raise an army of up to 10,000 troops under certain circumstances.²⁴² My prior article’s analysis of this provision, while I believe it was substantially accurate,²⁴³ failed to mention a key change to the act during the drafting process that speaks to the nondelegation issue. When this measure was introduced in the House, it originally provided that the president could raise an army as, in his judgment, the “public safety requires.”²⁴⁴ This proposal prompted objections from numerous lawmakers who believed that it unconstitutionally delegated legislative power to the president.²⁴⁵ Supporters of the bill placated such concerns by amending the bill to specify that the president’s power to enlist the troops would be activated only “in the event of a declaration of war against United States, or of actual invasion of their territory . . . or of imminent danger of such invasion . . . before the next session of Congress.”²⁴⁶ The amendment rendered the measure constitutional, its supporters successfully argued, because it merely authorized the president to take specified actions when “a certain contingency shall have taken place,” and therefore was not a delegation of “legislative” power.²⁴⁷ The measure passed—though no lawmaker suggested that there were no constitutional limits on statutory delegations of authority; indeed, several emphatically stated otherwise.²⁴⁸ In the end, the Fifth Congress, while it “accept[ed] the constitutionality of delegating . . . factual determinations,” plainly “*rejected* the constitutionality of delegating vague policy questions.”²⁴⁹

²⁴²Gordon, *supra* note 9, at 749 (citing, e.g., An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 558 (1798)).

²⁴³*Id.* at 749–50.

²⁴⁴8 ANNALS OF CONG. 1685 (1798).

²⁴⁵*See id.* at 1638, 1649–56.

²⁴⁶An Act authorizing the President of the United States to raise a Provisional Army, ch. 47, § 1, 1 Stat. 558, 588 (1798).

²⁴⁷*See* 8 ANNALS OF CONG. 1528 (1798) (statement of Rep. Sewall).

²⁴⁸*See, e.g., id.* at 1703–07.

²⁴⁹Br. of the Competitive Enter. Inst. et al. as *Amici Curiae* in Support of Petitioner at 13, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 2684376 (emphasis added). Mortenson and Bagley assert that, during debate on the provisional army bill, “some members of the Founding generation . . . reject[ed]” the Nondelegation Doctrine outright. Mortenson & Bagley, *supra* note 19, at 2334 n.48 (quoting Representative Dana’s statement that constitutional objections to the measure “prove[d] too much, and [were] perfectly ridiculous,” 8 ANNALS OF CONG. 1637 (1798)). But Dana was merely criticizing an unduly stringent conception of nondelegation, which he warned would require Congress to act as “tax-gatherers, borrowers of money or money brokers, apprehenders of coiners, and recruiting sergeants.” 8 ANNALS OF CONG.

C. Naturalization Statutes

The closest Mortenson and Bagley get during their post-ratification congressional-practice discussion to identifying even one enactment that arguably cuts against the originalist case for the Nondelegation Doctrine is their citation of the nation's first naturalization statute, passed in 1790. The law provided that "any alien, being a free white person, who shall have resided within . . . the United States for . . . two years, may . . . become a citizen thereof, on application to any common law court of record" if, among other requirements, he demonstrates "to the satisfaction of such court, that he is a person of good character."²⁵⁰ The delegation of authority to courts to determine an applicant's "good character" may at first blush seem like a potentially constitutionally concerning grant of power.

Yet, upon scrutiny, the naturalization law falls short of delivering a body blow to the historical case for nondelegation. For one, the law merely authorized officials to apply general rules in particular cases, which "is not a delegation of legislative power," but rather of adjudicatory (or "quasi-judicial") power.²⁵¹ And "[t]here is certainly a difference between a discretionary power in a court, so undefined as to render its principles of decision in each case . . . vague and loose, and an authority to prescribe a rule for the regulation of other cases."²⁵² Still, nondelegation concerns ought not

1637 (1798). In fact, far from categorically rejecting the nondelegation principle, Dana apparently accepted its premises, as he proceeded to explain: "What, then, is the meaning of this general power placed in Congress [to raise and support Armies]? . . . [It is] that Congress shall define the number of troops to be raised, and the manner and the time of their service, and having done that, . . . they have done all that is necessary; the rest is to be submitted to the Executive." *Id.* That Dana believed some core policy choices "necessar[ily]" had to be made by Congress and could not be delegated supports, rather than undermines, the originalist case for the Nondelegation Doctrine. Mortenson and Bagley go on to quote two other congressional defenders of the provisional army bill's constitutionality, but neither lawmaker endorsed anything like Mortenson and Bagley's absolutist view that there are no constitutional constraints on statutory delegations of power to the executive. *See id.* at 1635 (statement of Rep. Sewall) (defending the bill on the ground that "nothing more is intended to be done than to authorize the President to raise an army, in case of certain contingencies"); *id.* at 1678 (statement of Rep. Dayton) (calling constitutional objections to the bill "remarkable for the[ir] novelty" without elaborating on whether the Constitution limited congressional delegations of power).

²⁵⁰ Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103.

²⁵¹ Gordon, *supra* note 9, at 755–56. Nor is the law an invalid grant of Article III "judicial Power" to the executive since it concerns adjudication of "public rights." *See Murray's Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1855).

²⁵² *Ritter v. Ritter*, 5 Blackf. 81, 82 (Ind. 1839). An illustration of this distinction may be found in the case just quoted, which rejected a nondelegation challenge to a statute that authorized circuit

be brushed aside too casually; the naturalization statute conferred upon courts the discretion to assess an applicant's "character," which is more a value judgment than a factual determination. Nor can the statute be justified by reference to the principle that Congress may delegate greater discretion to the executive in the foreign-relations realm; the law delegates discretion to *courts*, which (whether state or federal) are neither part of the executive branch nor otherwise subject to presidential control.

So how could the Framing generation accept the Nondelegation Doctrine's constitutional validity (as virtually all other evidence suggests they did) and simultaneously enact a statute basing naturalization on a judicial determination of character? For one, such determinations were commonplace in many areas of law, where the character of witnesses and litigants alike was frequently put in issue; and where a framework of rules had emerged governing a court's inquiry into the matter.²⁵³ What sort of evidence guided that inquiry? A conviction for an "infamous" crime (i.e., a felony), for instance, raised a presumption of bad character that could only be overcome by powerful contrary evidence.²⁵⁴ On the other hand, "[e]very man [wa]s supposed capable of supporting his general character" by sworn oath or testimony.²⁵⁵

Moreover, given that an applicant's affirmation of his or her own good character was competent evidence on that point, it seems that judges applying the 1790 naturalization law had far less discretion to reject applicants on character grounds than Mortenson and Bagley assume they did. In proceedings pursuant to the 1790 act and its successors, "[a]ll is ex parte," explained the clerk's headnotes in an 1830 Supreme Court case; "[n]o one

courts to grant divorces for any of several enumerated causes, or "for any other cause, . . . where the [circuit] Court . . . shall consider" a divorce "reasonable and proper." *Id.* The act did not "vest the Circuit Courts with legislative power," the justices held, explaining that a judicial grant of a divorce "judgment that [a] cause [for divorce] is reasonable . . . is not an act of legislation. It prescribes no rule. It is the decision . . . upon the . . . facts presented," and once made, "the discretion of the Court ends The application of such a standard to an alleged cause of divorce in a particular case, is not the enactment of a law." *Id.* at 83.

²⁵³ See, e.g., 3 NATHAN DANE, GENERAL ABRIDGEMENT AND DIGEST OF AMERICAN LAW 343 (Boston, Cummings, Hilliard & Co. 1824) ("It is sometimes material, in both civil and criminal cases, to know . . . how the character of a party, or of a witness, can be . . . proved to be good or bad. . . . [T]here are rules in the books to be resorted to, in order to enable the judge or the lawyer to know . . . how character is to be put in issue or trial.")

²⁵⁴ See *State v. Holding*, 12 S.C.L. (1. McCord) 379, 381–82 (1821).

²⁵⁵ *Foot v. Tracy*, 1 Johns. 46, 53 (N.Y. Sup. Ct. 1806) (Kent, C.J.).

can oppose the act of granting the evidence of naturalization.”²⁵⁶ Neither the 1790 statute nor any of its pre-1900 successors allowed “the government to intervene or seek the cancellation of a naturalization judgment.”²⁵⁷ All applicants had to do to satisfy the character requirement, then, was present some evidence of their good character, which would presumably go uncontradicted. As one court explained in 1845, the alien’s oath was admissible evidence of good character, though applicants often had to supplement it with corroborating testimony from acquaintances.²⁵⁸ But by and large, in cases where applicants who met the other prerequisites for naturalization testified as to their own good character, and especially when they brought forth several others to do the same, courts granted applications as a matter of course.²⁵⁹ Only in 1906 did Congress, having “gr[own] concerned that federal courts were applying an insufficiently searching standard of review to naturalization petitions,” finally permit the government to intervene in naturalization proceedings.²⁶⁰

This perception of judicial liberality in granting naturalization applications is consistent with the scant antebellum caselaw interpreting the naturalization statutes. Supreme Court Justice Levi Woodbury, riding circuit in 1846, expressed his understanding that, “[w]here applicants discover a disposition to comply with the wishes of congress, . . . the inclinations of the court ought . . . to lean in favor of the petitioner.”²⁶¹ The U.S. Supreme Court weighed in on this issue in the 1849 *Passenger Cases*, where the Court invalidated a New York statute imposing a head tax on passengers on vessels arriving in the state from foreign nations. Though the five-justice majority produced no single opinion, Justice Catron, in an oft-cited concurrence joined by three of his colleagues, reasoned that the state law was preempted by the federal naturalization statute (which retained the 1790 act’s “character”

²⁵⁶ *Spratt v. Spratt*, 29 U.S. (4 Pet.) 393, 402 (1830); *accord In re An Alien*, 7 Hill 137 (N.Y. Sup. Ct. 1845); *Ex parte Pasqualt*, 18 F. Cas. 1283 (C.C.D.D.C. 1805) (No. 10,788); *Ex parte Saunderson*, 21 F. Cas. 540 (C.C.D.D.C. 1804) (No. 12,378); *Ex parte Walton*, 29 F. Cas. 125 (C.C.D.D.C. 1804) (No. 17,127); *Ex parte Tucker*, 24 F. Cas. 264 (C.C.D.D.C. 1802) (No. 14,214); *Butterworth’s Case*, 4 F. Cas. 924, 924 (C.C.D.R.I. 1846) (No. 2251).

²⁵⁷ James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1362 (2015).

²⁵⁸ *In re An Alien*, 7 Hill at 138–40.

²⁵⁹ *See, e.g.*, No. 5 J.: Rec. of the Sup. Ct. of Mich. from May 7, 1833 to June 30, 1836, 6 Blume Sup. Ct. Trans. 315, 346, 367–69, 373 (Mich. 1833).

²⁶⁰ Pfander & Birk, *supra* note 257, at 1362 n.53 (citing Act of 1906, Pub. L. No. 59-338, § 11, 34 Stat. 596).

²⁶¹ *Butterworth’s Case*, 4 F. Cas. at 924 (Woodbury, J.).

requirement): “The passengers in this instance were,” he wrote, “healthy persons of good moral character, *as we are bound to presume, nothing appearing to the contrary.*”²⁶²

This liberal judicial approach to the character element of naturalization also finds support in the 1790 law’s legislative history. In the House, Representative Jackson advocated requiring applicants to demonstrate good character, explaining,

I think, before a man is admitted to enjoy the high and inestimable privileges of a citizen of America, that . . . *he ought to pass some time in a state of probation, and, at the end of the term, be able to bring testimonials of a proper and decent behaviour; no man, who would be a credit to the community, could think such terms difficult or indelicate . . . [A]n amendment of this kind would be . . . proper; all the difficulty will be to determine how a proper certificate of good behaviour should be obtained; I think it might be done by vesting the power in the grand jury or district courts to determine . . . character . . .*²⁶³

This remark reinforces the view that the 1790 law’s “character” requirement conferred little discretion upon judges, for naturalization applicants could make the required showing with nothing more than the “testimonials” of several acquaintances. So while Mortenson and Bagley are technically right that Congress “didn’t lay out what factors ought to matter in deciding whether an alien was of ‘good character,’” they overreach in claiming that the issue “was left up to the courts.”²⁶⁴ True, this decentralized naturalization scheme made judicial discretion inevitable in practice, but does anyone seriously think that because the Framers considered the 1790 naturalization law constitutional, they would have felt the same way about the modern statute granting the SEC power to issue any “rules and regulations [that] the Commission” considers “necessary or appropriate in the public interest or for the protection of investors”?²⁶⁵

In fact, it is beyond question that at least three of the lawmakers present and participating in the debates preceding passage of the 1790 naturalization

²⁶²Smith v. Turner, 48 U.S. (7 How.) 283, 448 (1849) (Catron, J., concurring) (emphasis added).

²⁶³1 ANNALS OF CONG. 1114 (1790) (Joseph Gales ed., 1834) (emphasis added).

²⁶⁴Mortenson & Bagley, *supra* note 5, at 347–48.

²⁶⁵15 U.S.C. § 78i(a)(6).

act are on record as accepting the Nondelegation Doctrine as a constitutional imperative, yet none of these men objected on nondelegation grounds to the requirement that that naturalization applicants demonstrate their good moral character to a court.²⁶⁶ Indeed, Madison, who was present during the naturalization debate (and who vocally expounded nondelegation values on innumerable other occasions), approved of the bill's good-character provision.²⁶⁷ And Representative Page, a known proponent of the Nondelegation Doctrine,²⁶⁸ voiced his opposition on practical grounds to including a good-character requirement in the naturalization statute, but did not argue that the proposed measure would unconstitutionally delegate legislative power.²⁶⁹ That Page declined to invoke a constitutional principle in which he undoubtedly believed, even though it would have served him politically to do so, is a strong indication that the 1790 naturalization law's delegation of power to courts to determine applicants' character could coexist with the Constitution's Nondelegation Doctrine.

D. Post Roads Debate

Mortenson and Bagley also take issue with contemporary nondelegation proponents' analysis of the 1791 debate in the House of Representatives over a proposed bill establishing post roads. During the deliberations, Representative Sedgwick introduced an amendment that would have provided for delivery of mail "by such route as the President . . . shall, from time to time, cause to be established."²⁷⁰ Several lawmakers, including James Madison, objected to the proposal as an unconstitutional delegation of legislative power to the executive.²⁷¹ Sedgwick defended the measure *not* by denying the existence of a constitutional prohibition on such delegations, but instead by characterizing the power delegated by his proposal as merely executive, rather than legislative, in nature.²⁷² After some debate, a vote was taken, and the proposed delegation was rejected and replaced with specific enumeration of the routes along which mail was to be carried. "[T]he

²⁶⁶ 1 ANNALS OF CONG. 1112, 1114–16 (1790) (Joseph Gales ed., 1834) (citing statements of Reps. Hartley, Page, & Madison).

²⁶⁷ *See id.* at 1114.

²⁶⁸ *See id.* at 1114–15.

²⁶⁹ *See id.* at 1114 (calling the proposal "impracticable").

²⁷⁰ 3 ANNALS OF CONG. 229 (1791).

²⁷¹ *Id.* at 231–36.

²⁷² *Id.* at 230–31.

proceedings that day undoubtedly weigh in favor of the propositions that Congress could not delegate legislative power, and that an act of Congress could amount to such a delegation.”²⁷³

The above interpretation of these events is shared by a number of other commentators²⁷⁴—but not by Mortenson and Bagley, who argue that doubts about the constitutionality of Sedgwick’s proposal “did not reflect a majority view among those present and voting.”²⁷⁵ The pair’s principal support for that view is the inaccurate statement that “[a]mong the opponents” of Sedgwick’s proposed amendment, “at most three members of the House—and probably only two—raised a constitutional objection to delegating Congress’s Article I authority.”²⁷⁶ The actual number was at least five, and among those was the Father of the Constitution himself James Madison.²⁷⁷

In fairness, however, I will qualify my earlier claim that the “only argument offered in favor of the proposal’s constitutionality was Sedgwick’s contention that his amendment delegated only executive power,” for there was another remark made during this debate that could be construed as expressing Mortenson and Bagley’s view. Representative Benjamin Bourne considered Sedgwick’s proposal “constitutional,” explaining that the “delegation of the power of marking out the roads . . . could hardly be thought dangerous. The Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing.”²⁷⁸ The final quoted sentence is rather confusingly worded, but even conceding that Bourne was endorsing

²⁷³ Gordon, *supra* note 9, at 746–47.

²⁷⁴ See Mortenson & Bagley, *supra* note 5, at 352 n.401 (citing sources).

²⁷⁵ *Id.* at 353.

²⁷⁶ *Id.* at 351–52 (footnote omitted).

²⁷⁷ See 3 ANNALS OF CONG. 229 (1791) (statement of Rep. Livermore) (“[T]he Legislative body being empowered by the Constitution ‘to establish post offices and post roads,’ . . . he did not think they could with propriety delegate that power, which they were themselves appointed to exercise. . . . [T]his was not the intention of the Constitution.”); *id.* at 231 (statement of Rep. Hartley) (Congress, being “constitutionally vested with the power of determining upon the establishment of post roads . . . ought not to delegate the power to any other person.” (emphases added)); *id.* at 233–35 (statement of Rep. Page) (“[I]f this House can . . . leave the business of the post office to the President, it may leave to him any other business of legislation *I look upon the motion as unconstitutional.*” (emphasis added)); *id.* at 235 (statement of Rep. Vining) (“The Constitution has certainly given us the power of establishing posts and roads, and it is not even implied that it should be transferred to the President”); *id.* at 239 (statement of Rep. Madison) (“[A]lienating the powers of the House . . . would be a violation of the Constitution.”).

²⁷⁸ *Id.* at 232 (statement of Rep. Bourne).

Mortenson and Bagley's position, no other lawmakers during that debate (not even those who believed Sedgwick's proposal constitutional) in any way signaled their agreement with Bourne's sweeping statement that Congress could delegate power without constitutional limitation.

Mortenson and Bagley also assert that "even though Sedgwick's . . . amendment was defeated," the 1792 mail statute "that Congress actually adopted *did* confer wide discretionary authority to site post roads,"²⁷⁹ pointing to a provision empowering the Postmaster General "to enter into contracts, for a term not exceeding eight years, for extending the line of posts . . . [p]rovided, [t]hat no such contract shall be made, to the diminution of the revenue of the . . . post-office."²⁸⁰ Yet this provision, while undoubtedly a delegation of power, is not a delegation of purely *legislative* power. The Postmaster General, in exercising the discretion conferred by the 1792 act, was acting as a contractor rather than a legislator.²⁸¹ His modest proprietary power no more partakes of sovereignty than the prerogatives exercised by any private person in agreeing to pay another for services. What is more, even this contracting authority was tightly constrained; he could only contract to extend existing post roads (but not to eliminate them or establish new ones), his contracts were limited to eight years, and no such contract could reduce the Post Office's revenue. This delegation "was . . . much less significant . . . than the one proposed by Sedgwick."²⁸² All told, none of the provisions of the early statute governing post roads demonstrate that the Framing generation rejected a Gorsuch-style nondelegation rule.²⁸³

²⁷⁹Mortenson & Bagley, *supra* note 5, at 353.

