

Nondelegation at the Founding

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Delegations and Nondelegation After Gundy

Nondelegation at the Founding

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In recent articles, a number of scholars have sought to cast doubt on the originalist enterprise of reviving the nondelegation doctrine. In the most provocative of these, Professors Julian Mortenson and Nicholas Bagley challenge the conventional wisdom that, as an originalist matter, Congress cannot delegate its legislative power. The question, they say, is not even close. The founding generation recognized that power is nonexclusive, and so long as Congress did not “alienate” its power by giving up the ability to reclaim any exercise of power, it could delegate as broadly as it wanted to the Executive. In an article focusing on the direct tax legislation of 1798, Professor Nicholas Parrillo argues in this volume of the Yale Law Journal that although there may have been a nondelegation doctrine at the founding, it appears to have allowed for broad discretion to regulate even private rights. And in a third article, Professor Christine Kexel Chabot argues that early borrowing and patent legislation demonstrates that Congress routinely delegated important policy questions to the Executive.

This Essay rebuts these challenges to a revived, more robust nondelegation doctrine. It demonstrates that there was a nondelegation doctrine at the founding. To be sure, the history is a bit messy, precluding any kind of categorical conclusion. But when fairly evaluated, there is almost no evidence unambiguously supporting the proposition that there was no nondelegation doctrine at the founding, while there is significant evidence, somewhat ambiguous at times but unequivocal at others, that the founding generation believed that Congress could not delegate its legislative power. As for the content of that doctrine, it appears that Congress could not, and did not, delegate discretion over “important subjects” to the Executive. What are the important policies that must be resolved by Congress are sometimes, of course, in the eye of the beholder. But at most, debates over delegation at the founding were lower-order disputes over application of this principle, not higher-order disputes over its validity.

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INTRODUCTION

In a provocative Article,¹ Professors Julian Mortenson and Nicholas Bagley seek to buck the conventional wisdom about the nondelegation doctrine.

¹ Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, __ COLUM. L. REV. __ (2021).

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There was no nondelegation doctrine at the Founding, they argue. This is so because the Founders agreed that although the legislative branch could not *alienate* its power—it could not give away its power for good—the legislative branch could *delegate* its power, so long as it had the ultimate authority to reclaim any legislative power that it has so delegated.² Additionally, the founding generation recognized governmental power to be “nonexclusive” to one particular branch; so long as Congress has authorized the Executive to take some action, that action could be characterized as executive and therefore permissible for the Executive to undertake.³ Turning away from what the Founders “said” to what they “did,” Mortenson and Bagley argue that the legislation of the First Congress demonstrates that the founding generation had no problem delegating vast, presumably legislative, powers to the Executive.⁴ Summarizing their findings, they write, “there was no freestanding nondelegation doctrine at the founding, and the question isn’t close.”⁵

Professors Mortenson and Bagley are mistaken. At least, they have not come close to demonstrating their claim, let alone so categorically. Although the history is messy, there is significant evidence that the founding generation adhered to a nondelegation doctrine. Moreover, when Mortenson and Bagley’s evidence is correctly understood, there is almost no evidence that unambiguously supports the proposition that the founding generation believed that Congress could freely delegate its legislative power. It could be, however, that whatever nondelegation doctrine existed was not particularly robust. Professor Nicholas Parrillo, for example, argues in the pages of this volume that the direct tax legislation of 1798 reveals that Congress delegated discretion over private rights.⁶ In a different article, Professor Christine Kexel Chabot argues that although there was a nondelegation doctrine at the founding, early borrowing and patent legislation suggests that Congress often delegated important policy questions to the Executive.⁷

This Essay systematically compares the available evidence both for and against a nondelegation doctrine and responds to these recent challenges to a revived, more robust nondelegation doctrine, focusing largely but not exclusively on Professor Mortenson and Bagley’s work. It proceeds in five parts. Part I situates this Essay within the existing debates over originalism and nondelegation. In an important sense, the contributions of Professors Bagley, Chabot, Mortenson, and Parrillo to this literature represent a recognition that originalist work is possible—that we can make valid claims about some historical materials and can answer at least some historical questions of

² Id. at ___.

³ Id. at ___.

⁴ Id. at ___.

⁵ Id. at ___.

⁶ Parrillo [hopefully he’ll come up with a shorter title for his piece!] __ Yale L.J. ___ (2021).

⁷ Christine Kexel Chabot, *The Lost History of Delegation at the Founding*

importance (even though there are disagreements over that history). As for the nondelegation literature, the examinations of many early statutes, and the recognition of nonexclusive powers, suggest that a revived nondelegation doctrine does not require invalidating the entire modern administrative state. This Part reviews some of the earlier literature and the current discussion among Supreme Court Justices to suggest how we might improve upon them. Finally, much of the earlier literature focuses on constitutional structure, the meaning of the term “legislative power,” and the normative and theoretical reasons to have a nondelegation doctrine. The recent contributions force scholars to confront another, perhaps more direct, source of evidence of original meaning: the actual statements and practices of those first operating under the new federal Constitution.

Part II begins the argument in earnest and canvasses the affirmative evidence in favor of a nondelegation doctrine. Professors Mortenson and Bagley sporadically address such affirmative evidence, and each time come up with some reason for discounting it. But when the evidence is canvassed and displayed together, it paints a rather impressive picture of a nondelegation doctrine at the Founding. The evidentiary support comes first in the shape of explicit statements and arguments. Part II.A examines the explicit arguments in favor of a nondelegation doctrine made in the debates over a nondelegation amendment, the establishment of post roads, the Alien Friends Act, the power to raise armies, and more, largely in the first decade following ratification.⁸ Mortenson and Bagley claim that James Madison’s view of nondelegation was idiosyncratic and the result of motivated reasoning;⁹ not only was Madison consistent in his view, but his view also appears to have been widely shared on numerous occasions.¹⁰

Part II.B. then discusses John Locke, on whom the Founders placed great reliance and whose writing supports a nondelegation doctrine.¹¹ This Part shows that Mortenson and Bagley’s distinction between alienation and delegation was not shared by the founding generation. Even if Professors Mortenson and Bagley are correct that Locke distinguished between permissible delegation and impermissible alienation (itself not an entirely clear matter), the affirmative evidence in favor of the nondelegation doctrine shows that when the founding generation raised nondelegation concerns, they did so in terms of alienation or “transfers” of power—the same words Locke used.¹² In other words, Professors Mortenson and Bagley concede that alienation was thought to be impermissible.¹³ What they do not acknowledge is that what we mean today by

⁸ See *infra* Part II.A.

⁹ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

¹⁰ See *infra* Part II.A.

¹¹ See *infra* Part II.B.

¹² See *infra* Part III.B.

¹³ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

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“delegation” was understood by the founding generation to be precisely this impermissible *alienation*. When Congress “delegated” too much authority to Congress, or threatened to do so, opponents argued that Congress was improperly *alienating* or *transferring* its power.

This evidence is quite strong on its own terms, and it becomes stronger in view of the innumerable statements from the founding period that implicitly endorse a nondelegation doctrine, some of which are canvassed in Part II.C. These statements come in at least two varieties. First are statements about the institutions the Constitution creates. Time and again, the Constitution’s framers and ratifiers argued that each department was structured in a particular way so that it could exercise its particular function well.¹⁴ Each and every statement to this effect contains an entailment, or at least an implicature:¹⁵ that the legislative power *must* be exercised by the legislative branch, that the executive power *must* be exercised by the executive branch, and that the judicial power *must* be exercised by the judicial branch, to obtain the benefits of this institutional structure. The second variety of statements includes those advocating a separation of powers generally and opposing a combination of powers.¹⁶ Whenever such a statement was made, it also contained an entailment or implicature to the effect that the branches therefore could not delegate their respective powers to another branch.

Against this positive evidence of a nondelegation doctrine, Professors Mortenson and Bagley do not uncover relevant or unambiguous statements to the contrary. As shown in Part III of this Essay, they rely on dozens of statements approving the delegation of legislative power under the *British* constitution, even citing the notorious and detested Statute of Proclamations twice.¹⁷ But these are inapposite. Parliament was not limited under the British constitution;

¹⁴ See *infra* Part II.C.1, which highlights statements from *The Federalist*.

¹⁵ I take this distinction from the philosophy of language, at least as it has been explicated by prominent legal academics knowledgeable about such matters. John Mikhail explains that an entailment is an implication that follows necessarily from the semantic content of some expression. John Mikhail, *The Constitution and the Philosophy of Language: Entailment, Implicature, and Implied Powers*, 101 VA. L. REV. 1063, 1073 (2015) (“For A to entail B, it must be the case that in every conceivable situation in which A is true, B is also true.”). An implicature, on the other hand, is an implication from a statement that can be defeated by another express statement to the contrary, but without such a contradiction the recipient of the communication will presume the implication to follow from the available statement because of shared background understandings. *Id.* at 1074 (“Grice coined the term ‘implicature’ to refer to those inferences that are made, not only on the basis of what someone says, or the meaning or logical entailments of what she says, but also by virtue of the premise that the speaker is cooperative and the fact that she expressed herself in a particular way under a particular set of circumstances.”). Unlike entailments, in other words, implicatures “are *cancelable*.” *Id.* at 1075. I have not fully resolved in my mind whether the implication I am drawing from these founder-era statements follow necessarily from the language, or are mere implicatures; those in the founding era would have understood the implication either way, and that’s all I need to show.

¹⁶ See *infra* Part II.C.2.

¹⁷ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

the constitution was merely the institutions of governance that Parliament happened to create.¹⁸ These examples simply do not answer the question of whether Congress can delegate the legislative power assigned to it in a written constitution intended to bind the legislative department as well as the other departments of the national government. They also rely on practices under the Articles of Confederation, as though there were a consistent line of intellectual thinking from the Statute of Proclamations to John Locke to eighteenth-century British practice to the Articles of Confederation all the way through the American Founding.¹⁹ Beyond these inapposite statements, a careful reading of Mortenson and Bagley's Article uncovers probably only one statement—and a vague one at that—to the effect that there are no limits on what Congress can delegate to the Executive.²⁰ Every other representative or public figure on the opposite side of a nondelegation argument seems merely to have believed that there was no nondelegation problem with the particular statute at hand.