²⁸⁰Act of Feb. 20, 1792, ch. 7, § 2, 1 Stat. 232, 233.

²⁸¹The same goes for another provision of the act cited by Mortenson and Bagley, which authorized the postmaster general "to appoint . . . deputy postmasters, at all places where such shall be found necessary," and providing "[t]hat every deputy postmaster shall keep an office." Act of Feb. 20, 1792, ch. 7, §§ 3, 7, 1 Stat. 232, 234. Moreover, this delegation was also likely quite modest; "the post offices would be on the post roads that Congress had established. Presumably, there would be at least one such office in every major city. The . . . President's discretion was greatly cabined once Congress had established the locations of the post roads." Wurman, *supra* note 17, at 1511.

²⁸²Wurman, *supra* note 17, at 1511–12.

²⁸³One might reasonably wonder, if the discretion delegated in the 1792 act was not violative of the nondelegation principle, why the discretion that would have been delegated by Sedgwick's failed 1791 amendment would have run afoul of that constitutional rule. To tell the truth, I doubt that it would have. Indeed, many of the nondelegation rule's early invocations seem to have been false alarms, but it does not follow from the Founding generation's overly scrupulous adherence to

E. Alien Act

Having cited the notorious and detested Statute of Proclamations as evidence for their position, it is perhaps not surprising that Mortenson and Bagley also rely on the equally infamous 1798 Alien Acts. Yet, as we all learned in civics class, the Alien Act was widely condemned as unconstitutional at the time of its passage, which triggered the “nation’s first constitutional crisis” and “helped sweep the high-Federalist[s] . . . out . . . in the election of 1800.”²⁸⁴ “[T]he unconstitutionality of the Alien . . . laws” was a “constitutional question” that was “settled in the public opinion” within a few years of its enactment.²⁸⁵ Among the criticisms leveled against the Act was that it unconstitutionally delegated legislative power by authorizing the president to order removal of all aliens he considered “dangerous to the peace and safety of the United States.”²⁸⁶ Such was the view expressed in the Virginia General Assembly’s famous 1799 resolution condemning the Alien Act, as well as a legendary 1800 committee report authored by James Madison on the Act’s constitutional defects. Regarding the Resolution’s contention that the Act “unit[ed] legislative, judicial, and executive powers in the hands of the President,” the report explained that “details should leave as little as possible to the discretion of those who . . . execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, . . . it would follow, that the whole power of legislation might be transferred,” which would be “unconstitutional.”²⁸⁷

Mortenson and Bagley acknowledge that the Virginia resolution, as well as Madison’s accompanying report, undercut the duo’s claim that the Framing generation rejected the Nondelegation Doctrine. But they insist that Madison’s report (if not the Assembly’s resolution) “attracted little notice at the time,”²⁸⁸ and that his “nondelegation challenge to the Alien and Sedition Acts was unusual to the point of idiosyncrasy.”²⁸⁹ Both claims are false. During the congressional debates preceding the Alien Act’s passage, at least

the Nondelegation Doctrine that the principle lacks a foundation in original meaning. *See* Gordon, *supra* note 9, at 737.

²⁸⁴ AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* 6 (2008).

²⁸⁵ 3 STORY, *supra* note 127, at 166–67 n.2 (quoting Letter from John Calhoun to Gov. Hamilton (Aug. 28, 1832)).

²⁸⁶ An Act Concerning Aliens, ch. 58, § 1, 1 Stat. 570, 571 (1798).

²⁸⁷ Madison, *supra* note 101.

²⁸⁸ Mortenson & Bagley, *supra* note 5, at 364.

²⁸⁹ *Id.* at 365.

two representatives condemned the bill as an unconstitutional delegation of legislative power.²⁹⁰ Story's 1833 *Commentaries* noted that the Alien Act "was denounced . . . as uniting legislative . . . functions, with that of the executive," in addition to other constitutional infirmities.²⁹¹ Congressman William Rives recalled similar objections, reminding his colleagues in an 1827 House debate of "the sentence of indignant reprobation, which the public voice pronounced upon [the Alien] act, as a flagrant violation of the Constitution; and the records of the times distinctly inform us that one of the principal grounds upon which that judgment was pronounced, was, that . . . it conferred upon [the president] . . . legislative power."²⁹²

As to the impact of Madison's 1800 report more generally, it appears that the document (even if it "attracted little notice," whatever that means) won the plaudits of high-profile commentators and statesmen. St. George Tucker's 1803 American edition of Blackstone's *Commentaries* discussed the Alien and Sedition Acts' unconstitutionality, relying heavily on Madison's report, which, Tucker wrote, put forth "a train of arguments" supported by "powerful, convincing, and unsophistic reasoning, to which, probably, the equal cannot be produced in any public document, in any country."²⁹³ And despite his personal disagreement with Madison's position, Story admitted in his 1833 *Commentaries* that the former's 1800 report was "celebrated," and offered both an "elaborate vindication of [the Virginia Assembly's resolution on the Alien Act]" and "an ample exposition of the whole constitutional objections" to that law.²⁹⁴ An 1836 congressional committee report likewise remarked that the argument for the Alien Act's unconstitutionality had been "ably sustained by Mr. Madison, in his celebrated report to the Virginia Legislature, in 1799."²⁹⁵

²⁹⁰ See 8 ANNALS OF CONG. 2007–08 (1798) (statement of Rep. Livingston) ("Legislative power prescribes the rule of action," but under the Alien Act "the President alone, is empowered to make the law, to fix in his own mind, what acts . . . shall constitute the crime contemplated by the bill," and thus the Act "comes completely within the definition of despotism—a[] union of Legislative, Executive, and Judicial powers."); *id.* at 1963 (statement of Rep. Williams) ("[I]t is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to transfer power in this manner . . .").

²⁹¹ 3 STORY, *supra* note 127, § 1289.

²⁹² 19 REG. DEB. 1269 (1827).

²⁹³ TUCKER, BLACKSTONE'S COMMENTARIES, *supra* note 63, eds. app. note g at 27.

²⁹⁴ 3 STORY, *supra* note 127, § 1289 n.1.

²⁹⁵ S. REP. NO. 24-122, at 3 (1836).

In sum, it is plainly untrue that Madison's nondelegation challenge to the Alien Act was idiosyncratic. Not only did the nondelegation argument appear in the Virginia Assembly's 1799 resolution, but it also won the endorsement of two congressmen; and Story's *Commentaries* acknowledged that a leading constitutional objection to the Alien Act was its alleged delegation of legislative power.²⁹⁶ What is more, high-profile observers apparently regarded Madison's 1800 report with reverence, and remarked on the document's widespread acclaim.²⁹⁷ Surely such praise, as well as Madison's reputation as the "Father of the Constitution," lends his arguments an air of credibility that cannot be overcome by incorrectly claiming that they were "idiosyncratic."

F. Exceptions?

Mortenson and Bagley, on the very last page of *Delegation at the Founding*, drop the faintest of hints of a counterargument to what has been said thus far about early statutes delegating powers to local governments in federal territories or to the president in the foreign-affairs realm:

So maybe there was an exception for post offices. An exception for post roads . . . connected to roads previously specified by Congress. An exception for commercial interactions with noncitizens. An exception for noncommercial relationships with noncitizens. An exception for federal benefits. An exception for debt restructuring. An exception for loan repayment. . . . An exception for import duties. . . . An exception for territorial governance. An exception for the District of Columbia. An exception for intellectual property. An exception for search-and-seizure policy. An exception for immigration An exception for . . . vessels. An exception for raising a standing army. But if you have to stack all these . . . to defend your theory, . . . you've got to admit . . . the theory [is] mistaken.²⁹⁸

The passage misleads by repeating single exceptions to the nondelegation rule multiple times, as well as by making up exceptions for which no

²⁹⁶ 3 STORY, *supra* note 127, at § 1289.

²⁹⁷ *Id.* § 1289 n.2.

²⁹⁸ Mortenson & Bagley, *supra* note 5, at 367.

originalist nondelegation advocate has ever argued. Let us go through all fifteen examples individually.

First, Mortenson and Bagley say, “maybe there was an exception for post offices.”²⁹⁹ No, there was not. No originalist explains away the 1791 postal statute by reference to an “exception” to nondelegation for post offices; rather, the power to establish post offices could be delegated because it was proprietary rather than purely legislative, in that it involved management of government property rather than exercises of coercive sovereign power.³⁰⁰ Ditto for the supposed second, sixth, and seventh exceptions listed by Mortenson and Bagley (those “for post roads . . . connected to roads previously specified by Congress,” “debt restructuring,” and “loan repayment”). As for Mortenson and Bagley’s mention of an “exception for commercial interactions with noncitizens,”³⁰¹ this is just one iteration of the principle that greater delegation to the executive was permissible in the foreign-affairs realm (as are the other exceptions the authors list “for noncommercial relationships with noncitizens” and “for immigration and naturalization”). Mortenson and Bagley also separately list exceptions for territories and D.C., though I would have combined these into one category: places over which Congress has plenary power; and in any event, these regions represent exceptions to *all* the vesting clauses, not just the Article-I-derived Nondelegation Doctrine.

Finally, Mortenson and Bagley variously refer to: “An exception for federal benefits. . . . An exception for import[s]. . . . An exception for intellectual property. An exception for search-and-seizure policy. . . . An exception for all ships and vessels. An exception for raising a standing army.”³⁰² Where on earth did any of these come from?³⁰³ The authors, it seems, having run out of actual exceptions to nondelegation, have resorted to making them up—ostensibly in order to give the impression that modern originalist conceptions of the Nondelegation Doctrine attach more caveats to

²⁹⁹ *Id.*

³⁰⁰ See 3 ANNALS OF CONG. 229 (1791).

³⁰¹ Mortenson & Bagley, *supra* note 5, at 367.

³⁰² *Id.*

³⁰³ I am well aware that Mortenson and Bagley cite early American statutes dealing with these matters as supposed illustrations of a Framing-era understanding that no Nondelegation Doctrine existed. But, as I have explained, none of the laws cited come anywhere close to demonstrating such a thing; and (more importantly) none of my arguments to that effect posited a supposed “exception” to the Nondelegation Doctrine for pensions, taxation, searches, ships, intellectual property, or raising armies.

that principle than they actually do. On balance, then, out of Mortenson and Bagley’s fifteen supposed “exceptions” to modern originalist conceptions of the Nondelegation Doctrine, only two—foreign affairs and the territories—have any validity.

VI. PARRILLO ON THE 1798 DIRECT TAX LEGISLATION

In contrast to Mortenson and Bagley, Parrillo does not suggest anything so outrageous as that legislative power is delegable or that statutory delegations of rulemaking authority can never constitute delegations of legislative power. Instead, he argues simply that the Framing-era evidence cited by modern originalists in support of a revitalized nondelegation rule at most shows “that there was originally *some* unspecified constitutional limit on legislative delegation,” but that the Supreme Court’s current practice—allowing delegations of statutory power so long as exercise of that power is to be guided by even the vaguest of “intelligible principles”—may in fact be consistent with the Constitution as originally understood.³⁰⁴

Parrillo’s argument to that effect rests primarily on a single piece of historical evidence (albeit a strong one): the direct tax legislation of 1798.³⁰⁵ He claims that this statute included a sweeping domestic grant of legislative power to executive officials, and that this grant prompted virtually no contemporaneous controversy on constitutional grounds.³⁰⁶ This, Parrillo says, is “important evidence that the American political nation in the Founding era viewed administrative rulemaking as constitutional, even in the realm of domestic private rights.”³⁰⁷ In so arguing, Parrillo presents a concededly forceful originalist challenge to a Gorsuch-style Nondelegation Doctrine.

³⁰⁴ Parrillo, *Supplemental*, *supra* note 4, at 2.

³⁰⁵ The 1798 direct tax was levied by two interrelated statutes: first, there was “An Act to Provide for the Valuation of Lands and Dwelling-Houses, and the Enumeration of Slaves Within the United States,” Act of July 9, 1798, ch. 70, 1 Stat. 580 (“Valuation Act”); which specified the objects of taxation and established a method of valuation. Five days later, Congress passed “An Act to Lay and Collect a Direct Tax Within the United States,” Act of July 14, 1798, ch. 75, 1 Stat. 597 (“Lay and Collect Act”); which levied a total nationwide tax of two million dollars, apportioned the sum among the states based on population, and specified that each state would raise its share, first, with a fifty-cent tax on every slave; then with a tax on houses at a rate set by the statute; and finally, with a land tax at the rate necessary to meet the state’s revenue quota.

³⁰⁶ Parrillo, *Critical Assessment*, *supra* note 4, at 1313.

³⁰⁷ *Id.*

A. Overview of the 1798 Tax

The statutes establishing the 1798 direct tax set the amount to be raised thereby at two million dollars, and the Constitution's requirement that direct taxes be apportioned among states based on population naturally determined each state's proportionate share of that amount.³⁰⁸ The direct-tax legislation also specified that each state would raise its share, first, with a fifty-cent tax on every slave; then with a tax on houses at a rate also set by the statute; and finally, the remainder was to be raised through taxation of all land not permanently exempt from taxation by state law at whatever rate was necessary to meet the state's revenue quota.³⁰⁹ In order to assess the value of taxable property, the statute divided each state into a number of "divisions" based on its population.³¹⁰ The law established the position of federal tax commissioner, one of whom would be presidentially appointed and confirmed by the Senate to preside over each division.³¹¹ Each state would have its own board of commissioners consisting of all commissioners presiding over the divisions of that state.³¹² The boards had the statutory power to divide their respective states "into a suitable and convenient number of assessment districts,"³¹³ and to appoint a principal assessor for each district and as many assistant assessors as the commissioners felt necessary.³¹⁴ Assistant assessors would then divide each district into subdivisions and assign at least one assistant assessor per subdivision.³¹⁵ Assistant assessors were then charged with the listing and appraisal of all land and homes in their subdivisions, with valuations based on what each property was "worth in money" as of October 1, 1798.³¹⁶ To aid in this task, the assistant assessors could demand that property owners produce a "list" providing basic information about their properties.³¹⁷ Each state's board of commissioners

³⁰⁸ See U.S. CONST. art. I, § 9, cl. 4.

³⁰⁹ Act of July 14, 1798, ch. 75, § 2, 1 Stat. 598 (1798).

³¹⁰ Act of July 9, 1798, ch. 70, § 1, 1 Stat. 580, 580–83 (1798).

³¹¹ *Id.* § 3, 1 Stat. at 584.

³¹² *Id.* § 4, 1 Stat. at 584.

³¹³ *Id.* § 7, 1 Stat. at 584.

³¹⁴ *Id.* § 7, 1 Stat. at 584–85. Commissioners established 687 districts total, "nearly all [of which] consisted of a single county or a small cluster of several contiguous towns." Frank W. Garmon Jr., *Population Density and the Accuracy of the Land Valuations in the 1798 Federal Direct Tax*, 53 HIST. METHODS 1, 4 (2020).

³¹⁵ Act of July 9, 1798, ch. 70, § 7, 1 Stat. 580, 584 (1798).

³¹⁶ *Id.* § 8, 1 Stat. at 585.

³¹⁷ *Id.* § 9, 1 Stat. at 586.

also had the power to issue “such regulations, as to . . . a majority of them, shall appear . . . necessary” to govern the activities of “each commissioner and assessor, in the performance of the duties” under the tax legislation.³¹⁸

Once the assistant assessors’ valuations were complete, the results were to be submitted to each assistant assessor’s supervising principal assessor, who was in turn to “advertise” such valuations for public inspection for fifteen days.³¹⁹ During that period, property owners could challenge their appraisals in adjudicatory proceedings, where the principal assessor would “hear and determine,” “according to law and right” the question of “whether the valuation complained of be, or be not, in a just relation or proportion to other valuations in the same assessment district.”³²⁰ A principal assessor could then “re-examine and equalize the valuations” contested by property owners “as shall appear just and equitable; but no valuation shall be increased, without a previous notice of at least five days to the party interested, to appear and object to the same.”³²¹ The purpose of the last-mentioned procedure was of course to ensure uniformity of assessments within a district. But in order to ensure uniformity between districts, the statute established another layer of administrative review.

This brings us to the crux of Parrillo’s argument. After the principal assessors had adjudicated all challenges to valuations within their respective districts, they were to send complete lists of the valuations to their supervising boards of commissioners. Section 22 of the 1798 statute then provided:

[T]he [board of] commissioners . . . shall have power, on consideration and examination of the abstracts to be rendered by the assessors, . . . *to revise, adjust, and vary, the valuations of lands and dwelling-houses in any assessment district, by adding thereto, or deducting therefrom, such a rate per centum, as shall appear to be just and equitable: Provided, 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 . . .*³²²

³¹⁸ *Id.* § 8, 1 Stat. at 585.

³¹⁹ *Id.* § 18, 1 Stat. at 588.

³²⁰ *Id.* § 19, 1 Stat. at 588.

³²¹ *Id.* § 20, 1 Stat. at 588.

³²² *Id.* § 22, 1 Stat. at 588–89 (emphasis added).

Yikes. This provision would, at first blush, seem to delegate to boards of commissioners the discretionary power to issue regulations that, by adjusting the valuations of property subject to taxation, would affect the domestic legal duties of the citizenry. “The phrase ‘just and equitable’ seems open-ended,” says Parrillo, whose inquiry into its meaning turned up “nothing to suggest the phrase was a term of art implying any specific definition.”³²³ In fact, he claims, some of its contemporaneous uses “suggest it meant a decisionmaker was to make an all-things-considered judgment not bound by clear rules.”³²⁴ Even more troublingly, the boards’ district-wide revisions of valuations were apparently not subject to judicial review.³²⁵

But a close reading of Parrillo’s analysis, along with some additional historical context, reveals that the 1798 direct tax is not so devastating for a robust, Gorsuch-style Nondelegation Doctrine after all. The commissioners’ power to adjust district-wide valuations in a “just and equitable” manner was merely, in Professor Wurman’s words, “the third part of the process for determining what the proper valuations actually were.”³²⁶ Section 22 was apparently inspired by an analogous procedure previously implemented at the state level for equalizing valuations among properties.³²⁷ The sparse discussion in Congress of what became Section 22 reflects a similar understanding: the commissioners’ power was intended to *reduce* administrative discretion during the valuation process, not to augment it.³²⁸ It was seen by many at the time, rightly or wrongly, as a mere call for the commissioners to engage in the fact-finding necessary to equalize valuations in different parts of a state, so as to achieve greater accuracy in the assessment process—not as an invitation for the commissioners “to make an all-things-considered judgment not bound by clear rules.”³²⁹

Contemporaneous commentary on the 1798 legislation reflects precisely this limited understanding. Moreover, contrary to Parrillo’s findings, my research indicates that “just and equitable” (or “equitable and just”), when used during the late eighteenth and early nineteenth centuries in the contexts of taxation or valuation, meant either “equal” (when comparing different properties or regions to one another) or “accurate” (when referring to

³²³ Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

³²⁴ *Id.*

³²⁵ *Id.* at 1417; Act of July 9, 1798, ch. 70, § 21, 1 Stat. 580, 588.

³²⁶ Wurman, *supra* note 17, at 1552.

³²⁷ Parrillo, *Critical Assessment*, *supra* note 4, at 1370.

³²⁸ Wurman, *supra* note 17, at 1552.

³²⁹ Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

estimations of value). Such was how the phrase was used in caselaw, statutes, and other legal materials and commentary. To be clear, I do not assert that this narrow understanding of “just and equitable” as a mere delegation of “equalization” power is the *only* reasonable construction of the statutory language, or even necessarily the most reasonable one. But it is at least a construction plausible enough to explain why Section 22 set off no nondelegation alarms at the time, even among those who keenly policed limits on Congress’s delegation of lawmaking power.

B. Fact-Finding?

Parrillo, apparently anticipating the counterargument that the commissioners’ Section-22 authority was relatively circumscribed, preemptively responds that, “[e]ven if we assume the . . . phrase ‘just and equitable’ implied some kind of guiding direction in principle—say, that the federal board was to discern the average value of real estate per acre in each district and adjust the valuations of each district so that their average matched that value”—the process of valuation nonetheless presented “contestable methodological questions, plus difficulties in gathering and reasoning from data, all of which would leave the boards with inevitably wide discretion.”³³⁰ Parrillo then spends thirty-some pages analyzing the many difficulties attendant to determining property values, particularly in the late-eighteenth and early-nineteenth centuries.³³¹ His point in doing so seems to be that if the 1798 direct-tax statute can validly be written off by modern nondelegation advocates as delegating only fact-finding authority, “then the . . . legislation provides an originalist basis for construing th[e] . . . factual exceptions to a constitutional ban on rulemaking so broadly as to bless most and perhaps all statutory authorizations for rulemaking.”³³²

Parrillo’s premise—that a statute does not unconstitutionally delegate legislative power if its operation merely depends upon a factual contingency, the determination of which is committed to the executive—is uncontroversial. And Parrillo’s claims about the difficulties that came with the process of valuation in the early Republic may well be right. It would explain why some at the time considered a touch of administrative discretion inevitable in any system of property taxation. In order “to lay a direct tax on land,” wrote one jurist in 1796, it “will be necessary to . . . assess the land;

³³⁰ *Id.* at 1346.

³³¹ *See id.* at 1346–84.

³³² *Id.* at 1314.

and after all the guards and provisions that can be devised, we must ultimately rely upon the discretion of the officers in the exercise of their functions.”³³³

But is the value of a piece of property an ordinary fact question of the sort susceptible to determination by adjudication (or was it at least understood as such during the Framing era)? It seems so. For one, the necessity of determining property values through adjudication is contemplated by the Constitution itself; how else would courts enforce the prohibition on taking private property “without just compensation”?³³⁴ Indeed, the question of real property’s value was regularly put in issue in early American adjudicative proceedings,³³⁵ as well as in the administration of taxes. Since assessors’ “perception[s] of value” generally “constrained taxpayers, their assessments in effect were binding adjudications.”³³⁶ And those assessments were widely regarded as “[d]eterminations of facts” and hence “judicial in nature, not legislative.”³³⁷ As one court remarked in 1833, “apportionment of [a] tax . . . among the taxable inhabitants . . . according to the value of his real and personal estate” is “a *judicial act*”³³⁸—in that it was an exercise of “power to apply the laws to particular facts.”³³⁹ Other cases from this period are in accord.³⁴⁰ What is more, many states soon established their own boards of tax equalization that, like the commissioners of the federal direct tax, were charged with adjusting property valuations so as to equalize assessments

³³³ *Hylton v. United States*, 3 U.S. (1 Dall.) 171, 178–79 (1796) (Paterson, J.).

³³⁴ U.S. CONST. amend. V.

³³⁵ See, e.g., 4 DANE, *supra* note 253, at 485; *Oyster v. Oyster*, 1 Serg. & Rawle 422, 424 (Pa. 1815); *Town of Rochester v. Town of Chester*, 3 N.H. 349, 365–66 (1826); *Marshall’s Heirs v. McConnell’s Heirs*, 11 Ky. (1 Litt.) 419, 424 (1822); *Small v. Swain*, 1 Me. 133, 135 (1820); *Faw v. Marsteller*, 6 U.S. (2 Cranch) 10, 31–32 (1804); *In re William & Anthony Sts.*, 19 Wend. 678, 692 (N.Y. Sup. Ct. 1839).

³³⁶ HAMBURGER, *supra* note 61, at 209.

³³⁷ Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. (forthcoming 2023) (manuscript at 90) (<https://ssrn.com/abstract=3990247>).

³³⁸ *Easton v. Calendar*, 11 Wend. 90, 93 (N.Y. Sup. Ct. 1833).

³³⁹ 2 JOHN BOUVIER, A LAW DICTIONARY 407 (Phila., T. & J.W. Johnson 1839) [hereinafter A LAW DICTIONARY] (defining judicial power).

³⁴⁰ See, e.g., *Henderson v. Brown*, 1 Cai. 92, 102 (N.Y. Sup. Ct. 1803) (Kent, J.) (assessors of the 1798 federal direct tax act quasi-judicially in valuing property); *Dillingham v. Snow*, 5 Mass. 547, 559 (1809); *Le Roy v. City of New York*, 20 Johns. 430, 438–40 (N.Y. Sup. Ct. 1823); *Bouton v. Brooklyn*, 2 Wend. 395, 398 (N.Y. Sup. Ct. 1829); cf. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 179 (1796) (Paterson, J.).

throughout their respective states.³⁴¹ These boards' duties were also considered "*quasi* judicial" because "[t]hey require[d] the exercise of judgment in determining what changes shall be made in the valuations" in different localities "to produce a just relation to each other."³⁴²

This "judicial" or "quasi judicial" designation was more than symbolic. In the parlance of the early Republic, it signified that a decision-maker enjoyed "a mere legal discretion . . . in discerning the course prescribed by law."³⁴³ Even if the applicable rule of law seemed "not suited to . . . the present state of society," it would have "transcend[ed] judicial power to abrogate it; it is for . . . the legislature to . . . change the law."³⁴⁴ One with judicial power pronounced "judgment on what was the pre-existing law of the case"; to "modif[y] it as to meet [his or her] ideas of justice [and] policy" would amount to "usurpation of legislative powers."³⁴⁵ "[I]n this respect, the judicial [wa]s unlike the legislative department, whose functions are regulated by the caprice of an arbitrary discretion."³⁴⁶ This was as true of administrators acting judicially as it was of traditional courts; both were bound to act "according to some rule, and form their judgment and

³⁴¹ See HARLEY LEIST LUTZ, *THE STATE TAX COMMISSION: A STUDY OF THE DEVELOPMENT AND RESULTS OF STATE CONTROL OVER THE ASSESSMENT OF PROPERTY FOR TAXATION* 19–26 (1918).

³⁴² *Bellinger v. Gray*, 51 N.Y. 610, 618 (1873); *accord* *Town of Middletown v. Town of Berlin*, 18 Conn. 189, 197–98 (1846); *Hill v. Sellick*, 21 Barb. 207, 209 (N.Y. Gen. Term. 1855); *Tallmadge v. Bd. of Supervisors*, 21 Barb. 611, 614 (N.Y. Spec. Term 1856); *People ex rel. Thomson v. Bd. of Supervisors*, 35 Barb. 408, 414 (N.Y. Spec. Term 1861); *Cent. Pac. R.R. Co. v. Bd. of Equalization*, 32 Cal. 582, 584 (1867); *Smith v. Bd. of Supervisors*, 30 Iowa 531, 535 (1870); *Milwaukee Iron Co. v. Schubel*, 29 Wis. 444, 453 (1872); *Rhoads v. Cushman*, 45 Ind. 85 (1873); *Porter v. Rockford, R.I. & St. Louis R.R. Co.*, 76 Ill. 561, 585 (1875); THOMAS M. COOLEY, *A TREATISE ON THE LAW OF TAXATION* 290–91 (Chicago, Callaghan and Company 1876) ("In some states, . . . assessment rolls . . . are subject to review by a higher authority, for the purpose of an equalization These boards act judicially in equalizing, and their decision is conclusive."); W.H. BURROUGHS, *A TREATISE ON THE LAW OF TAXATION* 238 (New York, Baker, Voorhis & Co. 1877) ("The determination of the proper changes to be made in the [assessment] roll is a judicial act."); D.W. WELTY, *A TREATISE ON THE LAW OF ASSESSMENTS* 295 (New York and Albany, Banks and Brothers 1886) ("[I]t must not be understood that boards of equalization . . . have absolute power over valuations. They cannot arbitrarily fix values beyond the actual value.").

³⁴³ *Osborn v. Bank of U.S.*, 22 U.S. (9 Wheat.) 738, 866 (1824).

³⁴⁴ *Weidel v. Roseberry*, 13 Serg. & Rawle 178, 180–81 (Pa. 1825); *see also* *State v. Whitten*, 19 S.C.L. (1 Hill) 100, 108 (1833) (Harper, J.).

³⁴⁵ *Bennett v. Boggs*, 3 F. Cas. 221, 228 (C.C.D.N.J. 1830) (No. 1319); *see also* *Merrill v. Sherburne*, 1 N.H. 199, 204 (1818).

³⁴⁶ *Eakin v. Raub*, 12 Serg. & Rawle 330, 381 (Pa. 1825) (Duncan, J.).

determination upon correct legal principles.”³⁴⁷ That the functions of tax assessors and boards of equalization were considered quasi-judicial cuts against a conception of their powers as akin to modern administrative rulemaking.³⁴⁸

The broader point, moreover, is that there was an established practice at the time of the Framing of determining property’s market value through quasi-adjudication. Are we to infer from this that the Framing generation would also have considered it mere fact-finding when, say, the SEC exercises its statutory authority to issue any regulations it considers “appropriate in the public interest or for the protection of investors?”³⁴⁹ As will be shown in the pages that follow, no. Parrillo overreaches considerably in citing the Fifth Congress’s delegation of a valuation power to administrators as an “originalist basis for construing [the] factual exceptions” to nondelegation broadly enough to encompass the sweeping delegations of authority routinely upheld by the Supreme Court in the post-New-Deal era.³⁵⁰ Even assuming Parrillo is right that Framing-era property valuations were inherently “subjective” and “laden with policy choice,” then such decisions represent the apex of discretion that legislation could confer upon administrators

³⁴⁷N.J. R.R. & Transp. Co. v. Suydam, 17 N.J.L. 25, 34 (1839) (Hornblower, C.J.); *accord* People *ex rel.* Case v. Collins, 19 Wend. 56, 60 (N.Y. Sup. Ct. 1837); Copeland v. Packard, 33 Mass. (16 Pick.) 217, 221 (1834); Easton v. Calendar, 11 Wend. 90, 93 (N.Y. Sup. Ct. 1833); Henderson v. Brown, 1 Cai. 92, 102 (N.Y. Sup. Ct. 1803) (Kent, J.); *In re* William & Anthony Sts v., 19 Wend. 678, 681 (N.Y. Sup. Ct. 1839); Hawkins v. Robinson, 28 Ky. (5 J.J. Marsh.) 8, 10 (1830).

³⁴⁸Some might argue that because rulemaking by modern agencies is governed by the Administrative Procedures Act, which forbids “arbitrary” or “capricious” agency action, 5 U.S.C. § 706(2)(A), all such rulemaking is merely a “quasi-judicial” function (in Framing-era parlance) and thus permissible. But the comparison would be inapt. The APA’s arbitrary-and-capricious standard merely “requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential” FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021). More importantly, the APA contemplates that agencies will exercise this discretion in *making* the law, not merely in adjudicating based on preexisting rules. Under the APA, “administrative authorities must be permitted . . . to adapt their rules and policies to . . . changing circumstances.” *In re* Permian Basin Area Rate Cases, 390 U.S. 747, 784 (1968). Such discretion to change the substance of legal rules, though bound by basic requirements of rationality, is fundamentally different in kind from discretion in *applying* the law; the former would be considered by the Framing generation to be a quintessentially legislative (rather than a quasi-judicial) function. See notes 52–53, 55, 69–70, 343–346; Murray v. Coster, 20 Johns. 576, 600 (N.Y. Sup. Ct. 1822) (Vielie, Sen.).

³⁴⁹15 U.S.C. § 78i(a)(6).

³⁵⁰See Parrillo, *Critical Assessment*, *supra* note 4, at 1314–16.

without violating the separation of powers.³⁵¹ Indeed, as will be explored further in Section IV.F *infra*, early authorities on the subject generally agreed that a minimum degree of specificity was required in tax statutes to avert nondelegation objections. Notably, none of these sources agreed with Parrillo that a mere “intelligible principle” (as the term is used by modern federal courts) is sufficient.³⁵²

C. 1798 Direct Tax: Background

Start with the legislative origins of the 1798 tax legislation. Parrillo provides an exhaustive account of this history, but for our purposes we may begin with a 1796 report prepared by Treasury Secretary Oliver Wolcott at the request of the House of Representatives.³⁵³ Facing the prospect of war with France over its impressment of American commercial vessels, Congress began investigating methods of raising revenue to fund defense efforts—including direct taxation—and commissioned Wolcott to study the states’ various taxation regimes.³⁵⁴

Although state tax systems varied widely, Wolcott was certain that any direct tax “must necessarily include a tax on lands.”³⁵⁵ “The value of lands being assumed as the most eligible criterion of assessment,” he wrote, the challenge would be to devise “a mode of assessment, of which the principles shall be as nearly as possible, certain, uniform, and equal.”³⁵⁶ But of course achieving an “impartial estimate of the relative value of the different tracts of land” was easier said than done.³⁵⁷ Wolcott worried that “the Government [might] be unreasonably and improperly restricted by the establishment of a permanent rule”—though fortunately, he noted, there was “no necessity that the principles of valuation should be uniform in all the States.”³⁵⁸ He thus concluded that the best valuation method for taxable lands was to appoint

³⁵¹ *Id.*

³⁵² It warrants mention, too, that standards guiding official discretion need not be as definite in statutes delegating case-by-case decision-making powers as they do in statutes delegating a power to issue general, prospective rules of conduct. *See, e.g., Ritter v. Ritter*, 5 Blackf. 81, 82–83 (Ind. 1839); *Rensselaer Glass Factory v. Reid*, 5 Cow. 587, 597 (N.Y. 1825) (Colden, Sen.); *In re Oliver*, 17 Wis. 681, 686 (1864); Parrillo, *Critical Assessment*, *supra* note 4, at 1294.

³⁵³ *See* Parrillo, *Critical Assessment*, *supra* note 4, at 1318–72.

³⁵⁴ *Id.* at 1320.

³⁵⁵ 6 ANNALS OF CONG. 2707 (1797).

³⁵⁶ *Id.* at 2707–08.

³⁵⁷ *Id.* at 2712.

³⁵⁸ *Id.* at 2708, 2712.

“commissioners for each State, with the power of appointing . . . assessors, and of requiring a disclosure of . . . lands possessed by individuals.”³⁵⁹ (This proposal, of course, was similar to the valuation method eventually adopted by Congress in 1798.)³⁶⁰

In reading the Wolcott report’s summaries of states’ methods of levying direct taxes, the sources of inspiration behind the scheme adopted by Congress in 1798 become apparent (especially Section 22). That provision was most obviously based on the following feature of Pennsylvania’s taxation regime, as Wolcott described it:

In every year in which . . . assessments of property are made, the county commissioners are required to . . . compare the returns made to them by the assessors . . . , with full power to revise, alter, and adjust, the valuations in such returns; provided they do not change or vary the relative valuations of property in the same township, ward, or district. The proportional assessments upon individuals, thus equalized by the commissioners, . . . constitute a general rule or criterion, by which taxes on property are regulated for three years ensuing.³⁶¹

The parallels to the 1798 direct tax statute are patent: not only did Pennsylvania’s scheme call for boards of “commissioners” to review valuations made by “assessors,” but it also empowered commissioners to “revise, alter, and adjust” valuations on a township-, ward, or district-wide basis. Federal boards of commissioners’ analogous powers were described in similar terms: they could “revise, adjust, and vary” valuations on a district-wide basis.³⁶² And Pennsylvania’s tax commissioners, according to Wolcott, were blessed with this revision power as a means of “equaliz[ing]” valuations in different parts of each county.³⁶³ It stands to reason that Section 22 of the 1798 federal statute, to the extent it was modeled after Pennsylvania’s scheme, was also a mere equalization power—or at least was understood as such by its drafters.

³⁵⁹ *Id.* at 2712.

³⁶⁰ See Parrillo, *Critical Assessment*, *supra* note 4, at 1327–30.

³⁶¹ 6 ANNALS OF CONG. 2674–75 (1797).

³⁶² *Id.*; see also Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

³⁶³ 6 ANNALS OF CONG. 2675–76 (1797).

Wolcott’s descriptions of other states’ taxation regimes, though none entail a procedure quite like Pennsylvania’s, include several other features thereof that shed light on the meaning of the 1798 federal legislation. In Delaware, Wolcott observed, in order “[t]o remedy the inconveniences and inequality which have been experienced from arbitrary assessments, an act” was passed in 1796 establishing new procedures “for the valuation of real and personal estates.”³⁶⁴ Pursuant to this act, “assessors, in performing the[ir] duties” were subject to the “direction of the county commissioners; when the . . . assessments [were] completed, they [were] to be published in each hundred; after which, the commissioners [were] to hear and determine the complaints of individuals, subject, however,” to judicial review.³⁶⁵ So, too, was the 1798 direct tax’s assessment scheme reminiscent of that of Maryland—where, in Wolcott’s words,

five persons in each county . . . are named by the Legislature . . . as commissioners of the tax; the commissioners . . . , after appointing their clerks, they proceed to divide their counties into convenient districts; to appoint an assessor for each, . . . and to prescribe a time when [assessors] are to appear with written returns of their several valuations of property. . . . When the quantity of land in a county has been ascertained, its value is first computed according to the average prescribed by law; the aggregate amount is then apportioned to individuals, according to the relative value of their respective portions of lands Erroneous or excessive assessments may be corrected by application to the commissioners of the tax for the county, who may examine the parties or other persons on oath, and finally determine as shall appear equitable.³⁶⁶

While Maryland’s taxation scheme differed in several ways from the 1798 federal tax,³⁶⁷ the state’s “commissioners” were at least similar to their

³⁶⁴ *Id.* at 2678.

³⁶⁵ *Id.* at 2679–80. The law called for commissioners to arrange “valuations, so that no person or persons may be unequally or over rated.” 2 LAWS OF THE STATE OF DELAWARE 1256 (1797).