Professors Mortenson and Bagley instead rely on implications from other strains of the Founders' thought. They argue that the founding generation understood all government power to be nonexclusive to any particular branch.²¹ Mortenson and Bagley misunderstand the nature of the founding-era discussions of nonexclusive powers. The founding generation did, of course, recognize that some governmental power was not exclusive to any particular branch. Chief Justice John Marshall made the point in the Supreme Court's first nondelegation case,²² and it is a widely shared understanding that the legislative veto power exercised in *INS v. Chadha*²³ could be characterized as legislative, executive, or judicial power.²⁴ From this commonplace, Mortenson and Bagley draw a conclusion for which there does not appear to be actual evidence: that because some power is nonexclusive, *all* governmental power is nonexclusive.²⁵ Part IV shows that the founding generation believed there to be both nonexclusive *and* exclusive powers.

Part V examines the legislation of the First Congress, and particularly the borrowing legislation described by Professor Chabot. It also examines the subsequent 1798 direct tax legislation discussed by Professor Parrillo. Most of this legislation and the other legislation from early Congresses is consistent with modern scholarly accounts of nondelegation. Most of these early laws were not

¹⁸ See *infra* Part III.

¹⁹ See *id.*

²⁰ See *infra* note __ and accompanying text (discussing a statement of Rep. Bourne).

²¹ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

²² *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825); see also *infra* notes __ - __ and accompanying text.

²³ *INS v. Chadha*, 462 U.S. 919 (1983).

²⁴ See, e.g., Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. Penn. L. Rev. 603, 612–13 & n.21 (2001); see generally *id.* n.21 (citing secondary literature making similar observations about the difficulty of characterizing power).

²⁵ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

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nearly as broad as Professors Mortenson and Bagley suggest. Others did not delegate authority that any formalist would recognize as “exclusively legislative,” i.e. the kind of legislative power that it is impermissible for Congress to delegate. The direct tax legislation of 1798 is the strongest evidence in favor of a weak nondelegation doctrine. It may suggest that Congress could and did delegate some discretion affecting private rights to the Executive. And Congress at least arguably left out some important details. But *overall* the picture the founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over “important subjects,” although there were occasionally lower-order disagreements over what was important and what was a matter of mere detail. But the boldest claim of some of the recent scholarship—that there was no nondelegation doctrine at the founding, and that the question is not close—collapses upon examination.

I. THE TERMS OF THE DEBATE

Originalism, the idea that the Constitution should be interpreted with its original meaning,²⁶ appears to be ascendant on the Supreme Court.²⁷ Specifically for our purposes, five Justices on the Supreme Court have now expressed interest in resurrecting the nondelegation doctrine—the idea that Congress cannot delegate its legislative power to the executive—on the basis of originalist principles.²⁸

Yet originalism continues to be challenged by academics on numerous grounds, including that the historical meaning of constitutional provisions may

²⁶ Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* 11–21, 25–44, 84–96 (Cambridge 2017); *see also generally* Keith E. Whittington, *Originalism: A Critical Introduction*, 82 *Fordham L Rev* 375 (2013).

²⁷ Emily Bazelon, “How Will Trump’s Supreme Court Remake America?” *New York Times Magazine*, Feb. 27, 2020, <https://www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html>; The Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the Committee on the Judiciary, United States Senate, S. Hrg. 111-1044, 111th Cong., 2d Sess. 62 (“And I think that they laid down—sometimes they laid down very specific rules. Sometimes they laid down broad principles. Either way we apply what they say, what they meant to do. So in that sense, we are all originalists.”).

²⁸ *Gundy v. United States*, 139 S.Ct. 2116, 2131 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *id.* at 2131 (Alito, J., concurring in the judgment); *Paul v. United States*, slip op. at 2, No. 17-8330 (Nov. 25, 2009) (Kavanaugh, J., respecting the denial of certiorari) (noting that Justice Gorsuch’s opinion in *Gundy* “warrants further consideration in future cases.”).

be entirely unknowable;²⁹ historical evidence is often scant and conflicting,³⁰ and lawyers and judges are not particularly good at doing the historical work that originalism requires.³¹ There have been responses to such criticisms: historical knowledge is possible, at least as to some important questions relevant to today;³² evidence is often conflicting, but that does not mean there is no predominant view or most likely answer, or at least a limited range of plausible answers;³³ and lawyers have the tools and skills to do historical work of the kind relevant to modern law, and at a minimum have the ability to rely on the historical work of trained professionals.³⁴ The recent scholarship challenging the historical pedigree of the nondelegation doctrine is a refreshing contribution to these debates because it reflects a candid recognition that originalist work is possible. “[T]here was no freestanding nondelegation doctrine at the founding,” Mortenson and Bagley write, for example, “and the question isn’t close.”³⁵ Such a claim can only be made after canvassing and assessing most of the relevant historical evidence, and believing that valid claims can be made about that evidence.

As for the kinds of materials that originalists often examine, originalists usually look to text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision.³⁶ These tools may not all line up, but the more of them that do align, the more likely that particular interpretation is to be correct. Earlier

²⁹ David Strauss, *The Living Constitution* 18 (2010); William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237, 1243–44 (1986); Quentin Skinner, *Meaning and Understanding in the History of Ideas*, 8 Hist. & Theory 3, 6 (1969).

³⁰ Stephen M. Griffin, *Against Historical Practice: Facing Up to the Challenge of Informal Constitutional Change*, 35 Const. Comment. __, paper at 7 (forthcoming); David Strauss, *Originalism, Conservatism, and Judicial Restraint*, 38 Harv. J.L. Pub. Pol’y 137, 140 (2011).

³¹ Strauss, *The Living Constitution*, at 18; Stephen M. Griffin, *Optimistic Originalism and the Reconstruction Amendments*, paper at 8–10 (criticizing lawyers’ attractiveness to “objective” historical data as opposed to the actual, subjective views of historical actors).

³² Ilan Wurman, *A Debt Against the Living: An Introduction to Originalism* 104–06 (2017); Jack N. Rakove, *Joe the Ploughman Reads the Constitution, or, The Poverty of Public Meaning Originalism*, 48 San Diego L. Rev. 575, 577 (“After all, historians ask what documents originally meant all the time. Indeed, asking that question is the essence of what we do, and the answers we provide often deal with both the original intentions of a document’s author(s) and the impact the document had on its recipients, whether a lone individual or a great social collective.”).

³³ William Baude & Stephen E. Sachs, *Originalism and the Law of the Past*, 37 L. & Hist. Rev. 809, 815–16 (2019).

³⁴ Baude and Sachs, *Originalism and the Law of the Past*, at 813–15; Wurman, *A Debt Against the Living*, at 100–02.

³⁵ [110].

³⁶ See, e.g., ILAN WURMAN, *A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM* 18–20 (2017) (arguing that intent is evidence of textual meaning); William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019) (articulating a theory of originalism and historical practice); Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. U. L. REV. 1297, 1298–1301 (2019) (noting a variety of structural arguments made by originalists).

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scholarly defenses of nondelegation on originalist grounds have focused on constitutional structure,³⁷ political theory and the likely understanding of what “the legislative power” was thought to entail,³⁸ and British constitutional struggles.³⁹ Gary Lawson argues on the basis of the vesting clauses, for example, that “[t]he Constitution clearly—and one must even say obviously—contemplates some such lines among the legislative, executive, and judicial powers,” because “[t]he Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise.”⁴⁰ Larry Alexander and Saikrishna Prakash argue that the Framers would not have had any normative reasons to adopt a pro-delegation view and that doing so would have undermined constitutional structure;⁴¹ and that the term “the legislative power” in Locke, Blackstone, and Montesquieu was the power to make the rules for the governing of society, a definition that seems to have been adopted by Framers such as Wilson, Madison, and Hamilton.⁴² Philip Hamburger relies mostly on British history,⁴³ although he does rely on some early post-Ratification practice.⁴⁴

Similarly, in Justice Gorsuch’s dissent in *Gundy v. United States*, joined by Justice Thomas and Chief Justice Roberts, Justice Gorsuch relies on the structure of enumeration and the meaning of “the legislative power” as the power to make rules for the governing of society⁴⁵ and on normative reasons the Framers may have wanted to slow down the lawmaking process and assign that process to a representative body.⁴⁶ What is remarkable about Justice Gorsuch’s analysis and the previous literature is that it barely glances at the historical materials post-Ratification. Indeed, Gary Lawson ends with the following encomium upon text and structure at the expense of the historical record:

In the end, all of these speculations from the actions of early Congresses are of minimal value. Perhaps a clear, consistent practice would be a good indication of original public meaning, but the episodic data that history gives us, in both directions, is unenlightening. Its probative value may well outweigh its

³⁷ Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327 (2002).

³⁸ Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 Chi. L. Rev. 1297 (2003).

³⁹ Philip Hamburger, *Is Administrative Law Unlawful?* (2014).

⁴⁰ Lawson, 340.

⁴¹ Alexander and Prakash at 1299–1303

⁴² *Id.* at 1310–17.

⁴³ Hamburger, *supra*, at 31–100; cf. Adrian Vermeule, No, 93 Tex. L. Rev. 1547, 1551 (2015) (“If Hamburger were an originalist in the conventional American sense, he would spend far more time on the ordinary meaning of the text as of 1789, and on the ratification debates, and far less time on subterranean connections between the Stuart monarchs and German legal theory.”); Mortenson & Bagley, *supra*, at [16].

⁴⁴ Hamburger, *supra*, at 100–110.

⁴⁵ *Gundy v. United States*, 139 S.Ct. 2116, 2133 (Gorsuch, J., dissenting).