³⁶⁶ 6 ANNALS OF CONG. 2681–82 (1797).

³⁶⁷ Under Maryland’s law, it was “commissioners,” rather than “assessors,” who adjudicated claims of individuals contesting valuations of their properties. Nor was there a procedure for Maryland tax commissioners to revise valuations *en masse*, as there was in the 1798 federal direct-tax statute.

federal counterparts in their power to revise the valuations determined by “assessors.” Notably, Maryland’s tax commissioners, in so doing, were to “determine [assessments] as shall appear equitable,” according to Wolcott—a duty reminiscent of the one later conferred upon federal boards of commissioners by Section 22.³⁶⁸ But perhaps even more notable was Wolcott’s criticism of Maryland’s system: “the collection of State taxes has been inefficient and defective, owing to the want of a more energetic control than has been afforded by the boards of county commissioners.”³⁶⁹ This comment may well have informed Congress’s eventual decision to establish more “energetic” boards of federal tax commissioners with the authority to revise valuations on a district-wide basis.³⁷⁰

Finally, Wolcott’s discussion of Virginia’s tax regime sheds light on the meaning of the 1798 federal statute. Virginia, like other states thus far discussed, left administration of taxes to, among others, “assessors”—whose valuations were subject to review by “commissioners.”³⁷¹ But even the extra layer of administrative review proved insufficient security against arbitrary assessments, as Wolcott explained:

[V]aluations made by the commissioners . . . , though . . . just and accurate . . . within the same county, were found to be exceedingly unequal when compared with . . . other counties. . . . To effect a general equalization of the assessments, an act was passed . . . by which the different counties of the State were arranged into four districts [A] standard or average value was declared by the Legislature [for each district]. To give effect to this declaration, two commissioners were appointed . . . to examine the county returns, and, after ascertaining the average value of the lands in each county, agreeably to the

³⁶⁸ 6 ANNALS OF CONG. 2682 (1797).

³⁶⁹ *Id.* at 2683–84.

³⁷⁰ It also appears that Maryland lawmakers, in establishing the taxation system described in Wolcott’s report, did so primarily in order to remedy the problem of unequal assessments across different parts of the state: as the preamble to the 1786 statute initially creating that system declared, the legislature, recognizing “the great inequality that has hitherto taken place in the valuation of lands between . . . counties of this state,” was changing the method of assessment in order to “prevent[] . . . like injustice in future.” See An Act to ascertain the value of the land in the several counties of this state for the purpose of laying the public assessment, ch. 53, 1786 Md. Laws 1628, 1629 (1786).

³⁷¹ See 6 ANNALS OF CONG. 2684 (1797).

assessments made pursuant [to the old valuation system], and, after comparing the same with the . . . average value for the district, to apply the difference by adding or deducting the same, *pro rata*, to the assessment of each individual.³⁷²

Federal legislators reading this description of Virginia’s assessment scheme likely came away with the impression that mass revisions of assessments would be necessary in order to equalize valuations across various districts. Congress’s ostensible solution to the problem was Section 22, which undoubtedly addressed the problem in a different way than Virginia’s legislature had.³⁷³ The point, though, is that the federal boards of commissioners’ “revision” power was conceived as a means of *equalization*—not a power “to make an all-things-considered judgment not bound by clear rules.”³⁷⁴

Congressional debate over the 1798 legislation, though it focused mostly on non-constitutional concerns,³⁷⁵ tends to further confirm that the intent behind Section 22 of the statute was to reduce overall administrative discretion—and thereby achieve more accurate valuations—by empowering the boards of commissioners to equalize systematically disparate valuations across regions.³⁷⁶ The only extended discussion of the issue came from Congressman Albert Gallatin. He objected to an earlier version of the provision on the ground that the “commissioners ha[d] been provided to adjust the value of lands, but not of houses,” which would be taxed according to crude value “classes” rather than market value.³⁷⁷ Gallatin argued “that houses and lands” should “be valued together, according to their real value,” so that “the Commissioners will be able to rectify any inequality which may take place” in assessors’ valuations of houses:

³⁷² *Id.* at 2684–85.

³⁷³ In particular, Virginia lawmakers took a more hands-on approach, opting to address the disparity in valuations across regions by setting district-wide average values by statute and then charging the “commissioners” with the task of adjusting valuations accordingly on a county-wide basis. *Id.* at 2685–86.

³⁷⁴ Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

³⁷⁵ See 1 HISTORICAL REGISTER OF THE UNITED STATES 123 (T.H. Palmer ed., Washington City 1814) (The debate focused on whether it might “be better to raise the revenue . . . by an increase of the duty on distilled liquors.”).

³⁷⁶ 8 ANNALS OF CONG. 1848–49 (1798).

³⁷⁷ *Id.* at 1849.

[T]he houses being put in classes (and not according to the individual value of each) *the Commissioners could not raise or lower their value so as to adjust and equalize the tax upon the whole State. . . .* [N]o one can say that, in different places [assessors] will adopt the same ideas as to the value of the property. *On this account, it had always been found necessary in all the State laws upon this subject, to give a power to the Commissioners to regulate any variations Unless Commissioners were employed to adjust the various assessments . . . no equality of taxation could be expected.*³⁷⁸

In the end, Gallatin's pitch was half-successful: lawmakers abandoned the plan of taxing houses according to statutory value "classes," but the final bill retained the provision for separate taxation of land and houses.³⁷⁹ Gallatin nonetheless voted "yea" on the measure, saying that although it "was not formed . . . altogether to his wish; . . . it was as nearly so as he could get it, and it was necessary the money . . . be raised."³⁸⁰ The bill passed both houses with lopsided majorities in favor (69 to 19 in the House and 22 to 0 in the Senate), earning President Adams' signature shortly thereafter.³⁸¹

At any rate, what matters here is that the only legislative discussion of what became Section 22 came from Gallatin, who advocated extending the scope of boards of commissioners' district-wide revision powers as a means of *curbing* administrative discretion in assessment—not augmenting it.³⁸² Gallatin's argument further evinces an understanding that the boards of commissioners, in making district-wide revisions to assessors' valuations, were charged with equalizing valuations. This task, while undoubtedly leaving important decisions to administrative discretion, is considerably different in degree (if not also in kind) from the open-ended policymaking powers commissioners would have enjoyed under Parrillo's reading of Section 22. Of course, we cannot attribute a particular interpretation to the 1798 legislation merely because a single legislator's remarks during the drafting process reflect that interpretation.³⁸³ But Gallatin's account of the commissioners' revision power was consistent with Wolcott's 1796 report on

³⁷⁸ *Id.* at 1838, 1848 (statement of Rep. Gallatin) (emphasis added).

³⁷⁹ See Parrillo, *Critical Assessment*, *supra* note 4, at 1322–24.

³⁸⁰ 8 ANNALS OF CONG. 1919 (1798).

³⁸¹ See Parrillo, *Critical Assessment*, *supra* note 4, at 1322–24.

³⁸² 8 ANNALS OF CONG. 1848–49 (1798).

³⁸³ See *Aldridge v. Williams*, 44 U.S. (3 How.) 9, 24 (1845).

state taxation; indeed, Gallatin refers to those systems in explaining why boards of commissioners should have an inter-district equalization power, noting that “giv[ing] [such] power to the Commissioners to regulate any variations” “had always been found necessary in all the State laws upon this subject.”³⁸⁴

D. Contemporaneous Official Construction

Contemporaneous executive-branch documents also confirm that those administering the 1798 direct tax read Section 22 in much the same way Gallatin did.³⁸⁵ To begin with, in August of 1798, Secretary Wolcott issued a circular with advisory guidance for boards of commissioners.³⁸⁶ He recommended that boards provide the assessors they oversaw with advance standards for valuations of taxable houses and property, explaining:

[M]uch advantage would in my opinion result from indications of the sentiments of the Commissioners respecting the value of different descriptions of Houses, and the value of Lands of different qualities in various parts of each division—Without some standards . . . for determining the relative value of property in distant parts of the same State, *there may be danger that the opinions of the Assessors will be so variant as greatly to increase the labor of the Commissioners in equalizing the valuations, as directed by the twenty second section of the act*; for a proper decision on this point, I . . . repose entire confidence in the judgment . . . of the Commissioners.³⁸⁷

The most salient portion of this passage is Wolcott’s stated assumption that Section 22 “direct[s]” the boards not to revise valuations on a district-wide basis according to the commissioners’ sense of cosmic justice but rather to

³⁸⁴ 8 ANNALS OF CONG. 1838 (1798).

³⁸⁵ The “construction . . . given by the treasury department to any law affecting its arrangements” is “entitled to great respect” in interpreting the same. *United States v. Dickson*, 40 U.S. (15 Pet.) 141, 161 (1841).

³⁸⁶ Parrillo, *Critical Assessment*, *supra* note 4, at 1370.

³⁸⁷ *Id.* at 1372 (emphasis added) (quoting Letter from Oliver Wolcott, U.S. Dep’t of Treasury, to the Commissioners for Assessing Direct Tax (Aug. 7, 1798) (on file with the Connecticut Historical Society)).

simply “equaliz[e]” valuations across districts—precisely the reading espoused by Gallatin during the law’s drafting.³⁸⁸

In March of 1800, with boards of commissioners still at work in several states, Wolcott wrote an open letter to Congress detailing certain difficulties that had arisen during the assessment process, particularly in large states, and in states where much of the land was “unseated” (unimproved).³⁸⁹ Wolcott suggested that vesting the boards with a bit “more discretion . . . would be essentially necessary in regard to *the contemplated equalization of lands*.”³⁹⁰ Congress agreed, and in response enacted two statutes that slightly altered the boards of commissioners’ authority.³⁹¹ First, in January 1800, Congress conferred upon boards the power not only to make district-wide revisions to valuations, but also to revise valuations for each “subdivision of the several assessment districts” (i.e., subdivisions into which assistant assessors had divided the districts).³⁹² The Ways and Means Committee explained that this measure was necessary because “difficulties had occurred . . . in the large states [I]n some [subdivisions] the rates were given too high, and in others too low; and no power existed in the commissioners to establish a due proportion among the subdivisions.”³⁹³ Congress enacted further legislation in May 1800 that authorized boards to “revise the valuations of unseated lands in each . . . district” and “subdivision of such districts” by different uniform percentages than the uniform percentages by which the boards revised valuations of improved land.³⁹⁴ The enactment apparently achieved its objective of greater accuracy and equity in the assessment process. In an 1803 letter to Ways and Means, Gallatin (at that point the treasury secretary) praised the reform, writing that the direct-tax “assessment in [New York], so far as related to unoccupied lands, was rendered more correct than in almost

³⁸⁸ *See id.*

³⁸⁹ Letter from Oliver Wolcott, U.S. Dep’t of Treasury, to Robert G. Harper, Chairman of the Committee of Ways and Means (Apr. 10, 1800) (on file with the Connecticut Historical Society).

³⁹⁰ *Id.* (emphasis added).

³⁹¹ Act of Jan. 2, 1800, ch. 3, § 2, 2 Stat. 4, 4; Act of May 10, 1800, ch. 53, § 1, 2 Stat. 71, 71–72.

³⁹² Act of Jan. 2, 1800, ch. 3, § 1, 2 Stat. 4, 4.

³⁹³ Reprinted in VERGENNES GAZETTE AND VERMONT AND NEW-YORK ADVERTISER, Jan. 9, 1800, at [2] (House debate of Dec. 11, 1799).

³⁹⁴ Act of May 10, 1800, ch. 53, § 1, 2 Stat. 71, 71–72.

any other; for the act of May, 1800, . . . enabled [the board] to *equalize* the tax on those lands with much more correctness.”³⁹⁵

Parrillo considers the 1800 statutes as support for his view since both measures “increased the rulemaking discretion of the boards that were still operating.”³⁹⁶ This characterization overlooks the broader point that Congress vested the boards with the additional power *so as to achieve more equal valuations across different parts of each state*—as the Wolcott, Gallatin, and Congress itself explained.

In 1812, though collection of the 1798 direct tax had been completed several years earlier, the Treasury again sounded off on the meaning of Section 22 of the prior legislation. Treasury Secretary Gallatin, in a report to the House Ways and Means Committee, recommended as a revenue-raising measure that another “direct tax should be laid.”³⁹⁷ Notably, Gallatin criticized exactly that valuation procedure for which he had advocated as a Congressman: “The attempt made under the former direct tax . . . , to *equalize* the tax, by authorizing a board of commissioners in each State *to correct the valuations made by the local assessors*, was attended with considerable expense and productive of great delay.”³⁹⁸ Gallatin went on to propose an alternative method involving less administrative discretion (which was largely incorporated into the next direct tax statute³⁹⁹), but what matters here is that his report again reflects a reading of the 1798 statute under which commissioners’ revision power was a tool for equalizing valuations across districts so as to achieve more accuracy—or at least was intended as such, regardless of whether Section 22 achieved its equalization objectives in practice.

The few writings of federal commissioners that survive today further confirm the narrow construction of their Section-22 authority as a mere equalization power. First is a 1799 letter from one member of Connecticut’s board to another. The author, while acknowledging that “[t]he course pursued by the [Connecticut] Commissioners” in exercising the board’s Section-22 powers “was different from those in the neighboring States,” nonetheless understood the board’s duty to be “*equalizing* the Assessments in the several

³⁹⁵ Albert Gallatin, *Report*, REPUBLICAN WATCH-TOWER (New York City), Feb. 9, 1803 (emphasis added) (writing to the House Ways and Means Committee Chair John Randolph).

³⁹⁶ Parrillo, *Critical Assessment*, *supra* note 4, at 1336.

³⁹⁷ 1 ALBERT GALLATIN, *Gallatin to Ezekiel Bacon, M.C.*, in THE WRITINGS OF ALBERT GALLATIN 501, 507–08 (Henry Adams ed., Phila., J.B. Lippincott & Co 1879).

³⁹⁸ *Id.* at 508.

³⁹⁹ See Parrillo, *Critical Assessment*, *supra* note 4, at 1445–46.

Districts” throughout the state; the Connecticut board’s thorough methods, the letter observed, “although attended with some expense to the Public, and to [the commissioners], with fatigue without emolument; yet is productive of Salutory effects on the minds of the people.”⁴⁰⁰

Connecticut’s board was not alone in conceiving of its Section-22 revision authority as simply an equalization power. In South Carolina, Commissioner Robert Anderson conspicuously resigned his post in 1799, explaining in a series of public writings that he objected to the state board’s decision to use valuations made pursuant to state law in some districts but not others.⁴⁰¹ In his view, the tax statute required that, “if a federal board adopted by regulation a format of valuations similar to state law, it then had to imitate state law” throughout the state.⁴⁰² He based his reading on his view that the boards’ duties under the law were to ensure equality throughout each state:

The object of the [1798] law seems to be, *an equal tax* upon the ad valorem valuation of the land throughout the state A departure from *that* system, for the purposes of taxation, I presume is infringing the *rights* of the people, and destroying that principle of *equality* which ought to be the *basis* of all taxation; therefore *must* be *fundamentally* wrong. I am *pressed* into this measure by considerations of *policy*, as well as those of *right*.⁴⁰³

Anderson’s announcement prompted a response from an anonymous fellow commissioner of South Carolina’s board, who disagreed with Anderson on whether the board could adopt state-law valuations in some districts but not others, but—crucially—agreed that the board’s Section-22 power was merely one of equalization:

So far from destroying that principle of equality, which I agree with [Anderson] ought to be the basis of all taxation, . . . the system of assessment in question . . . approaches infinitely nearer to it than the indiscriminate

⁴⁰⁰Letter from William Heron to Andrew Kingsbury (Sept. 23, 1799) (first alteration in original) (emphasis omitted and added), *quoted in* Parrillo, *Critical Assessment*, *supra* note 4, at 1380–81.

⁴⁰¹See Parrillo, *Critical Assessment*, *supra* note 4, at 1414.

⁴⁰²*Id.* at 1412.

⁴⁰³Robert Anderson, *Letter to Editor of May 15, 1799*, CITY GAZETTE (Charleston), Aug. 23, 1799.

observance of the tax-law of this state could . . . [V]aluation of lands throughout the state . . . rests with the *commissioners* . . . [T]he great business of valuation lies indisputably with the *assessors*, whilst with the *commissioners* only rests the ultimate power of equalizing the returns of assessments . . . between different parts of the state.⁴⁰⁴

The final sentence could hardly be more unequivocal in endorsing the view that the boards' power to adjust district-wide valuations in a "just and equitable" manner was merely the authority to *equalize* valuations across the state—the final step of the process for determining what the correct valuations actually were.⁴⁰⁵ Equally unequivocal was Anderson's response, published a few weeks later in 1799:

The writing member states some cases, in which a strict observance of the legislative valuation of the lands throughout the state, would operate unequally . . . This may be the case; and that they ought to be relieved from that oppression, by the power possessing competent jurisdiction for that purpose, will never be denied by me . . . [T]he law of congress contemplates an equal tax upon the fair valuation of all the lands within the United States . . .⁴⁰⁶

Parrillo disparages Anderson's understanding of the direct-tax statute (i.e., as requiring that if a federal board adopted state-law valuations in some parts of the state, then it had to adopt them throughout the state), saying perplexedly of Anderson's "elaborate reading" that it "had no basis whatever in the Act's text."⁴⁰⁷ On the contrary, Anderson's reading had quite a firm basis in that text—provided one construes Section 22 of that text (as I do) as conferring upon boards of commissioners only a power of equalizing valuations across districts. Even the anonymous commissioner who criticized Anderson's position at least agreed with him (and me) that the statute simply entrusted the commissioners with "the ultimate power of equalizing the returns of

⁴⁰⁴ A Member of the Board of Commissioners, *Letter to Editor of Aug. 31, 1799*, CITY GAZETTE (Charleston), Sept. 4, 1799.

⁴⁰⁵ *Id.*

⁴⁰⁶ Robert Anderson, *Letter to Editor of Sept. 21, 1799*, CITY GAZETTE (Charleston), Oct. 16, 1799 (emphasis added).

⁴⁰⁷ Parrillo, *Critical Assessment*, *supra* note 4, at 1412.

assessments, so as to preserve a due proportion, between different parts of the state.”⁴⁰⁸

Other commissioners’ public accounts likewise adopted this understanding of Section 22. A published 1804 letter from another of South Carolina’s commissioners to Gallatin informed the Secretary as to the progress of the board’s operations:

The abstracts attending this, are file No. 1 containing G, H, J, K—each respectively comprising a view of the whole state, but *as we could not in such abstracts well insert the rate per centum of addition or reduction for equalising particular districts as they relate to each other—we have also transmitted file No. 2, containing abstracts of each of the five divisions separately* You will observe that . . . we have in very few instances deviated from the valuations made by the principal assessors, as *it is probable the[y] . . . had . . . better means of forming a correct and equal valuation . . . but the additions or deductions have been made on whole districts, by which we have endeavoured, taking the whole state into view, to fix a . . . fair and equalized valuation throughout*⁴⁰⁹

To the same effect is another of the same commissioner’s published letters to Gallatin, this one dated a few months later, where the former man again helpfully explained:

[A]lthough the commissioners settled it as a general rule that they would not alter the valuation of the property of individuals as made by the principal assessors, yet *they found it necessary to deviate from this rule . . . where such valuations evidently deviated . . . from the principle of equality intended by the law* It very early appeared to our board on looking into the lists . . . returned to us by assessors . . . that *our frequent interference would be necessary to equalize districts as they related to each other; we therefore adopted the following general rule as to lands.* By comparing the whole number of acres in any assessment

⁴⁰⁸ A Member of the Board of Commissioners, *supra* note 404.

⁴⁰⁹ J. Alexander, *Letter*, AMERICAN CITIZEN (N.Y.C.), Dec. 22, 1804 (emphasis added) (writing to Secretary of the Treasury Albert Gallatin).

district with the aggregate value as settled by the assessors, we discovered the average price per single acre; then by comparing districts contiguous to each other, in the same range of the state, with equal or similar advantages of trade, &c. if we found that the average price per acre in one far exceeded that of another, an addition or deduction was made so as to equalize them as nearly as might be to each other⁴¹⁰

In New York, too, the board of commissioners, in exercising its Section-22 authority, was seen as doing little more than equalizing disparities in valuations between the state’s tax districts. A 1799 announcement printed in a New York City newspaper declared that the commissioners “for this State, [had] adjourned” the week the before, “after a session of 32 days, spent in *revising and equalizing* the Valuations . . . , made under the act of Congress” imposing the direct tax; “[i]n most cases the valuations of the assessors were confirmed—in some few instances, however, material alterations were made.”⁴¹¹ Similarly, the North Carolina board’s record of its proceedings opened with a declaration that “certifie[d] that the Board . . . in *equalizing* the different valuations of lands within the District of North Carolina for a direct tax did order that on the valuations of lands in the County of Iredell there should be added 25 percent.”⁴¹²

E. Scholarship on the 1798 Direct Tax

Scholarly commentary on the 1798 direct tax further reinforces this narrow reading of commissioners’ power under Section 22. One historian has described the process of collecting the tax in Connecticut (the only state from which records of the board’s proceedings survive⁴¹³), as follows:

The valuations made in . . . [the] assessment districts were . . . scrutinized by [the] Board of Commissioners in order to determine if any were inconsistent relative to the other assessment districts. In such cases, the board decided

⁴¹⁰J. Alexander, *Letter*, CITY GAZETTE (Charleston), Feb. 7, 1805 (emphasis added) (writing to Secretary of the Treasury Albert Gallatin).

⁴¹¹*Announcement of June 3, 1799*, COMMERCIAL ADVERTISER (N.Y.C.), June 7, 1799.

⁴¹²Hugh Hill Wooten, *The Land Valuations of Iredell County in 1800*, 29 N.C. HIST. REV. 523, 526 n.4 (1952) (emphasis added).

⁴¹³Garmon, *supra* note 314.

upon percentages that would be used to adjust or “equalize” the valuation of all properties in the affected districts in order to bring all the valuations in line.⁴¹⁴

To the same effect is Frank Garmon’s account (also based on the Connecticut records), which describes boards of commissioners’ duty under Section 22 as “[e]qualization” of “assessments between districts,” a task that, Garmon notes, the boards took quite seriously.⁴¹⁵ Although the Connecticut board’s efforts, it seems, were exceptionally thorough,⁴¹⁶ commissioners in other states generally took seriously their duty of equalizing valuations. Another historian emphasizes “the painstaking efforts made” by direct-tax administrators across the country “in obtaining reasonable statewide assessments which were equitable from county to county The correspondence records show an astonishing amount of time given to this task by conscientious citizens.”⁴¹⁷ These descriptions of commissioners’ power under Section 22 again suggest that the provision conferred a simple “equalization” power.

Parrillo quibbles with such descriptions of boards’ Section-22 power, finding based on his admittedly impressive analysis of Connecticut’s board’s records that,

[d]istricts with lower [valuation-to-sale-price] ratios tended to be revised upward, and districts with higher ratios, downward. But this was only a tendency, not an absolute principle. . . . If the board cared about nothing except the sale price data, it would have used its revision power to bring the valuation-to-price ratios perfectly into line with each other But [w]ith a mean of 0.85, they range as low as 0.74 and as high as 1.00. . . . The standard deviation is 0.065 (compared to 0.115 before the revision). . . . [T]he

⁴¹⁴Judith Green Watson, *A Discovery: 1798 Federal Direct Tax Records for Connecticut*, PROLOGUE (Spring 2007), <https://www.archives.gov/publications/prologue/2007/spring/tax-lists.html>

⁴¹⁵Garmon, *supra* note 314. (“[T]he Connecticut state commissioners . . . spent more than 2,500 workdays collecting and reviewing the information needed to equalize the valuations. The commissioners found that the Connecticut assessments deviated only slightly from the recent sale prices, and they made minor adjustments to account for the discrepancies they discovered.”)

⁴¹⁶See Parrillo, *Critical Assessment*, *supra* note 4, at 1380.

⁴¹⁷Lee Soltow, *America’s First Progressive Tax*, 30 NAT’L TAX J. 53, 57 (1977) (emphasis added).

*board reduced the variation by almost half, but that is very far from eliminating it.*⁴¹⁸

Parrillo's point is apparently that the board of commissioners did not equalize the valuation-to-price ratios among districts to the degree they should have if historical data on sales were their sole metric for judging valuations' accuracy.⁴¹⁹ Maybe so, but this does not undercut the view that the boards' Section-22 power was intended to be one of simple equalization rather than of freewheeling lawmaking. Indeed, his concession that the board ultimately "reduced the variation by about half" tends to support that theory. Furthermore, as Parrillo himself notes, Connecticut's board "seems to have recognized" that, given "data limitations," "it could not rely exclusively on land sales" in determining valuations, but instead "needed to consider . . . more qualitative factors."⁴²⁰ If true, this would explain why the board's revisions did not equalize valuation-to-price ratios as much as Parrillo's calculations suggest they should have.

Empirical studies of valuations pursuant to the 1798 direct tax are also worthy of consideration, as they tend to confirm the "equalization" theory of commissioners' Section-22 power.⁴²¹ Garmon's study, based on records from all states except the three from which no records survive, "confirms the accuracy of the 1798 tax returns by demonstrating empirically that population density, rather than corruption or lax enforcement, can explain nearly all of the variation between the assessment districts."⁴²² Garmon, using "average land values and acreage reported in the 1798 direct tax, and total population figures from the Census of 1800," finds "an extremely strong correlation between population density and average land values. . . . Data from the individual tax districts reveal a[] . . . strong[] coefficient of determination, with 92% of the variation explained by the density of settlement."⁴²³

⁴¹⁸ Parrillo, *Critical Assessment*, *supra* note 4, at 1381–82 (emphasis added) (footnote omitted).

⁴¹⁹ *See id.*

⁴²⁰ *Id.* at 1384.

⁴²¹ To be clear, evidence that the valuations were *inaccurate* would not necessarily undercut that theory; any inaccuracies might have resulted from, say, a lack of reliable data for commissioners and assessors to work with, or perhaps commissioners' abuses for political ends of what was intended to be a mere equalization power. But insofar as the valuations *were* accurate, it would suggest that commissioners implementing the 1798 tax understood their tasks under Section 22 as those of equalizing valuations throughout the state with a view towards achieving greater accuracy overall.

⁴²² Garmon, *supra* note 314, at 1.

⁴²³ *Id.* at 6.

“Consequently,” he concludes, “the data suggest that the valuations described in the direct tax returns provide a very good indication of the relative value of land in each tax district.”⁴²⁴

Garmon is hardly alone in his view. As he points out, his conclusions accord with those of other historians and economists, including Alice Hanson Jones, who “collected a random sample of deeds and used regression analysis to predict land prices” in the southern colonies around that time that “are close to the average valuations per acre for those states in 1798 after exchange rates and inflation are considered.”⁴²⁵ Lee Soltow likewise argues that valuations under the 1798 direct-tax legislation are “reasonably accurate estimates” of the properties’ market values, citing the findings of “an investigation by Wolcott in his native state of Connecticut showed that assessment values were within 8% of sale prices.”⁴²⁶ American economist Ezra Seaman, in an 1852 work, compared valuations of land and dwellings pursuant to the 1798 statute to corresponding figures derived through other systems of assessment that had been tried around the country, concluding that “[a] comparison of the valuations [under the 1798 and 1813 direct tax statutes] with each other, and with” valuations made under other assessment schemes, “induces the belief, that property was generally estimated at its full cash value in 1813, and but little under its cash value in 1798.”⁴²⁷

F. The Meaning of “Just and Equitable”

My own survey of uses of “just and equitable” (or “equitable and just”) in the early Republic—unlike that of Parrillo, who found “nothing to suggest the phrase was a term of art implying any specific definition or method”⁴²⁸ of valuation—indicates that the phrase and its close variants, as used during the late eighteenth and early nineteenth centuries in the contexts of taxation or valuation, meant either “equal” (when comparing different properties or

⁴²⁴ *Id.* at 7.

⁴²⁵ *Id.* (citing 3 ALICE HANSON JONES, AMERICAN COLONIAL WEALTH: DOCUMENTS AND METHODS 1739–57 (1977)).

⁴²⁶ Lee Soltow, *Wealth Inequality in the United States in 1798 and 1860*, 66 REV. ECON. & STAT. 444, 444, 449 n.12 (1984).

⁴²⁷ EZRA C. SEAMAN, ESSAYS ON THE PROGRESS OF NATIONS, IN CIVILIZATION, PRODUCTIVE INDUSTRY, WEALTH AND POPULATION 619 (New York, Charles Scribner & Co. 1852).

⁴²⁸ Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

regions to one another)⁴²⁹ or “accurate” (when referring to valuation of particular parcels).⁴³⁰

Start with the dictionary—namely, Webster’s 1828 American edition thereof. One of the definitions for “equal” (admittedly the ninth of eleven) was, “[j]ust; equitable; giving the same or similar rights or advantages.”⁴³¹ An 1805 dictionary and thesaurus’s definition of “equal” used both emphasized words, as well: “UNIFORM . . . , in *just* proportion . . . ; *equitable*, fair, alike.”⁴³² Such definitions were in keeping with the then-established principle that “equality is equity among persons standing in the same situation,” as one court remarked in 1826.⁴³³ A New Jersey court, in an 1832 decision, invoked this rule in the tax context, upholding as reasonable a municipal bylaw requiring owners of property along a particular street “to fix curb stones and make a brick foot way [sidewalk] in front of his lot” or else reimburse the street commissioner the cost of doing the same, plus a five percent tax: “*Equality is equity*; the measure for one street should be meted to all alike. . . . [T]his system of improving the[] streets” is “the most *just and equitable* between the city and lot owners that they could devise.”⁴³⁴ Other antebellum American courts, too, used the phrase “just and equitable” to describe equal distributions of financial burdens among individuals.⁴³⁵

The U.S. Supreme Court had occasion, in an 1804 case, to weigh in on the meaning of “just and equitable.”⁴³⁶ At issue was a 1781 Virginia statute calling all paper money out of circulation and establishing rules governing “suit[s] . . . brought for the recovery of . . . [existing] debt[s]” owed in paper

⁴²⁹ See sources cited *infra* notes 431–435, 447, 456–457.

⁴³⁰ See sources cited *infra* notes 448–454.

⁴³¹ WEBSTER, *supra* note 23 (emphasis added) (defining “Equal”).

⁴³² WILLIAM PERRY, THE SYNONYMOUS, ETYMOLOGICAL, AND PRONOUNCING ENGLISH DICTIONARY (London, T. Gillet 1805) (emphasis added) (defining “Equal”).

⁴³³ Moore v. Moore, 11 N.C. (4 Hawks) 358, 360 (1826); *accord* Campbell v. Mesier, 4 Johns. Ch. 334, 338 (N.Y. Ch. 1820) (Kent, Ch.) (“[E]quality of burden, as to a common right, is equity”); Lansdale’s Adm’rs v. Cox, 23 Ky. 401, 403 (1828); Singstrom v. The Hazard, 22 F. Cas. 224, 225 (D. Pa. 1807) (No. 12,905).

⁴³⁴ Paxson v. Sweet, 13 N.J.L. 196, 197, 201–02 (1832) (emphases added).

⁴³⁵ See Hunt v. Rousmanier, 12 F. Cas. 933, 937 (C.C.D.R.I. 1823) (No. 6897) (Story, J.) (“[T]he general rule is, that equality is equity.”), *aff’d sub nom.* Hunt v. Rhodes, 26 U.S. (1 Pet.) 1 (1828); Vernon v. Morton, 38 Ky. (8 Dana) 247, 263 (1839) (referring to “the just and equitable purpose of securing an equal distribution . . . among all the creditors”); *cf.* McKenna v. George, 19 S.C. Eq. (2 Rich. Eq.) 15, 17 (S.C. Ct. App. 1845) (Johnson, Ch.).

⁴³⁶ Faw v. Marsteller, 6 U.S. (2 Cranch) 10, 31 (1804).

money, including a scale for converting such debts into specie.⁴³⁷ Another section of the law, however, declared that, under circumstances where recovery of debt according to this conversion scale would work injustice upon a debtor, a court may “award such judgment as to them shall appear just and equitable.”⁴³⁸ The debt in the case before the Supreme Court consisted of unpaid rent for leased property—and the Court (per Chief Justice Marshall), after concluding that the latter of the two quoted provisions applied, proceeded to inquire “what ‘judgment will be just and equitable.’”⁴³⁹ On that score, wrote Marshall, “the court can perceive *no other guide, by which its opinion ought, in this case, to be regulated, but the real value of the property at the time it was sold.*”⁴⁴⁰ The central take-away is that the Court not only understood “just and equitable” relief to mean the market value of the lease, but even went so far as to say that market value was the *only* conceivable “guide[] by which its opinion ought . . . to be regulated.” (At least one other early American case interpreted “just and equitable” in essentially the same way.⁴⁴¹) That courts inferred as much from the phrase “just and equitable” reinforces Professor Wurman’s theory⁴⁴² that boards of commissioners’ power to adjust district-wide valuations in a “just and equitable” manner under the 1798 direct tax law was simply “the third part of the process for determining what the proper valuations actually were.”

State legislation from the early Republic bolsters this same conception of federal boards’ Section-22 powers. The phrase “just and equitable” often appeared in statutes from this era providing for assessments of property for taxation, and as used therein apparently denoted equality of valuations across properties.⁴⁴³ An 1800 New York law empowered each town’s tax assessors to adjust “the valuation of the real estates, by adding to or deducting from each of them, such sums” as they find “to be *just and equitable*, and necessary

⁴³⁷ *Id.* at 28.

⁴³⁸ *Id.*

⁴³⁹ *Id.* at 31.

⁴⁴⁰ *Id.* (emphasis added).

⁴⁴¹ See *In re William & Anthony Sts.*, 19 Wend. 678, 683–84, 690 (N.Y. Sup. Ct. 1839) (holding that, under a statute providing for “just and equitable” compensation for private land taken to build roads, the “value of the land is the measure of damages,” since the court “d[id] not see how there can be a just and equitable estimate of the loss . . . without . . . consider[ing] . . . the market value of the property”).

⁴⁴² Wurman, *supra* note 17, at 1552.

⁴⁴³ See sources *infra* notes 444–447.

to *equalize* the tax . . . within their respective towns.”⁴⁴⁴ A comprehensive state tax statute enacted in Vermont in 1825 provided for ad valorem taxation of real estate. Under the assessment process set forth in the statute, each town’s tax administrators (“listers”) would value the taxable property in their respective towns; and thereafter each county would hold a meeting during which that county’s listers were to “examine, average, and *equalize*” the valuations “by adding thereto, or deducting therefrom, such . . . rate *per centum*, as shall render” them “*just and equitable, comparing one with the other.*”⁴⁴⁵ Each county’s listers would then submit the revised valuations to the general assembly, which would “appoint a committee” to “examine the . . . valuation[s] . . . and *equalise*” them “by adding to, or deducting . . . such rate per centum, as shall render . . . valuation[s] . . . *just and equitable.*”⁴⁴⁶ The Vermont statute’s language reflects an understanding that “just and equitable,” in the tax context, simply meant that valuations should be equal between regions.⁴⁴⁷

In the same way that “just and equitable” meant “equal” when used to describe schemes for valuation, so, too, did the phrase (and “just” in particular) mean “accurate” when used to describe the valuation of a

⁴⁴⁴ An act to explain and amend the act entitled “An act for the assessment and collection of taxes”, ch. 132, 1800 N.Y. Laws 594, 594 (1800) (emphasis added).

⁴⁴⁵ An Act ascertaining the principles on which the list of this state shall be made, and directing listers in their office and duty, ch. 48 § 18, 1825 Vt. Acts & Resolves 10, 19 (1825) (emphases added).

⁴⁴⁶ *Id.* (emphasis added).

⁴⁴⁷ Ohio’s 1834 counterpart to this Vermont law uses the same phrase to the same effect, establishing a “board of equalization for [each] county” with the “power to equalize the valuations . . . by adding to or deducting . . . such sum as to them . . . shall appear just and equitable.” An Act to provide for the revaluation of real property in this State, §§ 10–11, 1834 Ohio Laws 12, 14–15 (1834). Following these boards’ revisions, the “auditors of the several counties shall correct” the valuations accordingly and submit them to the legislature, which subsequently appointed “a board of equalization . . . to *equalize* the valuation of the real estate . . . throughout the state . . . by adding to or deducting from such per centum as to them shall appear just and reasonable.” *Id.* §§ 12–13 (emphasis added). Ohio’s adoption of this tax scheme was presaged by an 1825 legislative committee report, which proposed a similar system of assessment: the “important provisions of the proposed system are a just and equal valuation of, and a just and equal tax, . . . operating by the same just and equitable rule on all the members of the community.” *Report of the Joint Committee to whom [sic] was Referred so much of the Governor’s Message as Relates to the Revenue of the State* (Jan. 3, 1825), in JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF OHIO, BEING THE FIRST SESSION OF THE TWENTY-THIRD GENERAL ASSEMBLY 156 (Columbus, P.H. Olmsted 1824). Note that the report equated a “just and equal” system with a “just and equitable” one.

particular piece of property. An 1839 law dictionary defined “appraisement,” for instance, as simply “a *just* valuation of property.”⁴⁴⁸ The most conspicuous use of “just” in this sense was that of the U.S. Constitution’s Fifth Amendment (and state constitutional analogs) in prohibiting taking of private property “without just compensation.”⁴⁴⁹ This sparse phraseology was widely understood in the decades immediately after the Framing to connote (to quote the same dictionary) that “an appraisement of [the property taken] must be made so that the owner may be paid its value.”⁴⁵⁰ Adjudicators of constitutionally guaranteed “just compensation” were bound “to value the injury to the property” based on “what . . . the property” would “have sold for[] at the time the injury was committed.”⁴⁵¹

The phrase “just and equitable” also often appeared in statutes from this period providing for valuations of property, and, as used therein, apparently meant “accurate.” To name just one such enactment,⁴⁵² Pennsylvania’s legislature passed a law in 1830 to regulate inns and taverns. Among its provisions was an annual tax on such businesses levied in proportion to their rental value for that year, to be determined, in part, as follows: the assessors of each “township, borough, ward, or district” were to “make a *just and equitable* valuation of the yearly rental of . . . every inn and tavern within” their respective jurisdictions, and to “make return thereof to the county commissioners.”⁴⁵³ (Those commissioners were then “to examine, *equalize* and adjust the [valuations] as to them shall seem *just and reasonable*.”⁴⁵⁴)

It is true, as Parrillo points out, that the phrase “just and equitable” during this period was sometimes apparently used in a more generic sense—to refer

⁴⁴⁸ 1 A LAW DICTIONARY, *supra* note 339, at 84 (emphasis added) (defining appraisement).