⁴⁶ *Id.* at 2134–35.

potential for prejudice (though that is something that one could dispute), but that value pales before the available evidence from text, structure, and design.⁴⁷

Here, Professors Bagley, Chabot, Mortenson, and Parrillo make a particularly important contribution to the originalist debate over nondelegation. Their articles demonstrate that the available historical evidence is, on the contrary, sufficiently robust but not so voluminous that it allows us to make reasonably confident conclusions about the historical record. Aaron Gordon has also recently examined post-Ratification debates, previously unexamined by the scholarly literature, about nondelegation, also suggesting that the record is robust but not overwhelming.⁴⁸ The present Essay also contributes to the debate by tackling this historical record, too—the actual statements of prominent individuals within government, including some who had been Framers, in the early decades after Ratification, and the actual legislation and practice of the early Congresses. The historical record is sufficiently robust that we can in fact draw confident historical conclusions, even if there is disagreement over those conclusions. But this is not a mark against the historical record or the originalist enterprise. Judges, scholars, and people generally disagree over all sorts of things—economics, philosophy, linguistics, whether a prior decision even created a precedent⁴⁹—and this disagreement hardly proves there is no right, or at least better, answers.

As for the stakes: Justice Kagan wrote in *Gundy* that if the statute at issue there were unconstitutional, “then most of Government is unconstitutional” because Congress is dependent “on the need to give discretion to executive officials to implement its programs.”⁵⁰ Professors Mortenson and Bagley take this critique even further, arguing that if the proponents of nondelegation are right, then no act of rulemaking would be constitutional.⁵¹ To be sure, these opponents of nondelegation are not really helped by many of the proponents. One scholar has argued that “[u]nder a pure formalist approach, most, if not all, of the administrative state is unconstitutional” because agency “rulemaking and adjudication”—the core functions of modern administrative agencies—are “inconsistent with the formalist model.”⁵² And of course, Philip Hamburger’s

⁴⁷ Lawson, at 403.

⁴⁸ Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & Liberty 718, 744–50 (2019).

⁴⁹ *Ramos v. Louisiana*, No., 18-5924, slip. op. (Apr. 20, 2020) (arguing over whether *Apodaca v. Oregon*, 406 U.S. 404 (1972), even created a precedent).

⁵⁰ *Gundy*, 139 S.Ct. at 2130.

⁵¹ Mortenson and Bagley, at 21–22.

⁵² Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional Theory of the Second Best*, 80 Cornell L. Rev. 1, 11 (1994).

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recent attack on the administrative state implies that most if not all of administrative law is “unlawful.”⁵³

But the historical materials canvassed here, and by Professors Bagley, Chabot, Mortenson, and Parrillo, suggest that none of that need be the case. It is simply untrue that most of the administrative state would be unconstitutional because all executive rulemaking is impermissible, or because executive discretion is impermissible. As explained further below,⁵⁴ that is not what the historical evidence suggests, and it is not even what most originalists or formalists argue. The issue is not, or at least not entirely, about discretion or the form that discretion takes (rulemaking); the question is largely the kind of *matters* over which such discretion is exercised. For example, the evidence suggests that Congress may be able to give more discretion to the executive to formulate rules involving matters of public, as opposed to private, rights (although, as I also explain, I’m skeptical that Congress really gave that much more discretion in such matters).⁵⁵ And certainly Congress could delegate to the Executive in even broader terms authority to regulate official conduct (internal agency management, administration of public lands, and so on). In my view, the evidence suggests that Chief Justice John Marshall was likely right in his analysis of nondelegation in 1825: there are “important subjects” with respect to which Congress must make the relevant decisions, and there are matters of “less interest” with respect to which the executive may “fill up the details.”⁵⁶ Private rights and certain types of decisions (such as over goals and jurisdiction) are more important than others types of matters or decisions.⁵⁷ Under this account, I suspect that some, but hardly much, of the modern administrative state is unconstitutional.

With the stakes and methodology established, let us examine the historical record.

II. THE POSITIVE EVIDENCE OF A NONDELEGATION DOCTRINE

A. Explicit Statements and Arguments

⁵³ Philip Hamburger, *Is Administrative Law Unlawful?* Although, to be sure, Professor Hamburger’s view is more nuanced than some of his critics suggest. He does not argue that all delegations are unlawful, but rather only those that affect private rights and conduct. *Id.* at 100–104 (ish) (CHECK). Still, the book’s title makes it somewhat easy to mischaracterize the argument.

⁵⁴ See Part IV.

⁵⁵ See Part V.

⁵⁶ *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

⁵⁷ I am hardly the first to home in on Marshall’s test, see Lawson, *supra*, or on the relevant of private rights, see Hamburger, *supra*; *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 66 (2015) (Thomas, J., concurring in the judgment).

In the first dozen years after Ratification, members of the founding generation involved in public life and government repeatedly argued that Congress could not delegate its legislative power to the Executive. Such arguments were raised in discussions over a nondelegation amendment, the establishment of the post roads, the Alien Friends Act, raising an army, and other matters. At times, their opponents argued that the occasion did not raise a nondelegation concern. But it seems that at most one member of the House of Representatives ever stated that Congress could freely delegate its legislative power, and the statement was vague.⁵⁸ In every other episode, not a single member of Congress or person engaged in the public debate ever stated that there were no limits to what Congress could delegate—and surely proponents of the particular delegation would have had the motivation to raise such an argument if they believed it to be true. Professor Mortenson and Bagley’s examination of the evidence amounts to the proverbial dog that did not bark that, if anything, supports a conclusion opposite to theirs.⁵⁹ To be sure, sometimes Congress ended up enacting the challenged provision, or at least provisions that one might also question. But a plausible reading of the evidence is that on these occasions there was no disagreement over the principle so much as the application. And many of the provisions that were ultimately enacted represented quite narrow delegations of authority.

1. The Nondelegation Amendment

The first episode involving the nondelegation question under the newly ratified Constitution occurred in 1789 when James Madison proposed an amendment to include in the Bill of Rights. The amendment would have specified explicitly that no department of the national government could ever exercise the powers delegated by the Constitution to another branch. The proposed amendment read:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers

⁵⁸ See Part III.

⁵⁹ See, e.g., Julian Davis Mortenson, *The Executive Power Clause*, __ U. Pa. L. Rev. __ (forthcoming), paper at 90–97 (describing the lack of any concern over the scope of the executive power clause during the ratification debates as a “play park of silent dogs”); John Harrison, *Judicial Interpretative Finality and the Constitutionality Text*, 23 Const. Comment. 33, 36 (2006); *Harrison v. PPG Indus., Inc.*, 446 U.S. 578, 592 (1980) (“In ascertaining the meaning of a statute, a court cannot, in the manner of Sherlock Holmes, pursue the theory of the dog that did not bark.” (citing Arthur Conan Doyle, *The Silver Blaze*, in *The Complete Sherlock Holmes* (1938))).

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vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.⁶⁰

When Madison introduced the amendment, Rep. Sherman objected, conceiving the amendment “to be altogether unnecessary, inasmuch as the Constitution assigned the business of each branch of the Government to a separate department.”⁶¹ Madison agreed, but “supposed the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the construction of the Constitution.”⁶²

Here are two prominent representatives, both key players in the Constitutional Convention, arguing that a nondelegation amendment was unnecessary. Madison further argued that it was better to be doubly sure and make the principle explicit. Another representative, however, argued that the amendment was “subversive of the Constitution.”⁶³ It is not clear what he meant by this. The Constitution does assign some legislative power to the President in the form of the legislative veto,⁶⁴ and by assigning to the President part of the treaty-making power,⁶⁵ it also assigns to the Senate some part of the executive power in the form at least of the appointment power,⁶⁶ and also judicial power in the form of impeachment.⁶⁷ But the amendment would have prohibited one department from delegating to another department *any* of the powers that the Constitution has vested in the former—whether legislative, executive, or judicial in nature. Nothing in the amendment questioned that the Constitution assigns a limited number of legislative powers to the President and executive and judicial powers to the Senate.

In any event, the amendment carried the House of Representatives, so they must not have understood the amendment to be “subversive” of the Constitution’s true principles.⁶⁸ A majority of members of the First Congress instead may have agreed with Madison—that the nondelegation amendment was not strictly necessary, but it could do no harm either. Of course, some may have voted for the amendment because it was an improvement, suggesting that the Constitution as written is ambiguous on the point of delegation. This evidence

⁶⁰ 1 Annals of Cong. 760 [full cite] [Gales version—use Gale & Seton]

⁶¹ *Id.* ___

⁶² *Id.* ___

⁶³ *Id.* at 761. (Livermore)

⁶⁴ U.S. CONST. art. I, § 7.

⁶⁵ *Id.* art. II, § 2, para. 2 (treaty power). For a discussion of the legislative nature of the treaty power, *see infra* Part IV.B.

⁶⁶ *Id.* art. II, § 2, para. 2 (appointment power). I do not here refer to the treaty power, which I do not believe is part of “the executive power,” and is arguably legislative in nature. *See* Ilan Wurman, *In Search of Prerogative*, 70 DUKE L.J. ___ (forthcoming).

⁶⁷ U.S. CONST. art. I, § 3, cl. 6 (power to try impeachments).

⁶⁸ 1 Annals at 761.

is therefore hardly dispositive. But it is at least suggestive that the House disagreed with the speaker who argued the amendment was subversive, and the only other two members to speak about it argued it was either unnecessary or, although technically unnecessary, salutary. For unknown reasons—perhaps because it was unnecessary—the amendment was struck in the Senate.⁶⁹

2. The Post-Roads Debate

The first extensive⁷⁰ debate over whether a particular law would violate the nondelegation principle occurred in 1791 over the establishment of the post roads, an episode about which I have written previously.⁷¹ Professors Mortenson and Bagley discuss this episode in some detail,⁷² and they explicitly disagree with my earlier description of what transpired.⁷³ The background is as follows.⁷⁴ The Constitution grants Congress the power to establish post roads. This power is given explicitly and specifically: “The Congress shall have Power . . . To establish Post Offices and Post Roads[.]”⁷⁵ A committee of the Second Congress introduced a bill for the establishment of the Post Office and post roads that specified in great detail where the post roads would be.⁷⁶ Mr. Sedgwick introduced an amendment to strike the enumerated routes and replace them with the provision “by such route as the President of the United States shall, from time to time, cause to be established.”⁷⁷

⁶⁹ As is well known, the early Senate deliberations were secret.

⁷⁰ Earlier, brief discussions occurred at the introduction of the postal legislation in the First Congress that was tabled, and of the legislation empowering the President to borrow money. Chabot, *supra* note __. I address the borrowing legislation in Part V. Although a nondelegation objection was raised, it was not extensively discussed.

⁷¹ Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 991–93 (2018).

⁷² Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __).

⁷³ *Id.* at __ n. __.

⁷⁴ Some of what follows I borrow from Wurman, *supra* note __, at 991–93.

⁷⁵ U.S. CONST. art. I, § 8, cl. 7.

⁷⁶ The statute enacted in its very first section: “That from and after the first day of June next, the following roads be established as post roads, namely: From Wiscasset in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah, and from Augusta by Washington in Wilkes county to Greenborough and from thence . . .” Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232 (1792).

⁷⁷ 3 ANNALS OF CONG. 229 (1791). [This is the correct Gales & Seaton edition]

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Mr. Sedgwick's amendment was rejected.⁷⁸ In my reading, several prominent members expressed the view that the amendment would create an impermissible delegation of legislative power. According to the summary of the reporter, Representative Livermore observed "that the Legislative body being empowered by the Constitution 'to establish post offices and post roads,' it is as clearly their 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."⁷⁹ Representative Hartley argued, "The Constitution seems to have intended that we should exercise all the powers respecting the establishing [of] post roads we are capable of," and added, "We represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to delegate the power to any other person."⁸⁰ Representative Page agreed:

If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction. . . . I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency⁸¹

In addition to these voices, Representative White made "several objections on the expediency and constitutionality of the measure."⁸² Representative Vining added, "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; his powers are well defined"⁸³ Regarding another representative's statements, the recorder simply wrote, "Mr. Gerry took a general view of most of the arguments in favor of the motion; replied to each"⁸⁴ Nevertheless, we can surmise from this comment that Mr. Gerry likely agreed that the provision was unconstitutional. James Madison, for his part, argued in opposition to Sedgwick's motion that "there did not appear to be any necessity for *alienating* the powers of the House; and that if this should take place, it would be a violation of the Constitution."⁸⁵

⁷⁸ *Id.* at 241.

⁷⁹ 3 ANNALS at 229.

⁸⁰ *Id.* at 231.

⁸¹ *Id.* at 233–34.

⁸² *Id.* at 233.

⁸³ *Id.* at 235 (emphasis added).

⁸⁴ 3 Annals at 236.

⁸⁵ *Id.* at 239 (emphasis added).

By this count, Representatives Livermore, Hartley, Page, White, Vining, Gerry, and Madison all seem to have thought the motion unconstitutional because it would be transferring, alienating, or delegating the House’s legislative power. Yet Professors Mortenson and Bagley claim that calling “the post-roads debate a thin reed would be a vast overstatement” because “[i]t is no reed at all.”⁸⁶ Yet seven statements to the effect that the motion would violate a nondelegation principle, and the rejection of Sedgwick’s motion, strongly point to the contrary conclusion.

Professors Mortenson and Bagley argue that these statements should be discounted for a number of reasons, but none is particularly persuasive. They claim that most of the opponents of Sedgwick’s motion argued that it was bad as a matter of policy to give the President the authority over the post roads.⁸⁷ Of course most of them made policy arguments in addition to constitutional arguments, and some only made policy arguments, just as one would expect. That does not diminish that a substantial number of representatives believed the motion would also violate the Constitution.

Professors Mortenson and Bagley also argue that “probably only two” of the opponents actually raised constitutional objections—Page and Madison.⁸⁸ They discount the statements from Livermore, Hartley, and White as “criticism[s] of the policy” and not “hard constitutional objection[s].”⁸⁹ At a minimum that interpretation of these statements is debatable, and it is probably not the best interpretation. Here, again, is Livermore’s statement: “the Legislative body being empowered by the Constitution ‘to establish post offices and post roads,’ it is as clearly their *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.”⁹⁰ If it is Congress’s *duty* to exercise the power “which they were themselves appointed to exercise,” then Congress cannot constitutionally delegate that power. Mortenson and Bagley cite to a quotation from White that focuses on policy,⁹¹ but the recorder also wrote that White made “several objections on the expediency *and constitutionality* of the measure.”⁹² Mortenson and Bagley do not address Vining’s statement, but here again is Vining: “The Constitution has certainly

⁸⁶ Mortenson & Bagley, note __, at __.

⁸⁷ Mortenson & Bagley, at __ (“Among the seven delegates who voiced concerns in the recorded debates, most maintained that neither the president nor ‘any one man’ could be expected to know as well as House members where the roads ought to be placed.”). Mortenson and Bagley exclude Representative Gerry from among the seven and include Representative Steele. *Id.* at __ n. __.

⁸⁸ Mortenson & Bagley, at __.

⁸⁹ Mortenson & Bagley, at __.

⁹⁰ 3 ANNALS at 229 (emphasis added).

⁹¹ Mortenson & Bagley

⁹² 3 ANNALS at 233 (emphasis added).

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given us the power of establishing posts and roads, and it is not even implied that it should be *transferred* to the President; his powers are well defined”⁹³

As for Hartley, it is true that, according to the recorder, he said that Congress “*ought* not to delegate [its] power to any other person.”⁹⁴ But his statement that “[t]he Constitution *seems to have intended* that we should exercise all the powers respecting the establishing [of] post roads we are capable of,”⁹⁵ does not appear to be a policy argument.⁹⁶ The meaning of his statement seems to be that if Congress is capable of deciding the matter, the Constitution requires Congress to decide it. That is not a plausible test for the nondelegation doctrine—Congress clearly delegates much power that it could exercise itself—but the point is Hartley believed as a constitutional matter that there was some limit to what Congress could delegate. Elsewhere Hartley suggested that he was at a minimum unsure about the constitutional point.⁹⁷

In sum, even if we discount Gerry, whose arguments were not reported, that still makes six representatives who made nondelegation arguments against the Sedgwick motion. It is implausible to argue that the nondelegation argument was not widely shared, and to argue, as Professors Mortenson and Bagley do, that the post-road debate actually demonstrates the opposite of a commitment to nondelegation.⁹⁸ It is unpersuasive to argue that Sedgwick and his two supporters, Representatives Barnwell and Bourne, thought the constitutional objections were “obvious makeweights.”⁹⁹ Maybe they thought as much, but that still makes six or seven—and the majority of the House—against three. But more still, even Sedgwick did not deny the nondelegation principle; he simply argued that his motion did not violate it. Sedgwick did not wish “to resign all the business of the House to the President, or to anyone else; but he thought that the Executive part of the business ought to be left to Executive officers.”¹⁰⁰ He wanted to “leave the details of this business entirely to supreme Executive,” because he “thought it sufficient that the House should establish the principle, and then leave it to the Executive to carry it into effect.”¹⁰¹ This was not a higher-order dispute about the validity of nondelegation as a principle of constitutional law. It was a lower-order dispute over the application of that principle to

⁹³ *Id.* at 235 (emphasis added).

⁹⁴ *Id.* at 231 (emphasis added).

⁹⁵ *Id.*

⁹⁶ Contrary to what Mortenson and Bagley suggest. Mortenson & Bagley, *supra* note __, at

—.

⁹⁷ Cite (“This is a law of experiment, let us try it a few years. If, upon experience, we find ourselves incompetent to the duty, we must (if the Constitution will admit) grant the power to the Executive; or, if the Constitution will not allow such a delegation, submit the article for amendment in a constitutional way.”).

⁹⁸ Mortenson & Bagley, *supra* note __, at __.

⁹⁹ Mortenson & Bagley, *supra* note __, at __.

¹⁰⁰ 3 Annals at 230.

¹⁰¹ 3 Annals at 229.

Sedgwick’s motion, or at most an intermediate-order dispute about the exact contours of the principle.

To be sure, one should not overstate the case. Some of the comments (such as Hartley’s) are a bit ambiguous as to whether the speaker’s objection was really constitutional or not. But, as already suggested, history is messy—not to mention that the reporters recorded the representatives’ remarks in shorthand. Yet it is certainly possible, even sensible, to take these statements for the proposition that many believed Congress could not delegate away its power. It is certainly not obvious that this debate is “no reed at all” for proponents of nondelegation.

Professors Mortenson and Bagley’s most significant argument that the post-roads debate reveals a commitment to delegation is the actual bill and then the law that was enacted. After listing the post roads quite precisely, the bill nevertheless granted the President the authority to “to establish such *other* roads as post roads, as to him may seem necessary.”¹⁰² The final language of the statute that was enacted provided that the President could “enter into contracts, for a term not exceeding eight years, for extending the line of posts . . . ; and the roads, therein designated, shall, during the continuance of such contract, be deemed and considered as post roads.”¹⁰³ It is not clear why this delegation is problematic, however. It is one thing to establish an intricate network of post roads and grant the President discretion to *extend* the specific roads if *necessary*; it is quite another to give the President total discretion to decide where any and all the post roads should be. The former delegation is at least arguably a matter of “less interest” with respect to which the executive may “fill up the details.”¹⁰⁴ The latter delegation would involve matters that are too “important” to be left to mere filling in of details.¹⁰⁵

The Act also delegated to the President the question of where the post offices should be.¹⁰⁶ And, Professors Mortenson and Bagley rightly argue, the Constitution gives Congress authority over post roads and post offices equally.¹⁰⁷ It is not at all clear, however, that the delegation over post offices was significant, for the same reason just described. After all, 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 point is that the President’s discretion was greatly cabined once Congress had established the

¹⁰² 3 ANNALS at 230 (emphasis added).