⁴⁴⁹ U.S. CONST. amend. V.

⁴⁵⁰ 1 A LAW DICTIONARY, *supra* note 339, at 84.

⁴⁵¹ *Schuylkill Navigation Co. v. Thoburn*, 7 Serg. & Rawle 411, 422–23 (Pa. 1821), *accord In re Furman St.*, 17 Wend. 649, 660 (N.Y. Sup. Ct. 1836); *Tide Water Canal Co. v. Archer*, 9 G. & J. 479, 532 (Md. 1839); *COOLEY*, *supra* note 99, at 565.

⁴⁵² *See, e.g.*, An Act Authorising the Governor to Incorporate the Lick Run Rail Road and Coal Company, in Lycoming County, No. 142, §§ 3–4, 1828 Pa. Laws 222, 222–23 (providing that all real property used in the company’s operations “shall form a common stock,” and that before “said lands are put into the stock,” the landowners “shall apply to the court of common pleas,” which shall “appoint three disinterested free-holders to . . . put a fair valuation on the said land . . . and if the said court shall consider the said valuation as just and equitable . . . the said valuation and lands shall be put into the stock as a part thereof”).

⁴⁵³ An Act to Regulate Inns and Taverns, No. 186, § 3, 1830 Pa. Laws 352, 353 (emphasis added).

⁴⁵⁴ *Id.* (emphases added).

to “an all-things-considered judgment” of fairness.⁴⁵⁵ But it must be kept in mind in interpreting the 1798 legislation that it was enacted against an extremely strong background norm of equality in the tax context. Said the great James Kent in his 1827 *Commentaries*:

Every person is entitled to be protected in the enjoyment of his property . . . from all unequal . . . assessment The citizens are entitled to require, that the legislature itself shall cause all public taxation to be . . . equal in proportion to the value of property, so that no one . . . may be unequally . . . assessed. . . . This duty of protecting every man’s property, by means of just laws . . . impartially administered . . . is one of the strongest . . . obligations . . . of government.⁴⁵⁶

This norm should inform our construction of Section 22. It suggests that, while “just and equitable” may have had a more generic meaning in non-tax contexts, when the phrase is used to describe boards’ revision powers, it is best understood in its narrower sense (i.e., “equal”). (Recall that Commissioner Robert Anderson relied upon this principle in arguing that Section 22 conferred upon the boards a mere equalization power.) This view on equality in the taxation realm won the endorsement of, among others, Kentucky’s highest court, which remarked in an 1839 opinion that:

The distinction between constitutional taxation, and the taking of private property . . . may not be definable with perfect precision. But . . . whenever the property of a citizen shall be . . . appropriated . . . to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions . . . be exacted . . . from such . . . members of the same community . . . as own the same kind of property⁴⁵⁷

This passage reaffirmed the views the same court had expressed in a case decided two years prior.⁴⁵⁸ These cases buttress the view that boards of commissioners’ power under Section 22 to make “just and equitable” district-wide revisions to valuations is best understood as an equalization power, as such a reading is more consistent with the established norm of equality in

⁴⁵⁵ Parrillo, *Critical Assessment*, *supra* note 4, at 1369.

⁴⁵⁶ KENT, *supra* note 76, at 268–70.

⁴⁵⁷ *City of Lexington v. McQuillan’s Heirs*, 39 Ky. (9 Dana) 513, 517 (1839).

⁴⁵⁸ *See Sutton’s Heirs v. City of Louisville*, 35 Ky. (5 Dana) 28, 31 (1837).

assessment of taxes. Indeed, if one takes seriously the notion that legislation imposing a tax according to an unequal system of assessment would be unconstitutional, then such a reading of Section 22 is also at least strongly supported, if not outright compelled, by the age-old interpretive canon that “[n]o court ought . . . to give a construction to [legislation]” that would render it “a violation . . . of the constitution”—or that would raise “serious doubts” about its constitutionality—“unless the terms of [the] act rendered it unavoidable.”⁴⁵⁹

Nineteenth-century courts often kept in mind these sorts of background norms as they construed statutory conferrals of decision-making authority upon administrative officials.⁴⁶⁰ Their insistence on inferring limitations on administrators’ delegated decision-making powers carries important implications for interpreters of the 1798 direct-tax legislation. In particular, this caselaw suggests that interpreters should avoid imputing to Congress an intent to create a tribunal unconstrained by such clear rules.

G. *The 1798 Direct Tax in Context*

Other events contemporaneous with the 1798 direct tax, including subsequent federal tax legislation, further drive home the point that Section 22’s delegation to boards of commissioners is not such devastating evidence against a robust, Gorsuch-style nondelegation rule as Parrillo claims.

First, it is worth emphasizing the limited scope of the delegation to the commissioners under the 1798 statute—not because the delegation’s narrow scope would make it constitutional if the powers delegated were indeed purely legislative, but because it explains how an unconstitutional delegation

⁴⁵⁹Parsons v. Bedford, Breedlove & Robeson, 28 U.S. (3 Pet.) 433, 448–49 (1830).

⁴⁶⁰South Carolina’s top court, concerned that a statute delegating certain powers to road commissioners might constitute an “encroachment of jurisdiction . . . on the legislative department,” narrowly construed the grant of authority. See *Ex parte Withers*, 5 S.C.L. (3 Brev.) 83, 84 (1812). Noting that the law “authorized [the commissioners] . . . to lay out, and keep in repair, all such high roads . . . as they should judge necessary,” the court admitted that “[i]t may seem, from the expressions used in this grant of power, that the commissioners . . . might use their own arbitra[r]y will and discretion in all these respects,” but nonetheless concluded that the act, “construed *secundum subjectam materiam*, must mean a making, alteration, and preservation, of such roads, as . . . ordered . . . by legislative authority.” *Id.* at 86–87; see also *N.J. R.R. & Transp. Co. v. Suydam*, 17 N.J.L. 25, 34–35 (1839) (Hornblower, C.J.); *id.* at 46–48 (Ford, J.); *id.* at 52 (White, J.) (holding that a board of commissioners’ statutory power to determine compensation owed for private property taken through eminent domain was constrained by standards beyond those mentioned in the statute).

could have flown under the constitutional radar. The 1798 statute's text established the amount to be raised by the direct tax and the objects of taxation, with each state's share being determined by the Constitution's requirement that direct taxes be apportioned among states based on population.⁴⁶¹ As Professor Wurman points out, "Congress resolved for itself the most politically controversial issue: whether houses should be taxed separately from land," thereby "ensur[ing] that most of the tax burden would fall upon wealthy city dwellers with large houses."⁴⁶² Revenue from the 1798 direct-tax law was comparatively modest as well. According to one historian, the direct tax accounted for seven percent of federal revenue at its peak in 1800, declining to four percent in 1801, two percent in 1802, and a negligible portion during the several years that followed.⁴⁶³

Section 22's delegation of power to the commissioners was limited not only in scope but also temporally. As Parrillo acknowledges, the 1798 direct tax was "levied for a finite sum" and thus "was self-limiting."⁴⁶⁴ Each state's board of commissioners had only one opportunity to exercise its Section-22 revision authority before the full two million dollars levied was collected. Moreover, much of that sum had already been collected as of 1800.⁴⁶⁵ In 1802, the Jefferson Administration had successfully pushed through a repeal of all non-self-limiting federal internal taxation⁴⁶⁶ and "dismantled the collection bureaucracy."⁴⁶⁷ The federal government during the following decade was financed almost entirely by customs duties.⁴⁶⁸

Still, "by 1803, thirteen states . . . had an unaccounted-for balance due which amounted to 7 percent" of the total amount levied by the 1798 direct tax.⁴⁶⁹ Congress and the executive accordingly took additional measures to ensure that collection of the tax was completed—including passing remedial legislation, the text of which arguably sheds light on the 1798 law's meaning. In 1804, South Carolina's notoriously slow board of commissioners finally completed its district-wide revisions of valuations pursuant to Section 22 and

⁴⁶¹ See U.S. CONST. art. I, § 2.

⁴⁶² Wurman, *supra* note 17, at 1550.

⁴⁶³ Robin L. Einhorn, *Slavery and the Politics of Taxation in the Early United States*, 14 *STUD. AM. POL. DEV.* 156, 175 tbl. 2 (2000).

⁴⁶⁴ Parrillo, *Critical Assessment*, *supra* note 4, at 1437.

⁴⁶⁵ See *id.*

⁴⁶⁶ See *id.* at 1439–40.

⁴⁶⁷ Einhorn, *supra* note 463, at 183.

⁴⁶⁸ Soltow, *supra* note 417, at 57.

⁴⁶⁹ *Id.*

submitted them to Treasury Secretary Gallatin, who then asked Congress for additional funding and other reforms designed to facilitate the collection process.⁴⁷⁰ Congress obliged, enacting a law in early 1805 with Gallatin's requested fixes. Importantly, the 1805 statute empowered the treasury secretary to employ clerks "to add to, or to deduct from the valuations . . . such a rate per centum as has been determined by the commissioners" under the 1798 direct tax legislation; and further provided that the clerks' valuations, once "completed in conformity with the revisions and equalizations made by the commissioners aforesaid, shall have the same . . . effect as if they had been completed . . . agreeably" to the 1798 legislation.⁴⁷¹ If the 1805 act is any indication, Congress itself conceived of the tax commissioners' duty under Section 22 of the 1798 law as that of making not just revisions, but specifically "equalizations."⁴⁷² A law enacted so soon after the 1798 direct-tax statutes that evinces such an understanding is strong support for the interpretation of Section 22 as merely empowering boards to equalize valuations among districts.

What is more, despite Parrillo's claims to the contrary, the apparent breadth of Section 22's grant of authority to boards of commissioners was an anomaly during the Republic's early years. Once collection of the two million dollars to be raised under the 1798 direct tax was finally completed in 1805, Congress imposed no direct taxes until 1813, when the War of 1812 forced lawmakers to turn to such taxes for revenue.⁴⁷³ The "most important difference from the 1798 tax," Parrillo admits, "was that Congress in 1813 greatly reduced . . . administrative discretion . . . [T]here was no mechanism for federal administrators to adjust the relative taxable values . . . across the different parts of the state."⁴⁷⁴ Still, Parrillo emphasizes, under Section 15 of the 1813 legislation:

[T]he principal [federal] assessor covering a *county* containing multiple assessment districts had power "to revise, adjust, and equalise the valuations" of real estate and enslaved persons "between such assessment districts [within the county], by deducting from or adding to either such a rate

⁴⁷⁰ See Parrillo, *Critical Assessment*, *supra* note 4, at 1440–41.

⁴⁷¹ Act of Jan. 30, 1805, ch. 11, § 1, 2 Stat. 311, 311–12 (emphasis added).

⁴⁷² Then as now, "acts *in pari materia*, and relating to the same subject, are to be . . . compared in the construction of them." 1 KENT, *supra* note 76, at 433 (1826).

⁴⁷³ Parrillo, *Critical Assessment*, *supra* note 4, at 1440.

⁴⁷⁴ *Id.* at 1444.

per centum as shall *appear just and equitable*”—the same open-ended standard as from the 1798 legislation.⁴⁷⁵

Yes, the same open-ended standard—but cabined this time by the use of different language describing the assessors’ power itself: whereas boards of commissioners under Section 22 of the 1798 legislation had the power “to revise, adjust, and vary” valuations on a district-wide basis, assessors under Section 15 of the 1813 statute had the power “to revise, adjust, and *equalise* the valuations . . . between . . . districts” in a single county.⁴⁷⁶

Thus, the successor to the 1798 legislation made more explicit what I have argued can be reasonably inferred from Section 22 of the earlier law: that the delegated power of making “just and equitable” district-wide revisions merely empowers the agent charged with exercising it to equalize valuations among districts. And the Treasury Department, among others, apparently agreed. In 1813, the Department issued a circular to principal assessors instructing them to, in administering the direct-tax law adopted that year, revise the valuations pursuant to Section 15 of the law when the assessors were “of opinion that the valuations, as made generally in any of those assessment districts, should be relatively higher or lower than the valuations of the other assessment districts composing the county”—in which case the assessors were to revise at “such a rate per cent as will make those valuations relatively equal.”⁴⁷⁷

In 1815, Congress enacted what was intended to be a permanent direct tax levying six million dollars annually.⁴⁷⁸ Parrillo stresses the fact that the 1815 legislation “reinstated federal boards in each state with broad rulemaking power to allocate the intrastate tax burden, very similar to the 1798 tax.”⁴⁷⁹ True, federal boards under the 1815 tax statute had the “power to revise, adjust and equalize the valuation of property in any county or state district” so as to “render the valuation . . . just and equitable.”⁴⁸⁰ But the language of the 1815 tax statute, just like that of the 1813 tax statute,

⁴⁷⁵ *Id.* (second alteration in original) (quoting Act of July 22, 1813, ch. 16, § 15, 3 Stat. 22, 29, repealed by Act of Jan. 9, 1815, § 2, 3 Stat. 164, 165).

⁴⁷⁶ *Id.*

⁴⁷⁷ UNTITLED CIRCULAR, WITH FORMS, RELATIVE TO THE ASSESSMENT AND COLLECTION OF DIRECT TAXES AND INTERNAL DUTIES, UNDER THE ACTS OF JULY 22, 1813, AND AUG. 2, 1813 [2] (1814), quoted in Parrillo, *Critical Assessment*, *supra* note 4, at 1445.

⁴⁷⁸ Parrillo, *Critical Assessment*, *supra* note 4, at 1449.

⁴⁷⁹ *Id.*

⁴⁸⁰ Act of Jan. 9, 1815, ch. 21, § 20, 3 Stat. 164, 171 (repealed).

undercuts rather than reinforces Parrillo's point—and for the same reasons. The 1815 law made clear that the power to make “just and equitable” revisions was not merely the “power to revise” or “adjust,” but to “*equalize*” valuations across regions.⁴⁸¹ The next section of the 1815 law even confirmed this by providing that “as soon as the said [federal] board . . . shall have completed *the adjustment and equalization of the valuation aforesaid*, they shall proceed to apportion to each county and state district its proper quota of direct tax.”⁴⁸² Thus, the process of district-wide revisions by the boards was not simply one of “adjustment” but of “equalization.” And once again, the Treasury Department apparently agreed with me on this point. The Department's 1815 circular concerning the administration of the direct tax enacted that year instructed federal boards under the statute to make county or statewide revisions when they were “necessary, in the opinion of the board, to produce an *equality* of the valuations throughout the state.”⁴⁸³

Shortly after the first six million dollars was fully collected under the 1815 direct-tax statute, the conflict with Britain came to an end, and Congress, given the decreasing need for revenue, enacted measures in 1816 canceling the permanent annual direct tax statute and levying a one-time direct tax of three million dollars according to the assessments done under the 1815 law.⁴⁸⁴ Not until 1861 did Congress impose another direct tax.⁴⁸⁵

All this is to say that the 1798 direct tax legislation's delegation of authority to boards of commissioners is simply not capable of bearing the evidentiary weight that Parrillo attributes to it. The delegation effected by Section 22 was (a) extremely limited in scope, allowing boards to alter valuations on a district-wide basis, but not the rates or objects of taxation, nor the amount to be raised;⁴⁸⁶ (b) in effect only temporarily, giving the boards just one opportunity each to exercise their Section 22 authority before the full

⁴⁸¹ *Id.*

⁴⁸² *Id.* § 21 (emphasis added).

⁴⁸³ U.S. DEP'T OF TREASURY, CIRCULAR TO THE PRINCIPAL ASSESSORS IN THE STATES OF MASSACHUSETTS, NEW HAMPSHIRE, RHODE ISLAND, VERMONT, CONNECTICUT, NEW YORK, DELAWARE, MARYLAND, NORTH CAROLINA, TENNESSEE (Mar. 10, 1815), quoted in Parrillo, *Critical Assessment*, *supra* note 4, at 1451. Delaware's legislature, too, in an 1815 memorial to Congress, also referred to the process by which “the valuations of the several counties were adjusted and *equalized*” by federal boards pursuant to the act. JOURNAL OF THE HOUSE OF REPRESENTATIVES OF THE STATE OF DELAWARE 179 (1816) (emphasis added).

⁴⁸⁴ See Act of March 5, 1816, ch. 24, §§ 1–2, 3 Stat. 255, 255; Act of April 26, 1816, ch. 82, §§ 1–2, 3 Stat. 302, 302.

⁴⁸⁵ See Act of Aug. 5, 1861, 12 Stat. 292 (1861).

⁴⁸⁶ See Act of July 14, 1861, 1 Stat. 597 (1798).

two million dollars was collected;⁴⁸⁷ and (c) an anomaly during the antebellum period in terms of the apparent breadth of commissioners' discretion, with the handful of other direct-tax statutes more clearly delimiting the scope of powers delegated to administrators.⁴⁸⁸ Once again, the delegation's narrow scope, limited duration, and abnormality would not make an otherwise unconstitutional delegation constitutional, but it *would* explain how an unconstitutional delegation could have slipped by unnoticed.

That Section 22 slipped by without contemporaneous nondelegation objections from statesmen, commentators, or the public presents something of a problem for Parrillo's reading of the provision. As he observes, the "absence of recorded objection[s]" in Congress to the 1798 legislation is "striking . . . considering that the *Annals* record Gallatin near-simultaneously making nondelegation objections" to the provisional-army bill.⁴⁸⁹ Exactly. Why would Gallatin—a believer in nondelegation values—emerge as the principal *advocate* for delegating to boards of commissioners the power to make district-wide revisions of valuations under the direct-tax law if the delegation really was as sweeping as Parrillo claims? More importantly, why did none of the other lawmakers (among whom were many nondelegation proponents) broach the issue during debate on the direct tax? Surely all nineteen House members that voted against the 1798 tax bill had a political incentive to invoke nondelegation in defense of their position. But they did not—even though that principle was undoubtedly familiar to even the dullest of statesmen. Nondelegation arguments were ubiquitous at the time and often succeeded even in situations where they were likely false alarms. Nor am I aware of any court or commentator mentioning the 1798 direct tax when discussing nondelegation at any time prior to the Civil War.

The most reasonable explanation for the contemporaneous acquiescence to Section 22 of the 1798 direct-tax law was, I think, that most observers interpreted that provision as I do: as a mere delegation of power to boards of commissioners to equalize valuations among districts with a view towards achieving greater accuracy overall. But does understanding the delegation in this way establish "originalist precedent for construing [the] factual exceptions to a constitutional ban on rulemaking quite broadly," as Parrillo suggests? No. To understand why not, one must delve into the historical sources for guidance as to precisely what separates an unconstitutional

⁴⁸⁷ *See id.*

⁴⁸⁸ *See id.*

⁴⁸⁹ Parrillo, *Critical Assessment*, *supra* note 4, at 1431.

delegation of power from a constitutional one, as I shall do in the pages that follow.

H. An Intelligible-Principle Test?

I previously argued that “a statute unconstitutionally delegates legislative power when it 1) allows the agent . . . to whom authority is delegated[] to issue general rules governing private conduct that carry the force of law and 2) makes the content or effectiveness of those rules dependent upon the agent’s policy judgment.”⁴⁹⁰ Parrillo, however, argues that the Constitution demands nothing more than the Supreme Court’s current “intelligible-principle” test, meaningless as it is. As is explained in the pages that follow, I stand by the framework I proposed initially, which is supported by the historical sources in several respects.

First, consider the accepted Framing-era definitions of “law” and “legislative power.” As was discussed earlier, the sources from that period uniformly hold that “[t]he essence of the legislative authority” is “to enact laws,” which are “rule[s] of civil conduct prescribed by the . . . state” for “its subjects.”⁴⁹¹ It follows from these definitions that legislation must be complete enough upon enactment that it prescribes comprehensible rules by which private parties can conduct themselves. Such was the view of early American courts in applying what is now known as the void-for-vagueness doctrine: “Laws which create crimes,” wrote a Supreme Court justice while riding circuit in 1815, “ought to be so explicit in themselves, or by reference to some other standard, that all men . . . may know what acts it is their duty to avoid.”⁴⁹² “[N]o person,” wrote another justice in 1810, may “be adjudged guilty of an offence unless it be created and promulgated in terms which leave no reasonable doubt of their meaning.”⁴⁹³ A similar requirement applied to noncriminal statutes.⁴⁹⁴ To be sure, this rule was partly founded on the due-process principle that a person ought to have fair warning of what is conduct prohibited—a non-issue where administrative regulations have been

⁴⁹⁰Gordon, *supra* note 9, at 781. This general framework is, of course, subject to the qualifications discussed earlier related to territorial and D.C. governments, as well as foreign relations.

⁴⁹¹See *supra* note 97 and accompanying text.

⁴⁹²United States v. Sharp, 27 F. Cas. 1041, 1043 (C.C.D. Pa. 1815) (No. 16,264).

⁴⁹³The Enterprise, 8 F. Cas. 732, 734 (C.C.D.N.Y. 1810) (No. 4499).

⁴⁹⁴See *Drake v. Drake*, 15 N.C. (4 Dev.) 110, 115 (1833); see also *Commonwealth v. Bank of Pa.*, 3 Watts & Serg. 173, 177 (Pa. 1842).

promulgated so as to provide such notice.⁴⁹⁵ But the rule was also founded on the separation-of-powers principle that it “is the legislature, not the Court, which is to define a crime, and ordain its punishment.”⁴⁹⁶ Hence, it violates the separation of powers if the legal rules governing private conduct arise from administrative regulation pursuant to a statutory delegation rather than from the statute itself.

Early applications of the nondelegation rule support this theory. Many of these have already been discussed in the preceding pages.⁴⁹⁷ But there are others, including an 1839 decision of Massachusetts’s highest court that illustrates the point, albeit indirectly. There, a law providing for taking of property in order to construct a railroad was attacked as unconstitutional because it did “not of itself appropriate the specific land taken, to public use, but delegates to [a] corporation th[at] power”—which “cannot be delegated.”⁴⁹⁸ Although the court said of “[t]his objection” that it “deserves and has received great consideration,” it ultimately upheld the law:

[W]e are of opinion that [the act] sufficiently declares the public necessity . . . of a rail road [and] fixes the *termini* Nothing therefore is delegated . . . but the power of directing the intermediate course between the *termini*[.] The question of necessity for public use is passed upon and decided by the legislature. Whether the road goes over the lands of one or another private individual, does not affect that question.⁴⁹⁹

The clear upshot of this reasoning is that the statute *would* have unconstitutionally delegated the legislative power of eminent domain had it

⁴⁹⁵ See *Loving v. United States*, 517 U.S. 748, 768 (1996).

⁴⁹⁶ *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820).

⁴⁹⁷ See, e.g., *Rice v. Foster*, 4 Del. (4 Harr.) 479, 492 (Del. 1847) (invalidating an identical statute on the same ground, reasoning that the act was “not a law; it . . . is not a rule prescribed by . . . the State to its citizens, enforcing some duty or prohibiting some act”); *Parker v. Commonwealth*, 6 Pa. 507, 518 (1847) (similar); *Marr v. Enloe*, 9 Tenn. (1 Yer.) 452, 453–55 (1830) (invalidating on nondelegation grounds a statute authorizing county judges to “levy a tax to meet the current expenses of their county for the ensuing year” because “[u]ntil county courts by its order . . . imposes the tax, the people have no knowledge what they have to pay”). Note that the legislation was held unconstitutional even though judges’ discretion was constrained by what today would be called an “intelligible principle”: they could tax as necessary “to meet the current expenses of their county for the ensuing year.”

⁴⁹⁸ *Bos. Water Power Co. v. Bos. & Worcester R.R. Corp.*, 40 Mass. (23 Pick.) 360, 395 (1839).

⁴⁹⁹ *Id.* at 396.

not designated the railroad's start- and endpoints.⁵⁰⁰ Such logic undercuts Parrillo's claim that only a vague "intelligible principle" is necessary to avert nondelegation problems. If that were so, why would a statute need to designate the railroad's *termini*? Could the statute not simply empower the corporation to designate them based on its own view of the "public interest?"

This point was even more plainly illustrated in an 1838 decision of one South Carolina court, which confronted a similar nondelegation challenge to a statute delegating the power to condemn private property to a corporation in order to construct a railroad. The court agreed with the challenger that "the legislature [could not] assign to any corporation, the eminent domain."⁵⁰¹ It "would be utterly inconsistent with . . . the constit[ut]ion" and "well established rules for . . . agencies" if that authority were "transferred from the . . . agent, to whom it has been confided by the constitution, to any secondary hand."⁵⁰² "But," the court went on to say,

[t]he . . . use of the eminent domain . . . is to be found in the enactment, that a rail road shall be constructed between specific termini: and the land essential for its track and construction, shall be released . . . upon full compensation . . . Surely this is an . . . exercise of their high privilege by the legislature itself . . . The provisions, that the precise track of the road, preserving the termini, shall be marked out, and the road constructed . . . are mere executive . . . processes.⁵⁰³

Again, note that if an "intelligible principle" were all that was constitutionally required, there would be no need for the statute to specify the "termini" of the railroad.

Further confirmation of the insufficiency of today's intelligible-principle standard may be found in sources from the ensuing decade. Consider, first, an 1842 attorney general opinion analyzing "whether, in the absence of any regulations . . . prescribed by Congress since the passage" of an 1833 statute regulating duties, the Treasury Department retained its powers under that

⁵⁰⁰ See *Loughbridge v. Harris*, 42 Ga. 500, 503–05 (1871) (invalidating on nondelegation grounds a law providing "for the taking of such strips of land as may be deemed necessary for the construction" of a railroad); see also *Day v. Green*, 58 Mass. (4 Cush.) 433, 438–39 (1849).

⁵⁰¹ *Louisville, Cincinnati and Charleston R.R. Co. v. Chappell*, 24 S.C.L. (Rice) 383, 389–90 (1838).

⁵⁰² *Id.* at 390.

⁵⁰³ *Id.* at 390–91.

statute's 1832 predecessor to, "under the direction of the President . . . prescribe regulations to carry out . . . the [1833] act."⁵⁰⁴ The attorney general reflected on Congress's history of delegations to the executive in the realm of taxation: "To prevent . . . the evils incident to every system of valuation, the different statutes upon this subject have vested in [the Treasury] powers . . . in some cases falling little short of legislative power."⁵⁰⁵ The attorney general concluded that the Treasury retained its rulemaking power, but only after assuring readers that, under his proffered interpretation of the statutes, "the legislature, as such, has . . . done its part. It has prescribed a clear rule of conduct . . . In short, the act," as construed by the attorney general, was "in itself a complete law."⁵⁰⁶ In other words, the attorney general apparently thought it necessary for Congress, in order to "do[] its part" as a legislative body, to "prescribe[] a clear rule of conduct," which had to be done to make the statute "a complete law."⁵⁰⁷ Obviously, this bar would not be cleared by a mere "intelligible principle."

Also instructive is the early American caselaw limiting the extent to which municipal corporations could delegate the powers conferred upon them by state law. This limitation was "the same which rest[ed] upon the legislative power" under the Constitution, "and it spr[ang] from the same reasons"⁵⁰⁸—namely, the agency-law maxim *delegatus non potest delegare*. In 1820, a New York court applied that maxim in construing a state statute authorizing the inhabitants of a school district "to vote a tax on the resident inhabitants of such district, as they shall deem sufficient to purchase a suitable site for their school house," and "to build, keep in repair, and furnish such school house."⁵⁰⁹ Pursuant to this statute, one district passed a resolution providing for construction of a new school house and empowering "the trustees of the said district [to] levy a tax on [its] inhabitants . . . to defray the expenses of the same."⁵¹⁰ The court held that this resolution was an unauthorized delegation of the district's powers under state law: "The [district's] freeholders and inhabitants . . . had no right to delegate to the trustees any discretionary power, as to the aggregate amount of the tax to be

⁵⁰⁴Duties Under the Compromise Act of 1833, 4 U.S. Op. Att'y. Gen. 56, 56 (1842).

⁵⁰⁵*Id.* at 59.

⁵⁰⁶*Id.* at 61–62.

⁵⁰⁷*Id.*

⁵⁰⁸COOLEY, *supra* note 99, at 205; *accord* City Council v. Pinckney, 1 Tread. 42, 49–50 (S.C. Const. Ct. App. 1812) (Nott, J.) (making this comparison).

⁵⁰⁹Robinson v. Dodge, 18 Johns. 351, 351 (N.Y. Sup. Ct. 1820).

⁵¹⁰*Id.*

collected. They are required to . . . vote for a definite sum.”⁵¹¹ Again, this rule would make no sense if Parrillo were right that a delegation need only be accompanied by a vague “intelligible principle”—in which case the inhabitants could have simply delegated to the trustees the power to raise any sum they felt the “public interest” demanded.

Gallatin and his congressional colleagues, who drafted and enacted the 1798 direct-tax legislation, apparently had similar views on how much discretion Congress could commit to officials administering tax statutes. Gallatin, during the very same legislative session, objected to a provisional-army bill on nondelegation grounds, and in doing so made clear that this constitutional principle applied to taxation.⁵¹² Supporters of the bill fired back—*not* by denying the constitutional validity of the nondelegation rule, but rather by denying that the bill would precipitate the parade of horrors feared by Gallatin.⁵¹³ Congressman Harper believed Congress might “authorize the collecting of [a tax], only in case the President should find it necessary, or in case a certain event should take take [sic] place”—so long as the House itself “determine[d] upon [the] tax.”⁵¹⁴ Congressman Pinckney likewise opined that Congress could enact a law “with a provision that [a tax] should not be collected until it was wanted, or until some contingency should take place”—for so long as the act itself “rais[ed] [the] tax, specifi[ed] the mode of laying it, and the quantum of money to be raised,” he did not feel that Congress had truly “transferred the power of raising taxes to the President.”⁵¹⁵

Finally, looking ahead to sources from later in the nineteenth century, much may be gleaned from Thomas Cooley’s seminal 1876 treatise on taxation, which reconciled the Nondelegation Doctrine (in which he was a firm believer) and the longstanding practice of delegating discretion to officials administering tax laws:

The power to impose taxes, like any other . . . legislative authority, must be exercised by the legislature itself, and

⁵¹¹ *Id.* at 352; *see also* *Cruikshanks v. City Council*, 12 S.C.L. (1 McCord) 360, 360 (1821).

⁵¹² *See* 8 ANNALS OF CONG. 1655–56, 1526–27, 1539 (1798) (“If the principle upon which this bill is founded, were to be established, our Constitution would become a mere blank. . . . For if Congress can transfer power to the President to raise [an army], they can . . . vest the power in him of raising taxes . . .”).

⁵¹³ *See id.* at 1529–30.

⁵¹⁴ *Id.* (statement of Rep. Harper).

⁵¹⁵ *Id.* at 1661 (statement of Rep. Pinckney).

cannot be delegated. . . . [T]he legislature must . . . prescribe the rule under which taxation may be laid; . . . but it need not prescribe all the details of action, or even fix with precision the sum to be raised or all the particulars of its expenditure. If the rule is prescribed which, in its administration, works out the result, that is sufficient But to leave to a court[,] . . . officer[,] or board the power to determine whether a tax should be laid for the current year, or at what rate, or upon what property is clearly incompetent.⁵¹⁶

Caselaw and commentary from the 1850s, ‘60s, and ‘70s espoused similar views: though formulations of the principle varied slightly, they agreed that a legislative body with the power to tax must itself “determine all questions of . . . necessity, discretion or policy involved in ordering” or “apportioning” taxes, as well as “make all the necessary rules and regulations which are to be observed in order to produce the desired returns.”⁵¹⁷

We, therefore, arrive once again at the conclusion that a legislature’s inclusion of a nebulous “intelligible principle” to guide delegated discretion is insufficient to render such a delegation constitutional. Moreover, early authorities generally agreed on the minimum degree of specificity required in tax statutes to avert nondelegation objections: lawmakers had to specify objects and rates of taxation, or at least a formula by which these things could be determined (which the 1798 direct tax legislation, properly read, clearly did).⁵¹⁸ If the modern Court’s conception of the Nondelegation Doctrine were correct, by contrast, such policy choices could be committed to tax administrators’ views on what the “public interest” required. Yet nothing like that was ever done, nor did those dismissing nondelegation concerns ever

⁵¹⁶COOLEY, *supra* note 342, at 48–50. Cooley “do[es] not provide as much insight into [the Constitution’s] original meaning as earlier sources,” but his views, like those of others “educated in the early 19th century” are “instructive” nonetheless. *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008). Though such sources “cannot by [them]sel[ves] establish an early American tradition,” they “may reinforce an early practice.” *Espinoza v. Mont. Dep’t of Revenue*, 140 S. Ct. 2246, 2259 (2020).

⁵¹⁷COOLEY, *supra* note 342, at 34; *accord* *Marr v. Enloe*, 9 Tenn. (1 Yer.) 452, 454 (1830); *Trumbull v. White*, 5 Hill 46, 47–48 (N.Y. Sup. Ct. 1843); *Houghton v. Austin*, 47 Cal. 646, 657–58 (1874); *Gaines v. Hudson Cnty. Ave. Comm’rs*, 37 N.J.L. 12, 17–19 (1874); *Wharton v. Koster*, 38 N.J.L. 308, 309 (1876); *Hance v. Sickles*, 24 N.J.L. 125, 126–27 (1853); *Hydes v. Joyes*, 67 Ky. (4 Bush) 464, 467–68 (1868); *Thompson v. Schermerhorn*, 6 N.Y. 92, 96 (1851); *Ould v. City of Richmond*, 64 Va. (23 Gratt.) 464, 471–72 (1873); W.H. BURROUGHS, *supra* note 342, at 194 n.1; *see also* *Ruggles v. Collier*, 43 Mo. 353, 366 (1869); *People v. McCreery*, 34 Cal. 432, 443 (1868).

⁵¹⁸*See generally* Act of July 14, 1798, 1 Stat. 597 (1798).

argue that sweeping delegations of power were constitutional as long as exercise of the delegated power was constrained by an “intelligible principle”—as they assuredly would have argued if Parrillo were correct about the Constitution’s meaning as it relates to nondelegation.

VII. STRUCTURE

I agree with Mortenson and Bagley that originalist advocates of nondelegation cannot “infer [that] hard-edged legalized limitation[]” from nothing more than “ambiguous first principles animating the constitutional structure.”⁵¹⁹ But, while the pair are right that structural arguments ought not be dispositive, they are too quick to dismiss the relevance of appeals to structure—a form of reasoning that is itself originalist.⁵²⁰

Structurally, the problem with delegation of legislative power is that it subverts the Constitution’s bicameralism and presentment requirements,⁵²¹ which reflect the Framers’ judgment that “the facility and excess of law-making seem to be the diseases to which our governments are most liable [A] second branch of the legislative assembly . . . dividing the power with a first . . . doubles the security to the people”⁵²² But if Congress and the President enact a statute delegating rulemaking authority, the agent entrusted with that authority may thereafter issue rules carrying the force of law, many of which could not have been enacted via the constitutionally prescribed legislative process. And “[i]f Congress wants to revoke the delegation of rulemaking authority, or even repeal a particular rule, it must affirmatively object by passing a statute.”⁵²³

Policymaking by administrative regulation thus has led in practice to precisely the pitfalls against which the Constitution’s legislative process was meant to guard. First, a key benefit of the “distribution of the legislative power” between two houses of Congress and a veto-wielding president is that it “secure[s] . . . independent review of [proposed laws] by different minds, acting under different . . . opinions.”⁵²⁴ Regulation formulated and imposed by agencies evades these mechanisms for ensuring that the rules that govern

⁵¹⁹Mortenson & Bagley, *supra* note 5, at 292.

⁵²⁰See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407, 426 (1819); 1 STORY, *supra* note 127, § 405.

⁵²¹U.S. CONST. art. I, § 7.

⁵²²THE FEDERALIST NO. 62, at 378–79 (James Madison) (Clinton Rossiter ed., 1961).

⁵²³Gordon, *supra* note 9, at 801.