¹⁰³ Act of Feb. 20, 1792, 1 Stat. 232, 233.

¹⁰⁴ *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

¹⁰⁵ *Id.*

¹⁰⁶ 1 Stat. 232, 234 (authorizing Postmaster General “to appoint . . . deputy postmasters, at all places where such shall be found necessary,” and directing “[t]hat every deputy postmaster shall keep an office.”); Mortenson & Bagley, *supra* note __, at __.

¹⁰⁷ U.S. CONST. art. I, § 8, cl. 7 (Congress shall have the power to “establish Post Offices and post Roads”).

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locations of the post roads. After all, the important question of the day was what cities would get the roads.¹⁰⁸ This seems to have been Livermore's argument:

The establishment of post roads he considered as *a very important object*. . . . If the post office were to be regulated by the will of a single person, the dissemination of intelligence might be impeded, and the people kept entirely in the dark with respect to the transactions of Government; or the Postmaster, if vested with the whole power, might branch out the offices to such a degree as to make them prove a heavy burden to the United States. . . . *The most material point*, in his opinion, *was to determine the road itself*.¹⁰⁹

In other words, once the road was determined, it would be impossible for the Postmaster General to “branch out the offices to such a degree as to make them prove a heavy burden,” because the offices would be along the post roads that Congress had established. Maybe the delegation over post offices was improper, but the representatives appear to have believed that it was a much less significant delegation than the delegation over the post roads themselves.¹¹⁰

Finally, Professors Mortenson and Bagley rely on another statute that Congress enacted that established tax districts, but authorized the President to alter the districts “from time to time, 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.”¹¹¹ Perhaps Congress was being inconsistent; even if that were true, that would not be evidence that there was no nondelegation doctrine at the Founding. It would at most indicate that the politicians of the founding generation were occasionally inconsistent on the question. But in any event, this delegation, too, is much more cabined than the one proposed by Sedgwick. As already suggested, it is one thing to establish the tax districts and

¹⁰⁸ As Mortenson and Bagley note, the post-roads were the pork-barrel or water projects of the day. Mortenson & Bagley, *supra* note __, at __; see also Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 403 (2002) (“Postal routes were the eighteenth-century equivalent of water projects.”); cf. David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801*, at 149 (1997) (speculating that “the House’s zest for detail” was attributable “to a taste for pork.”).

¹⁰⁹ 3 Annals at 230 (emphases added).

¹¹⁰ This is not to say that the House was necessarily being consistent. David Currie, like Mortenson and Bagley, thought the House was being rather unprincipled in light of the broader delegations of authority elsewhere in the final law. Currie, at 149 (cited in note __). But even Currie, at least, recognized that the debate itself “stands as something of a precedent for an extremely restrictive view of Congress’s power to delegate its authority to the executive,” *id.* at 148–49, albeit perhaps not a strong precedent in light of those other delegations of authority. Still, it is one thing to say that the precedent is not a strong one; it is another to say it is not even a thin reed.

¹¹¹ Act of Mar. 3, 1791, 1 Stat. 199, 200; Mortenson & Bagley, *supra* note __, at __.

authorize the President to make necessary or convenient deviations; it is quite another to give the President free rein to set up all the districts from scratch as he sees fit. One is merely a matter of detail while the other is the whole game.

3. The Alien Friends Acts

The third major episode in which nondelegation concerns were raised was the Alien and Sedition Acts controversy, and here again James Madison led the way. The Alien Friends Act, in particular, authorized “the President of the United States . . . to order all such aliens as he shall judge dangerous to the peace and safety of the United States,” to depart the country.¹¹² Among numerous constitutional objections made against this law (and against the Alien Enemies Act¹¹³ and the Sedition Act¹¹⁴) was a nondelegation challenge. In Madison’s Report of 1800, defending the Virginia Resolutions, Madison argued against the acts as follows:

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law. If nothing more were required, in exercising a legislative trust, than a general conveyance of authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect; it would follow, that the whole power of legislation might be *transferred* by the legislature from itself, and proclamations might become substitutes for laws. A delegation of power in this latitude, would not be denied to be a union of the different powers.¹¹⁵

Here, Madison argued that if a law were so vague and undefined, that might work an unconstitutional transfer of legislative power to another department. Some amount of specificity is required in laws. Moreover, there may be distinctions based on the nature of the subject at hand, for example

¹¹² An Act Concerning Aliens, June 25, 1798, ch. 58, 1 Stat. 570.

¹¹³ An Act Respecting Alien Enemies, July 6, 1798, ch. 66, 1 Stat. 577.

¹¹⁴ An Act for the Punishment of Certain Crimes against the United States, July 14, 1798, ch. 74, 1 Stat. 596.

¹¹⁵ Report of 1800 (emphasis added)

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between private rights and public rights, or public conduct and official conduct, or criminal matters and other matters. In the very next sentence, Madison wrote,

To determine then, whether the appropriate powers of the distinct departments are united by the act authorising the executive to remove aliens, it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.¹¹⁶

Put another way, all laws require sufficient detail and specificity such that they have the “true character” of laws, and those that involve traditional private rights—rights to life, liberty, and property—require all the more detail and specificity.

Professors Mortenson and Bagley respond that Madison’s report seems to have had little impact, and that “his nondelegation challenge to the Alien and Sedition Acts was unusual to the point of idiosyncrasy.”¹¹⁷ The debate in Congress, they write, was largely over policy and over what enumerated power justified the acts in the first place.¹¹⁸ Even they acknowledge, however, that at least two members of Congress did in fact raise nondelegation concerns at the time. Representative Williams argued that “it is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to *transfer* power in this manner.”¹¹⁹ And Representative Livingston argued that “[l]egislative power prescribes the rule of action; the judiciary applies that general rule to particular cases, and it is the province of the executive to see that the laws are carried into full effect.” Under the Alien Friends Act, however, “the president alone, is empowered to make the law, to fix in his own mind, what acts, what words what thoughts or looks, shall constitute the crime contemplated by the bill.” Thus the Act “comes completely within the definition of despotism, and union of legislative, executive, and judicial powers.”¹²⁰

The focus of the congressional debates on other reasons why the Alien Friends Act may have been unconstitutional is rather beside the point. Certainly the arguments of three prominent individuals that the Alien Friends Act violated a nondelegation principle is *some* evidence that there was a nondelegation doctrine at the founding. And not a single representative argued in response that Congress could freely delegate power—an argument surely they would have

¹¹⁶ Cite report of 1800

¹¹⁷ Mortenson & Bagley, *supra* note __, at __.

¹¹⁸ *Id.* at __.

¹¹⁹ 8 ANNALS OF CONG. 1963 (emphasis added).

¹²⁰ 8 Annals at 2007–08 (1798). I am indebted to Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 747 (2019), for this quotation.

been motivated to make if it were true.¹²¹ Rather, in enacting the Alien Friends Act, Congress could have been rejecting the nondelegation arguments as to this particular application. It is certainly possible to infer that the nondelegation principle itself was rejected, but there is no way to know that with any degree of confidence.

Instead, the best reading of the evidence so far—adding to the Alien and Sedition episode the evidence from 1789 and 1791—is that there probably was some version of a nondelegation doctrine, although not everyone agreed on the precise principle or the principle’s application in particular cases. At a minimum, there appears to be more evidence for that proposition than the proposition that there was no nondelegation doctrine at the founding.

4. Other American Statements and Arguments

Beyond these three key episodes, nondelegation arguments were repeatedly made by prominent American political and judicial officials throughout the antebellum period. Aaron Gordon helpfully collects many of these arguments.¹²² As we move farther away from 1787–88, the evidence of such statements becomes less and less probative of the original meaning. But the consistency of such statements over decades is nevertheless striking.

In 1798, the same year as the Alien and Sedition controversy, the House debated a bill that would authorize the President to raise an army of up to 10,000 men, but the bill would have left it to the President to determine the final amount.¹²³ At least three representatives raised nondelegation concerns. Representative Nicholas “objected to the second reading of the bill, as he believed it possessed a principle which could not be assented to. . . . The highest act of Legislative power was, by it, proposed to be transferred to the Executive.”¹²⁴ Representative Gallatin agreed:

The Constitution has declared that the raising of an army is placed in Congress, but this bill goes to declare that this power shall be vested by law in the President. That is the principle of the bill; and if Congress were once to admit the principle that they have a right to vest in the President powers placed in their hands by the Constitution, that instrument would become a piece of blank paper. . . . [I]f they could delegate the power of raising an

¹²¹ See *supra* note __

¹²² Gordon, *supra* note __, at 747–50.

¹²³ An act authorizing the President of the United States to raise a provisional army, 1 Stat. 558 (1798).

¹²⁴ 8 Annals of Congress 1525.

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army to the President, why not do the same with respect to the power of raising taxes?¹²⁵

And Representative McDowell thought the bill “would be unconstitutional” because “it delegated Legislative powers to the President.”¹²⁶

To be sure, the bill passed, but as Aaron Gordon notes, “no one in Congress so much as suggested that there were no constitutional limits on statutory delegations of authority; indeed, several emphatically stated otherwise.”¹²⁷ Once again, the dog did not bark.¹²⁸ The more plausible conclusion to draw from the enactment of the law is that representatives believed that this particular bill did not work an unconstitutional delegation of authority.