⁵²⁴2 STORY, *supra* note 127, §§ 554, 556.

us reflect a balancing of diverse interests and priorities. Granted, the administrative rulemaking process often involves some representation of affected societal interests—such as a period of public “notice and comment” on proposed substantive rule changes.⁵²⁵ But while agencies may be required to consider certain factors or views of interested parties (and in some cases to respond thereto), they need not make any changes to their proposed regulations as a result of those parties’ input.⁵²⁶ These modest opportunities for public input are simply not comparable to the safeguards that the Constitution’s bicameralism and presentment process affords to interested societal factions to block a proposal or otherwise force compromise.⁵²⁷

Relatedly, the Framers also envisioned that the Constitution’s lawmaking procedure would reinforce federalism. Requiring that federal legislation earn the assent of the Senate, where an “equal vote [is] allowed to each State,” is “at once a constitutional recognition of [states’] . . . sovereignty”; bicameralism and presentment “guard . . . against an improper consolidation of the States into one simple republic.”⁵²⁸ Hence, another of “the structural arguments for the nondelegation doctrine is that it promotes federalism by . . . mak[ing] it harder to pass laws,” which “means that the federal government will enact fewer statutes that displace state policy (either by preempting state laws or by . . . imposing laws that operate within the states).”⁵²⁹

Also among the “calamitous . . . effects” of lawmaking by a unitary authority is that, according to Madison in the *Federalist*, the laws may become “so voluminous that they cannot be read.”⁵³⁰ This warning was prophetic. “[T]he removal of limits on Congress’s . . . ability to delegate [legislative] powers” has “produce[d] too much law.”⁵³¹ “Between 1975 and

⁵²⁵ See 5 U.S.C. § 553.

⁵²⁶ See, e.g., 32 Arthur R. Miller et al., *Federal Practice and Procedure* § 8180 (1st ed., Westlaw (database updated Apr. 2022)).

⁵²⁷ As Story rightly pointed out, mere “guards interposed to secure due deliberation” are not alone sufficient to ensure broad representation in lawmaking; “an independent revisory authority, must have the means . . . to give” proposed measures “a full and satisfactory review”—including, in some instances, “to alter, amend, or reject them.” 2 STORY, *supra* note 127, § 556.

⁵²⁸ THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

⁵²⁹ Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 344 (2001).

⁵³⁰ THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

⁵³¹ Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 173 (2016).

2016, the Code of Federal Regulations' page count has grown . . . from less than 75,000 to over 175,000, and its word count now exceeds 103 million" (not to mention the additional 22 million words of federal statutory law).⁵³²

Another "great injury" that the Framers feared from unitary lawmaking bodies was a tendency toward "unstable government," which "damps every useful undertaking, the success . . . of which may depend on a continuance of existing arrangements."⁵³³ "Under a well-balanced constitution, the legislature" cannot "delegate its proper function," as doing so would "subject[] the governed, not to prescribed rules of action, to which he may safely square his conduct before-hand, but to the unsettled will of the ruling power."⁵³⁴ Can this criticism be fairly leveled at policymaking by modern administrative agencies? Many think so. Administrative law "is more dynamic, expansionist, and unpredictable than statutory law."⁵³⁵ Agency "[p]olicy reversals [have become] more common in the era of partisan volatility," and these "create costly regulatory uncertainty"—precisely as Madison predicted.⁵³⁶

But what, then, is the structural argument for allowing greater delegations of authority by Congress to the executive in the foreign-affairs realm, or to territorial legislatures to make laws within U.S. territories or D.C.? Surely Congress's delegation of discretion in those circumstances, no less than delegation of its core and exclusive legislative powers, raises concerns about policy instability or evasion of the broad societal deliberation fostered by the constitutional legislative process, no?

Perhaps so, but there are also strong countervailing concerns that led the Framers to permit greater congressional delegation under these conditions. First, it is quite sensible that greater delegations to the executive are tolerable in the foreign-affairs realm. As a unitary actor, the Executive is better equipped to act decisively in emergencies and to freely conduct negotiations with foreign powers on behalf of the United States.⁵³⁷ It is also rational, as a

⁵³² See Gordon, *supra* note 9, at 813–14.

⁵³³ THE FEDERALIST NO. 62, at 381 (James Madison) (Clinton Rossiter ed., 1961).

⁵³⁴ *In re Borough of W. Phila.*, 5 Watts & Serg. 281, 283 (Pa. 1843).

⁵³⁵ DeMuth, *supra* note 531, at 173–74.

⁵³⁶ Michael A. Livermore & Daniel Richardson, *Administrative Law in an Era of Partisan Volatility*, 69 EMORY L.J. 1, 7 (2019).

⁵³⁷ See 8 COMPILATION OF REPORTS OF THE COMMITTEE ON FOREIGN RELATIONS 24 (Washington 1816) ("The President is the constitutional representative of the United States with regard to foreign nations. He manages our concerns with foreign nations, and must necessarily be most competent to determine when, how, and upon what subjects negotiation may be urged with

matter of policy, that the Constitution's vesting clauses do not forbid congressional establishment of subordinate governments for federal territories and D.C. Since these regions are not represented in Congress (nor are territories represented in the electoral college), delegation of powers is necessary to allow home rule, without which neither territorial nor D.C. residents would have a say in formulating the laws that governed them.⁵³⁸ A final reason for tolerating greater congressional delegations of power both over foreign affairs and within territories or D.C. than would be otherwise permissible is that such delegations are less of a threat to federalism; when Congress legislates for federal territories or D.C., or in the foreign-relations domain, "federal legislation does not displace state policy, because the states are prohibited from acting anyway," which also means that "the nation must rely entirely on the federal government" to formulate policy in these areas.⁵³⁹

None of this is to say that these structural arguments are normatively unanswerable. Some might say that the federal policymaking process ought to strike the balance between full deliberation and stability on the one hand, and flexibility and responsiveness on the other, in favor of flexibility and responsiveness. But this is not the balance struck by the Constitution. Like it or not, that document dictates that none but the legislature may exercise purely legislative power.⁵⁴⁰

the greatest prospect of success. . . . The nature of transactions with foreign nations . . . requires caution and unity of design, and their success frequently depends on secrecy and dispatch.").

⁵³⁸ See, e.g., *Parker v. Commonwealth*, 6 Pa. 507, 528 (1847).

⁵³⁹ Rappaport, *supra* note 529, at 344; see also 2 STORY, *supra* note 127, §§ 1064–68.

⁵⁴⁰ In reply to this structural case for nondelegation, some may argue that, even with a revived nondelegation rule, executive officials may still fashion rules in exercising prosecutorial discretion, which is functionally similar to a delegated power to issue regulations. This overlooks the fact that agency regulation, unlike prosecutorial discretion, involves promulgating rules *with the force of law*. This difference is meaningful in several ways. "First, where executive officials exercise enforcement discretion, the illegal conduct they decline to prosecute may still be prosecuted by subsequent administrations . . ." Gordon, *supra* note 9, at 809. This is often true despite the executive's pardon power since many rules established by regulation are non-criminal and hence not pardonable. See *supra* note 216. Second, many "regulations give rise to private rights of action, and so executive . . . non-enforcement of such restrictions does not mean violators incur no penalty." Gordon, *supra* note 9, at 809–10 (footnote omitted). Finally, contracts to engage in conduct forbidden by law are unenforceable in court due to illegality, even if officials exercise prosecutorial discretion not to prosecute the conduct at issue. *Id.* at 810. For further discussion of these matters, see *id.* at 809–11.

VII. FINAL THOUGHTS AND CONCLUSION

All told, Mortenson and Bagley's flawed analysis is too thin a reed to support their bold claims or to otherwise challenge the overwhelming evidence that a robust Nondelegation Doctrine has a firm foundation in the Constitution's original meaning. Among the more significant flaws in Mortenson and Bagley's account are its heavy reliance on British Parliamentary and other pre-constitutional practices, as well as its misunderstanding of agency law principles at the time of the Framing. Even more problematic is the authors' conspicuous lack of antebellum sources endorsing either of their main affirmative claims: that Congress's legislative power could be delegated or that officials making policy pursuant to statutory grants of rulemaking authority were always exercising executive power. And against the flimsy case put forth by Mortenson and Bagley in support of their position is the mountain of evidence directly undercutting it.

On top of all this, the authors alarmingly warn that revival of the nondelegation rule would imperil "the agencies that we've come to rely on for cleaner air, effective drugs, and safer roads"; and cause "serious disruptions in basic governance."⁵⁴¹ But Mortenson and Bagley provide no support for these empirical claims, and such doomsday predictions that a meaningful nondelegation rule would hopelessly frustrate congressional policymaking are questionable.⁵⁴² Congress has thus far had no trouble generating a U.S. Code of over twenty-two million words in length all by itself (an already-large figure that likely would be higher but for the availability of the tempting alternative of delegating important decisions to administrative agencies). And if Congress's power to delegate were curtailed to the extent the Constitution demands, it is fair to assume that lawmakers would put greater care into codifying important regulations in statutory text, resulting in not only a longer Code, but also a scheme of regulation that could not be undone through unilateral administrative action.

It is thus not clear that a stronger Nondelegation Doctrine would leave Congress without adequate means to maintain a robust system of

⁵⁴¹Mortenson & Bagley, *supra* note 5, at 288.

⁵⁴²I indulge in this public-policy debate only to counteract certain claims made by Mortenson and Bagley. The policy discussion herein should not be taken to suggest that the question of whether the Constitution incorporates a robust Nondelegation Doctrine depends substantially on whether one thinks such a doctrine would be a good idea. It is, after all, a cardinal rule of interpretation that "[a]rguments drawn from impolicy or inconvenience" are "of no weight" in construing the Constitution; the "only sound principle is to declare . . . and to obey." 1 STORY, *supra* note 127, § 426.

administration. Congress could still authorize executive officials to fill in details of regulatory schemes, find facts that trigger rules of conduct, or exercise other powers not purely legislative in nature. And however true it may be that “[l]egislatures have neither the bandwidth nor the expertise to write every detail of complex government programs,”⁵⁴³ Congress would remain free to call upon experts to *recommend* legislative language, which would go into effect only if enacted through the constitutionally prescribed lawmaking process.

What is more, even accepting *arguendo* the proposition that reviving the Nondelegation Doctrine will reduce the frequency and pervasiveness of “complex government programs” emanating from Washington, it is far from clear that a central government that can easily legislate with respect to every facet of “our increasingly complex society” is desirable from a policy standpoint. As that society has grown in size and complexity, centralized mandates have arguably become increasingly less appropriate. In the modern Republic, where the factors relevant to policymaking are so numerous that no government body can effectively take account of them all, decentralization becomes imperative. The Nondelegation Doctrine harmonizes with this objective, for if nationwide regulations of conduct can only be enacted through bicameralism and presentment, then they will be harder to enact and hence less pervasive.

Conversely, regulation by regulatory agencies circumvents the constitutional legislative process, thereby facilitating centralization of policymaking power in the federal government. Measures that would have been defeated in Congress may be imposed nationally by a single administrator’s decree, thus supplanting any alternative approaches that state or local governments might have adopted. Unsurprisingly, Congress’s increasing propensity to delegate its legislative power to agencies has produced a great deal of law—perhaps too much. “A 2013 study of product market regulation in thirty-five OECD countries found that the United States was the ninth most regulated nation”⁵⁴⁴ Many such countries also outranked the U.S. in the ease-of-doing-business index and other measures

⁵⁴³ Julian Davis Mortenson & Nicholas Bagley, *There’s No Historical Justification for One of the Most Dangerous Ideas in American Law*, THE ATL. (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-originalism/612013/>.

⁵⁴⁴ See Gordon, *supra* note 9, at 814.

of economic freedom.⁵⁴⁵ Since 1980, cumulative effects of regulation have slowed U.S. GDP growth by 0.8% annually, according to one 2020 study.⁵⁴⁶

And what about Mortenson and Bagley's prediction that any revival of the nondelegation rule would cause "serious disruptions in basic governance"?⁵⁴⁷ Have other jurisdictions with meaningful nondelegation rules experienced such catastrophes?

In Germany, which has arguably the world's most stringent judicial protections against legislative delegation,⁵⁴⁸ "the striking down of statutes on delegation grounds is considered a normal event that frequently occurs."⁵⁴⁹ The German Constitutional Court has developed various legal tests that place limits on the regulatory discretion that the legislature may entrust to the executive. The Constitutional Court's nondelegation jurisprudence has equipped "lawyers, judges, and politicians" with "superior analytical tools to define" these limits on legislative delegation.⁵⁵⁰ Nor, apparently, have German policymakers been hamstrung by judicial enforcement of those limits. By one metric, Germany in 2019 ranked 9th out of 167 nations in governance quality (compared to 21st for the United States)⁵⁵¹; while the 2020 Rule of Law Index ranked Germany 6th out of 128 countries in its regulatory enforcement quality (the United States was 20th)⁵⁵²; and the World Bank's Worldwide Governance Indicators, which aggregate "the views on the quality of governance provided by a large number of enterprise, citizen and expert survey respondents," show the United States lagging slightly behind Germany in "Government Effectiveness" and "Regulatory

⁵⁴⁵ See WORLD BANK, *DOING BUSINESS 2017: EQUAL OPPORTUNITY FOR ALL* 7 tbl.1.1 (2017), <https://tinyurl.com/y2ex9l4u> (U.S. 8th); Gordon, *supra* note 9, at 814–15 n.323 (citing studies ranking U.S. 11th and 17th).

⁵⁴⁶ Bentley Coffey et al., *The Cumulative Cost of Regulations*, *REV. ECON. DYNAMICS*, Oct. 2020, at 1, 1; see also Gordon, *supra* note 9, at 815 n.324 (citing studies with similar findings).

⁵⁴⁷ Mortenson & Bagley, *supra* note 5, at 288.

⁵⁴⁸ See DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 126–27 (1994).

⁵⁴⁹ Uwe Kischel, *Delegation of Legislative Power to Agencies: A Comparative Analysis of United States and German Law*, 46 *ADMIN. L. REV.* 213, 239 (1994).

⁵⁵⁰ Peter L. Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L.J.* 1341, 1396 (2004).

⁵⁵¹ LEGATUM INST. FOUND., *THE LEGATUM PROSPERITY INDEX* 14 (13th ed. 2019), <https://tinyurl.com/y6fd75p9>.

⁵⁵² WORLD JUST. PROJECT, *RULE OF LAW INDEX 2020* 27 (2020), https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2020-Online_0.pdf.

Quality.”⁵⁵³ So, too, have the courts of many U.S. states continued to enforce state-constitutional nondelegation doctrines stronger than their federal counterpart without apocalyptic consequences. Nine such states rank above the fiftieth percentile of states in governance quality,⁵⁵⁴ while eleven score similarly in U.S. News’ 2019 list of “Best States,”⁵⁵⁵ and six have median household incomes higher than that of the United States at large.⁵⁵⁶

Are these policy arguments for the Nondelegation Doctrine’s revival unanswerable? Obviously not. The point of the preceding discussion is merely that Mortenson and Bagley’s warnings of the dire consequences that would supposedly flow from resurrecting the Constitution’s nondelegation principle are without foundation and probably at least exaggerated. Surely, if it is *ever* proper to disregard the Constitution out of fear of the consequences

⁵⁵³ *Worldwide Governance Indicators*, WORLD BANK GRP., <http://info.worldbank.org/governance/wgi/Home/Reports> (last visited Dec. 15, 2022).

⁵⁵⁴ See Samuel Stebbins, *Best and Worst Run States in America*, 24/7 WALL ST. (Feb. 17, 2020, 12:15 p.m.) <https://247wallst.com/special-report/2019/11/12/best-and-worst-run-states-in-america-a-survey-of-all-50-2/>. Among the top twenty-five were the following that continue to adhere to a meaningful nondelegation rule: (2nd) Washington, see *State v. Ramos*, 202 P.3d 383 (Wash. Ct. App. 2009); *In re Powell*, 602 P.2d 711, 715 (Wash. 1979). (6th) Colorado, see *Amica Life Ins. Co. v. Wertz*, 462 P.3d 51, 54 (Colo. 2020); *People v. Lepik*, 629 P.2d 1080, 1082 (Colo. 1981). (7th) Iowa, see *In re D.C.V.*, 569 N.W.2d 489, 495 (Iowa 1997). (8th) North Dakota, see *N.D. Legis. Assembly v. Burgum*, 916 N.W.2d 83, 102 (N.D. 2018). (10th) Nebraska, see *Boll v. Dep’t of Revenue*, 528 N.W.2d 300, 305 (Neb. 1995). (12th) Georgia, see *Turner Cnty. v. City of Ashburn*, 749 S.E.2d 685, 691 (Ga. 2013). (17th) Florida, see *Fla. Dep’t of State v. Martin*, 916 So. 2d 763, 773 (Fla. 2005); *B.H. v. State*, 645 So. 2d 987 (Fla. 1994); *Bush v. Schiavo*, 885 So. 2d 321, 332 (Fla. 2004). (21st) New Hampshire, see *Guillou v. Div. of Motor Vehicles*, 503 A.2d 838, 839 (N.H. 1986); *Op. of the Justs.*, 725 A.2d 1082, 1092 (N.H. 1999). (22nd) North Carolina, see *Northampton Cnty. Drainage Dist. No. One v. Bailey*, 392 S.E.2d 352, 356 (N.C. 1990).

⁵⁵⁵ See U.S. NEWS & WORLD REP., BEST STATES 2019 2 (2019), <https://www.usnews.com/media/best-states/overall-rankings-2019.pdf> (listing Washington 1st, New Hampshire 2nd, Nebraska 9th, Colorado 10th, New Jersey 12th (see *N.J. State Firemen’s Mut. Benevolent Ass’n v. N. Hudson Reg’l Fire & Rescue*, 775 A.2d 43, 54 (N.J. Super. Ct. App. Div. 2001)), Florida 13th, Iowa 14th, North Dakota 15th, Georgia 17th, North Carolina 18th, and South Dakota 20th (see *Cary v. City of Rapid City*, 559 N.W.2d 891, 895 (S.D. 1997))). Some of these states’ nondelegation rules may be less stringent than the one called for under an originalist reading of the U.S. Constitution. But this is precisely why I have proposed compromise approaches to partially reviving the Nondelegation Doctrine without upending too much of the modern bureaucracy. See Gordon, *supra* note 9, at 816–25.

⁵⁵⁶ See *Median household income in the past 12 months*, U.S. CENSUS BUR., <https://tinyurl.com/ydeedy54> (last visited Dec. 15, 2022) (listing New Jersey 2nd, New Hampshire 7th, Washington 9th, Colorado 11th, Rhode Island 17th (see *Metals Recycling Co. v. Maccarone*, 527 A.2d 1127, 1130 (R.I. 1987) and *Ferland Corp. v. Bouchard*, 1998 WL 269098 (R.I. Super. Ct. 1998)), and North Dakota 18th).

that might result from obeying it, at the very least, the burden should be on those advocating a departure from constitutional principle to show by clear and convincing evidence that compliance with the basic law will precipitate disaster.

Mortenson and Bagley have made no such showing. More importantly, the duo has fallen dramatically short of their stated goal of showing that the Constitution, as originally understood, lacked a robust Nondelegation Doctrine. Other recent historical accounts have come closer, but even the most formidable of these—Parrillo’s—ultimately does not pose an unanswerable challenge to the originalist case for the Nondelegation Doctrine, either. In any event, the ongoing scholarly and judicial debate on this topic is unlikely to subside anytime soon. It suffices for now to say that the historical evidence firmly gives lie to Mortenson and Bagley’s emphatic assertion that “[t]here was no nondelegation doctrine at the Founding, and the question isn’t close.”⁵⁵⁷

⁵⁵⁷Mortenson & Bagley, *supra* note 5, at 367.