In 1808, Congress debated whether to allow the President the power to suspend an embargo with either France or England, which at the time were at war. Representative Philip Key objected on nondelegation grounds: “to suspend or repeal a law is a legislative act, and we cannot transfer the power of legislating from ourselves to the president.”¹²⁹ Representative John Rowan agreed, arguing that “the Constitution does not permit us to pass it,” and he was “unwilling to vest a discretionary power in the President to repeal or modify it.”¹³⁰ To be sure, once again, the bill passed; but the disagreement seems to have been a lower-order one. As Joseph Postell and Paul Moreno have argued, “Subsequent statutes clarified that the president could not suspend the law at his own discretion but was merely declaring the facts that Congress declared would trigger or suspend the law,” and it was on that ground that the Supreme Court upheld the constitutionality of the delegation in *Cargo of the Brig Aurora v. United States*.¹³¹

In 1810, several representatives objected to a bill that would empower the President to “to employ the public armed vessels in protecting the commerce of the United States, and to issue instructions which shall be conformable to the laws and usages of nations, for the government of the ships which may be employed in that service.”¹³² At least some of these arguments were rooted in nondelegation concerns; admittedly, such arguments were probably misplaced as applied to this particular bill. Representative John Jackson argued, for example, “It seems to me with equal constitutionality we might refer to the President the authority of declaring war, levying taxes, or of doing everything

¹²⁵ *Id.* at 1526–27.

¹²⁶ *Id.* at 1535.

¹²⁷ Gordon, *supra* note ___, at 749.

¹²⁸ See *supra* note ___.

¹²⁹ 8 Annals at 2125.

¹³⁰ *Id.* at 2232.

¹³¹ 11 U.S. 382 (1813); Joseph Postell & Paul D. Moreno, *Not Dead Yet—Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUDIES 41, 47 (2018).

¹³² 21 Annals ___.

which the Constitution points out as the duty of Congress. All legislative power is by the Constitution vested in Congress. They cannot transfer it.”¹³³

A few years later, in 1818, Representative Alexander Smyth similarly argued, “Legislative power, when granted, is not transferable; nor can it be exercised by substitute; nor in any other manner than according to the constitution granting it.”¹³⁴ And in 1842 then-Representative John Quincy Adams objected to a bill on the ground that “it was a transfer of legislative power to a board of officers”; if such a delegation were permissible, then “[i]t would be just as reasonable to transfer the power of legislation from . . . Congress to the President, and to say that he shall make the laws for the people of this Union”¹³⁵

Finally, of course, is the famous statement by Chief Justice John Marshall in the 1825 case of *Wayman v. Southard*, involving the question whether Congress could delegate to the courts the power to make and alter their rules respecting proceedings at common law.¹³⁶ Chief Justice Marshall explained, “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative,” but “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”¹³⁷ “The line has not been exactly drawn,” Chief Justice Marshall continued, “which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions *to fill up the details*.”¹³⁸

Put another way, Chief Justice Marshall seems to have recognized that there is a category of “exclusively” legislative power—whatever the scope of this exclusive category—that Congress could not delegate to the Executive or the courts. But, he argued, there are things that could be done by Congress or by the Executive or by the courts. For example, most regulations are partly legislative in nature in the sense that Congress *could* have enacted them into law, but they involve mere matters of detail and therefore can also be characterized as executive power.¹³⁹

B. John Locke, Alienation, and Delegation

¹³³ 21 Annals of Congress 2022 (1810) .

¹³⁴ 31 Annals of Cong. 1144 (1818) .

¹³⁵ Cong. Globe, 27th Cong., 2nd Sess. 510 (1842) .

¹³⁶ *Wayman v. Southard*, 23 U.S. 1 (1825).

¹³⁷ *Id.* at 42–43.

¹³⁸ *Id.* at 43 (emphasis added).

¹³⁹ For an elaboration of exclusive and nonexclusive powers, see Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689 (2020).

Nondelegation at the Founding

The nondelegation principle can be traced to John Locke’s Second Treatise, which was deeply influential on the founding generation.¹⁴⁰ In a famous passage, Locke wrote:

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 people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws, but such as are enacted by those whom they have chosen, and authorized to make laws for them. The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to *transfer* their authority of making laws, and place it in other hands.¹⁴¹

Professors Mortenson and Bagley argue that this passage by Locke has been misinterpreted by proponents of nondelegation. They argue that Locke was merely restating a distinction between *delegation*, which was permissible, and *alienation*, which was not. Delegation is allowing another person or body to exercise authority, but that authority may always be reclaimed by the principal; alienation is transferring and giving up one’s power altogether, after which that power cannot be reclaimed. Summarizing this general rule, they write that “the founding generation saw nothing untoward about provisionally *delegating* the power to make rules so long as Congress did not permanently *alienate* its power to make laws.”¹⁴² As for Locke, they argue that his use of the different word “transfer” and “delegate” in the first sentence of Section 141 suggests that those

¹⁴⁰ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 27–30 (enlarged ed. 1992) (describing Locke’s influence on Founding-generation Americans); ALAN GIBSON, *INTERPRETING THE FOUNDING* 13–21 (2006) (describing the prominent interpretation of the Founding in the twentieth century suggesting “that the core of the Founders’ political thought is encapsulated in the Lockean variation of the principles of classical liberalism”); Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *FORDHAM L. REV.* 1587, 1598 (1997) (“There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone.”).

¹⁴¹ Sec. 141 (emphases added).

¹⁴² Mortenson and Bagley, *supra* note __, at __.

two words “mean different things.”¹⁴³ “Locke consistently uses ‘transfer’ in the ordinary seventeenth-century property sense of permanent alienation,” they write, but “he uses ‘delegation’ in connection with powers which the delegating principal may supervise and at some point resume.”¹⁴⁴

Even if this distinction were valid for Locke—something that is not entirely clear¹⁴⁵—it is not a distinction that the founding generation appears to have used. First, the distinction is meaningless in the relevant context because it is quite impossible for Congress to “alienate” its power in this sense. One Congress cannot bind a future Congress, and so there would be no way to alienate power. Thus, the prohibited category of alienation creates an empty set of legislation. It does no work at all.¹⁴⁶

Even more significantly, all the nondelegation arguments canvassed in Part II.A interchangeably used the terms delegate, transfer, and alienate. Here is Madison in the post-roads debate: “there did not appear to be any necessity for *alienating* the powers of the House; and that if this should take place, it would be a violation of the Constitution.”¹⁴⁷ In contrast, Representatives Livermore and Hartley used the term “delegate” in the same debate: Livermore “did not think they could with propriety *delegate* [their] power,”¹⁴⁸ and Hartley argued, they “ought not to *delegate* the power to any other person.”¹⁴⁹ And Representative Vining argued that “[t]he Constitution has certainly given us the power of

¹⁴³ *Id.* at __.

¹⁴⁴ *Id.* at __.

¹⁴⁵ In Section 135, Locke uses the word “transfer” to mean “delegate”:

[The legislature] is *not*, nor can possibly be absolutely *arbitrary* over the lives and fortunes of the people: for it being but the joint power of every member of the society given up to that person, or assembly, which is legislator; it can be no more than those persons had in a state of nature before they entered into society, and gave up to the community: for no body can *transfer* to another more power than he has in himself; and no body has an absolute arbitrary power over himself, or over any other, to destroy his own life, or take away the life or property of another.

Sec. 135 (third emphasis added). Here, Locke is talking about the initial transfer of power from the people to the legislator. Yet Mortenson and Bagley’s entire argument about Locke is that he was arguing that the people *delegated* their power to the legislature but did not *alienate* their power, as absolutists like Jean Bodin had argued. Mortenson & Bagley, *supra* note __, at 31–32. And now we see that in section 135, when Locke is talking about this original delegation (not alienation), he uses the word “transfer.” In section 135, then, “transfer” means delegation, not alienation.

¹⁴⁶ I am indebted to John Ohnesorge for this insight.

¹⁴⁷ 3 *Annals* at 239 (emphasis added).

¹⁴⁸ 3 *ANNALS* at 229. (emphasis added).

¹⁴⁹ *Id.* at 231 (emphasis added).

Nondelegation at the Founding

establishing posts and roads, and it is not even implied that it should be *transferred* to the President.”¹⁵⁰

In the 1798 debate over the provisional army, Representative Nicholas argued that “[t]he highest act of Legislative power was, by it, proposed to be *transferred* to the Executive.”¹⁵¹ Gallatin, in the same debate: “[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?”¹⁵² And McDowell: “[the bill] *delegated* Legislative powers to the President.”¹⁵³ In the Report of 1800, Madison used the terms transfer and delegate interchangeably: “[T]he whole power of legislation might be *transferred* by the legislature from itself, and proclamations might become substitutes for laws. A *delegation* of power in this latitude, would not be denied to be a union of the different powers.”¹⁵⁴

Chief Justice Marshall also used the term “delegate”: “It will not be contended that Congress can *delegate* to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”¹⁵⁵ Representatives John Jackson (1810) and John Quincy Adams (1842) used the word *transfer*: “All legislative power is by the Constitution vested in Congress. They cannot *transfer* it.”¹⁵⁶ And: “it was a *transfer* of legislative power to a board of officers.”¹⁵⁷

Compare these statements to those made by Revolution-era Americans, cited by Professors Mortenson and Bagley for the proposition that Americans distinguished between alienation and delegation.¹⁵⁸ Thomas Jefferson argued in the *Notes on the State of Virginia* that the “laws [of nature] forbid the *abandonment* of [legislative responsibility], even on ordinary occasions; and much more a *transfer* of their powers into other hands and other forms, without consulting the people.”¹⁵⁹ And James Otis parroted Locke, writing in his *Rights of the Colonies* that “[t]he legislative cannot transfer the power of making laws to any other hands” because “their whole power is not transferable.”¹⁶⁰ Whenever these revolutionary Americans thought about “alienation” in the sense Mortenson and Bagley ascribe to that term, they often used Locke’s term “transfer.” And that’s exactly how post-1787 Americans spoke when they were concerned with unconstitutional “delegations” or “alienations” or “transfers” of legislative power.

¹⁵⁰ *Id.* at 235 (emphasis added).

¹⁵¹ 8 Annals of Congress 1525 (emphasis added).

¹⁵² *Id.* at 1526–27 (emphasis added).

¹⁵³ *Id.* at 1535 (emphasis added).

¹⁵⁴ Cite report of 1800 (emphasis added)

¹⁵⁵ 23 U.S. at 42.

¹⁵⁶ 21 Annals of Congress 2022 (1810) (emphasis added).

¹⁵⁷ Cong. Globe, 27th Cong., 2nd Sess. 510 (1842) (emphasis added).

¹⁵⁸ Mortenson and Bagley [36]

¹⁵⁹ *Id.* (quoting ___)

¹⁶⁰ *Id.* (quoting ___)

Put another way, those who made nondelegation arguments in the early decades after the founding used the terms delegation, alienation, and transfer interchangeably. Indeed, even if there were a distinction for Locke between delegation and alienation, when those in the founding generation raised the concerns that today would be understood as nondelegation concerns, they overwhelmingly spoke in the language of “alienation” and “transfer.” In other words, a “delegation” of power to the executive would be an alienation.

The reason why a delegation of legislative power to the Executive would be an “alienation” is not difficult to see. Could such a power be reclaimed after it has been given to the Executive, if the Executive could veto any future attempt to reclaim such a power? It would be possible, yes, but exceedingly difficult. Here is John Randolph in opposition to an 1803 law which gave President Jefferson complete power to make laws and regulations for the Louisiana Territory: “If we give this power out of our hands, it may be irrevocable until Congress shall have made legislative provision; that is, a single branch of the Government, the Executive branch, with a small minority of either House, may prevent its resumption.”¹⁶¹ Perhaps it is appropriate for Congress to “delegate” tasks to subordinates—like committee staff—over whom Congress has total and complete control. But delegating legislative power to the *executive branch* is effectively an alienation because Congress simply does not control that branch.

That is also why Mortenson and Bagley’s evidence that “redelegation” of authority was routine in the founding generation is immaterial. They write that the Executive could redelegate its power to subordinate magistrates.¹⁶² That’s an entirely different matter: there is ordinarily no problem when an officer subdelegates power to a subordinate, who is under his supervision and control, because the officer continues to have the real power. Redelegation is only a problem when power is transferred to someone whom the original delegatee cannot control. When Congress delegates power to the Executive, it forfeits control. Such a practice gains no support from analogy to the accepted practice of administrative subdelegation.¹⁶³

Professors Mortenson and Bagley’s other evidence on this score fails for the same reason. As evidence of other “redelegations,” they point to Parliament or the Crown delegating legislative authority to the colonies,¹⁶⁴ the states delegating legislative authority to the Continental Congress,¹⁶⁵ and later on

¹⁶¹ 13 *Annals of Cong.* 498 (1803).

¹⁶² Mortenson & Bagley, *supra* note __, at [26]

¹⁶³ None of this means Congress does not have many tools to supervise administrative agencies. *See generally* Jack M. Beer, *Congressional Administration*, 43 *San Diego L. Rev.* 61 (2006) (describing the numerous tools available to Congress to seek to shape and control administration). But that’s simply not the same thing. Once Congress has delegated authority, it is up to the agencies and the President how to exercise that power. They are ultimately accountable only to the text of Congress’s statutory delegations.

¹⁶⁴ *Id.* at __ [28]

¹⁶⁵ *Id.*

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congressional delegations to territories.¹⁶⁶ These involve circumstances far removed from the concerns of modern proponents of the nondelegation doctrine. These all involved one government (King-in-Parliament, the states, Congress) delegating legislative authority to a subordinate government (colonial authority, Continental or Confederation Congress, or the territorial governments), over which the superior government had ongoing control. Delegating to the Executive—where the Executive with a small minority in either House may prevent a resumption of any legislative power by Congress, and where the Executive is not an agent of or subordinate to Congress—is not the same thing as delegating to a subordinate entity. It is simply not the case that the examples that Professors Mortenson and Bagley raise represent “precisely the circumstance that applies with delegations to the executive branch.”¹⁶⁷

In summary, this and the previous sections have revealed significant evidence of a nondelegation doctrine at the founding. Numerous individuals, many quite prominent, raised nondelegation challenges on numerous occasions. Many times they seem to have carried the point, as in the short debate over a nondelegation amendment and the longer debate over the post roads. At other times their arguments failed to persuade, not necessarily because other members thought there was no limit to what Congress could delegate, but more probably because they believed that there was no improper delegation in that particular instance. There is, in contrast, no evidence that anyone ever thought or said there was no limit to what Congress could delegate, with perhaps one exception;¹⁶⁸ aside from this exception, there is no direct support for the proposition that there was no nondelegation doctrine at the founding.

C. Implicit Statements and Arguments

In addition to the overwhelming affirmative and explicit evidence of a widespread belief in a nondelegation doctrine, and the paucity of affirmative and explicit evidence to the contrary, there is also significant implicit evidence of a nondelegation doctrine. Professors Mortenson and Bagley discount this evidence: “the only actual quotes from historical sources” cited by defenders of nondelegation “either speak generally to the undesirability of vesting all constitutional powers in one body or recite the familiar reasons that the Constitution makes legislating hard.”¹⁶⁹ In light of the substantial evidence of

¹⁶⁶ *Id.* at __ [68-69]

¹⁶⁷ Mortenson and Bagley [38]

¹⁶⁸ In the post-roads debate, Representative Bourne argued that “[t]he Constitution meant no more than that Congress should possess the exclusive right of doing that [establishing post roads], *by themselves or by any other person*, which amounts to the same thing.” 3 Annals of Cong. 232 (1791) (emphasis added). This is the only statement I could find after a careful reading of Mortenson and Bagley’s paper that directly states their claim that there was no limit to what Congress could delegate.

¹⁶⁹ Mortenson and Bagley

explicit statements and arguments in favor of a nondelegation argument, the abundant implicit evidence should not be so casually discounted.

1. Institutionalism

When the Framers created three distinct institutions to exercise three distinct kinds of powers, they did so because they believed the structure of each institution would make that institution uniquely suited to its particular task. And that is how the ratifiers and others in the founding generation would have understood things, too. They would have understood that, as a consequence, no branch could delegate its own power, nor could Congress reassign any powers, without defeating the whole purpose of designing the three national institutions in their particular ways.

Consider the description in Federalist No. 53 of the advantages representation brings to the legislative process. The “public affairs of the Union” are “diversified by the local affairs connected with them, and can with difficulty be correctly learnt in any other place than in the central councils to which a knowledge of them will be brought by the representatives of every part of the empire.”¹⁷⁰ Some knowledge of these affairs will “be possessed by the members from each of the States.”¹⁷¹ Publius goes on:

How can foreign trade be properly regulated by uniform laws, without some acquaintance with the commerce, the ports, the usages, and the regulations of the different States? How can the trade between the different States be duly regulated, without some knowledge of their relative situations in these and other respects? How can taxes be judiciously imposed and effectually collected, if they be not accommodated to the different laws and local circumstances relating to these objects in the different States? How can uniform regulations for the militia be duly provided, without a similar knowledge of many internal circumstances by which the States are distinguished from each other? These are the principal objects of federal legislation, and suggest most forcibly the extensive information which the representatives ought to acquire. The other interior objects will require a proportional degree of information with regard to them.¹⁷²

When readers of *The Federalist* encountered this passage, surely they would have understood this to mean that the representative mechanism, which

¹⁷⁰ Federalist No. 53.

¹⁷¹ *Id.*

¹⁷² *Id.*

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brought the knowledge of members of Congress from all parts of the Union, was essential to the proper exercise of legislative power. If those members could delegate their power to the Executive, that would defeat the whole purpose of having an institution that can adequately represent the interests of the various parts of the nation and whose members would have the requisite local knowledge of the various parts of the nation.

Similarly, in Federalist No. 55, Publius, in evaluating the size of legislative bodies, observed “that in all cases a certain number at least seems to be necessary to secure the benefits of free consultation and discussion, and to guard against too easy a combination for improper purposes.”¹⁷³ And discussing the advantages of the Senate’s unique structure, Publius wrote that one “advantage” stemming from the “constitution of the Senate” is that the Senate can serve as an “additional impediment . . . against improper acts of legislation.”¹⁷⁴ “No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States.”¹⁷⁵ These advantages too, would be entirely eliminated if Congress could freely delegate its legislative power to the Executive.

The Executive was also structured to be well suited to *its* particular tasks. “Energy in the Executive,” Publius wrote, “is essential to the protection of the community against foreign attacks,” and is no less essential “to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.”¹⁷⁶ A key ingredient of energy is “unity”: “Decision, activity, secrecy, and despatch will generally characterize the proceedings of one man in a much more eminent degree than the proceedings of any greater number; and in proportion as the number is increased, these qualities will be diminished.”¹⁷⁷

The judiciary, too, was structured suitably for its function. “The standard of good behavior for the continuance in office of the judicial magistracy, is certainly one of the most valuable of the modern improvements in the practice of government”; it is “the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the law.”¹⁷⁸ “The complete independence of the courts of justice is peculiarly essential in a limited Constitution,” because constitutional limitations “can be preserved in practice no other way than through the medium of courts of justice, whose duty it must be to declare all acts contrary to the manifest tenor of the

¹⁷³ Federalist No. 55.

¹⁷⁴ Federalist No. 62.

¹⁷⁵ *Id.*

¹⁷⁶ Federalist No. 70.

¹⁷⁷ Federalist No. 70.

¹⁷⁸ Federalist No. 78.

Constitution void.”¹⁷⁹ “That inflexible and uniform adherence to the rights of the Constitution, and of individuals . . . can certainly not be expected from judges who hold their offices by a temporary commission.”¹⁸⁰ And, “[next] to permanency in office, nothing can contribute more to the independence of the judges than a fixed provision for their support.”¹⁸¹

To summarize, the Framers created a constitution where each of the three branches of government would be structured in such a way that it would do its particular task well. The ratifying public would have understood that, by vesting legislative power in Congress, executive power in the President, and judicial power in the courts, the intention of the Framers was that each of these respective institutions would exercise its respective powers. Put another way, every statement to the effect that each institution was structured in a particular way includes within it a widely shared implication: that therefore *these* institutions and *only* these institutions can exercise their respective powers. Each of statement to that effect, in other words, would have been understood implicitly to include a nondelegation argument. Even if this implication is not necessarily entailed by the linguistic meaning of these statements, they were still “implicatures”—they would have been understood by the community to carry that meaning.¹⁸² And that is what matters.

2. Separation of Powers

The next point is so well known that it does not require an extended discussion. The founding generation viewed the combination of powers that should be separate as the very definition of tyranny. As James Madison wrote in Federalist No. 47,

The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny. Were the federal Constitution, therefore, really chargeable with the accumulation of power, *or with a mixture of powers, having a dangerous tendency to such an accumulation*, no further arguments would be necessary to inspire a universal reprobation of the system.¹⁸³

¹⁷⁹ Id at

¹⁸⁰ Id

¹⁸¹ Federalist No. 79.

¹⁸² For the distinction between implicature and entailment, see supra note __.

¹⁸³ Federalist No. 47 (emphasis added).

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Or in the words of Montesquieu, well known to and influential in the founding generation,¹⁸⁴ “When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty.”¹⁸⁵

In light of statements such as these, could it possibly have been understood by anyone at the founding that the Constitution imposed no limits on what Congress could delegate to the Executive? This separation-of-powers sentiment, widely shared in the founding era, also included at least an implicature whenever expressed. Listeners in the founding era would likely have understood such statements to imply that Congress could not delegate its legislative power.

III. POSITIVE EVIDENCE OF A LIMITLESS DELEGATION DOCTRINE

In contrast to the abundant evidence that is at least suggestive of a nondelegation doctrine, the direct evidence that the founding generation believed there was no limit to what Congress could delegate is scant. I have already suggested that it amounts to the proverbial dog that did not bark.¹⁸⁶ This Part specifically considers the evidence that Professors Mortenson and Bagley believe establishes their proposition more directly. None of the evidence does so.

Professors Mortenson and Bagley cite numerous statements made about legislative delegation under the British constitution. Algernon Sidney argued that Parliament could give the King a “part in” the legislative power.¹⁸⁷ David Hume wrote that “every minister or magistrate ... must exert the authority delegated to him after the manner, which is prescribed.”¹⁸⁸ (Even here, note, this is not support for delegation of legislative power; every law delegates authority to the executive.) An American pamphleteer in the 1760s—when the British constitution still operated in America—argued that Parliament delegated legislative power to the colonies.¹⁸⁹ And Benjamin Franklin, in 1755, argued that a Legislature may “generally” not delegate its lawmaking power to others, “but certainly in particular Cases it may.”¹⁹⁰ Mortenson and Bagley then cite to Edmund Burke on the East India Bill, and James Kent on the Statute of Proclamations, in which Parliament notoriously delegated enormous legislative

¹⁸⁴ BAILYN, *supra* note __, at 27–30; Rakove, *supra* note __, at 1598.

¹⁸⁵ Spirit of the Laws

¹⁸⁶ *Supra* note __.

¹⁸⁷ Mortenson and Bagley [27].

¹⁸⁸ *Id*

¹⁸⁹ *Id* [28 & n.103]

¹⁹⁰ *Cite*

powers to King Henry VIII.¹⁹¹ Later on Mortenson and Bagley also discuss British practices, citing again to the Statute of Proclamations.¹⁹²

None of this evidence is relevant. The British constitutional system was very different from the subsequent American constitutions in that it was an unwritten system; by definition Parliament could not violate the British constitution because Parliament could shape that constitution however it wanted. The constitution in this sense was merely the institutions of the government, whatever they happened to be. What is the constitution, asked the Tory Charles Inglis in 1776? It is “that assemblage of laws, customs, and institutions which form the general system according to which the several powers of the state are distributed and their respective rights are secured to the different members of the community.”¹⁹³ The Parliament was “itself part of the constitution, not a creature of it,” as Bernard Bailyn explains.¹⁹⁴ When William Blackstone described the British constitution, he described its particular distribution of power among the King, Lords, and Commons.¹⁹⁵ This distribution Parliament itself could change at any time.¹⁹⁶ Blackstone recognized the dangers of such a constitution: “[I]f by any means a misgovernment should any way fall upon it [Parliament], the subjects of this kingdom are left without all manner of remedy.”¹⁹⁷

The “heart” of the problem faced by the colonists in the 1760s, writes Bailyn, was thus to determine in what sense the “‘constitution’ could be conceived of as a limitation on the power of lawmaking bodies.”¹⁹⁸ The colonists were presented with “the continuing need, after 1764, to distinguish fundamentals from institutions and from the actions of government so that they might serve as limits and controls.”¹⁹⁹ Hence in 1769 one colonial thinker “flatly distinguished legislatures from the constitution, and declared that the existing Parliament ‘derives its authority and power from the constitution, and not the constitution from Parliament.’”²⁰⁰

The pamphleteer Thomas Tudor Tucker, according to Gordon Wood, wrote the “conclusive statement”²⁰¹ on the nature of the new American conception of constitutionalism. He wrote that the Framers should “fix[]”the

¹⁹¹ Cites.

¹⁹² Mortenson and Bagley, [61-63].

¹⁹³ BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 175 (Enlarged Ed. 1992) (quoting [cite]).

¹⁹⁴ *Id.* at 179.

¹⁹⁵ 1 Blackstone *50-51.

¹⁹⁶ *Id.* at *160.

¹⁹⁷ *Id.* at *161.

¹⁹⁸ BAILYN, *supra* note __, at 176.

¹⁹⁹ *Id.* at 181.

²⁰⁰ *Id.*

²⁰¹ GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787*, at 281 (1969).

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Constitution “on the firm and proper foundation of the express consent of the people, unalterable by the legislative, or any other authority but that by which it is to be framed,” and, “being founded in undeniable authority, it would have the most promising chance of stability.”²⁰²

Contrary to the British people, most of whom “could not conceive of the constitution as anything anterior and superior to government and ordinary law, but rather regarded it as the government and ordinary law itself,” the American colonists began to conceive of a constitution as “a written superior law set above the entire government against which all other law is to be measured.”²⁰³ It was “inconceivable,” writes Wood, quoting Thomas Paine, “that the liberties of the people should depend ‘upon nothing more permanent or established than the vague, rapacious, or interested inclination of a majority of five hundred and fifty eight men’”²⁰⁴ A corollary of this new conception was that this constitution, if antecedent and superior to the constituted government, would also be enforceable against the government through judicial review.²⁰⁵ In short, pre-revolutionary arguments about whether delegating legislative power would be “constitutional” are simply inapposite to the context of the new American constitutions.

Perhaps nothing puts the point more sharply than Mortenson and Bagley’s reliance on a statement from James Wilson at the Pennsylvania Ratification Convention about the Statute of Proclamations. James Wilson, write Mortenson and Bagley, “agreed that ‘[w]hen the Parliament transferred legislative authority to Henry VIII, the act transferring could not in the strict acceptation of the term be called unconstitutional,’ at least in the American

²⁰² Thomas Tudor Tucker, *Conciliatory Hints* (1784) [full cite] (emphasis added). Part of this passage is quoted in WOOD, *supra* note __, at 281.

²⁰³ WOOD, *supra* note __, at 260-61. Of course, many colonists also believed that the particular principles for which they were fighting were “permanent” in the sense of being rooted in natural right and natural law. *See, e.g.*, BAILYN, *supra* note __, at 181-82 (colonial writers also declared that Parliament “can no more make laws which are against the constitution or the unalterable privileges of the British subjects than it can alter the constitution itself”); 1 BLACKSTONE, *supra* note __, at *54 (“no human legislature has power to abridge or destroy” those rights “which God and nature have established, and are therefore called natural rights”). The key for the colonists, however, was that “[s]omething must exist in a free state, which no part of it can be authorised to alter or destroy, otherwise the idea of a constitution cannot subsist.” *The Crisis, Number XI* [full cite].

²⁰⁴ WOOD, *supra* note __, at 266 (quoting *The Crisis, Number XI* [proper cite])

²⁰⁵ Hence numerous writers, such as James Iredell, argued that judicial review of legislative acts follows from the nature of written constitutions. The constitution was a fundamental law “limiting the powers of the Legislature, and with which every exercise of those powers, must necessarily be compared”; and judges can (indeed, must) make this comparison as part of their ordinary judicial duties because the constitution was not “a mere imaginary thing, . . . but a written document to which all may have recourse, and to which, therefore, the judges cannot witfully blind themselves.” WOOD, *supra* note __, at 461-62 (quoting James Iredell to Richard Spraight, Aug. 26, 1787, and “To the Public,” Aug. 17, 1789, in 2 MCREE, *LIFE OF IREDELL* 169-70, 172-76, 148 (year) [Cite Check]).

sense of the term.”²⁰⁶ Yet Wilson’s point is exactly contrary. His point was that the Statute of Proclamations was not strictly speaking unconstitutional under the *British* constitution, but he implied that it *would* be unconstitutional under the *American* constitution. Here is the full passage:

There necessarily exists in every government a power, from which there is no appeal; and which, for that reason, may be termed supreme, absolute, and uncontrollable. Where does this power reside? To this question, writers on different governments will give different answers. Sir William Blackstone will tell you, that in Britain, the power is lodged in the British parliament; that the parliament may alter the form of the government; and that its power is absolute and without control. The idea of a constitution, limiting and superintending the operations of legislative authority, seems not to have been accurately understood in Britain. There are, at least, no traces of practice, conformable to such a principle. The British constitution is just what the British parliament pleases. When parliament transferred legislative authority to Henry the eighth, the act transferring it could not, in the strict acceptation of the term, be called unconstitutional.

To control the power and conduct of the legislature by an overruling constitution, was an improvement in the science and practice of government reserved to the American States.²⁰⁷

The conclusion to draw from Wilson’s speech is that the transference of authority in the Statute of Proclamation was permissible only because Parliament could alter the British constitution at will. In America, on the other hand, the legislature could *not* alter the structure and assignment of powers made in a constitution that is supposed to control the actions of all departments of government.

Not only is most of their evidence inapposite, Professors Mortenson and Bagley also seem to assume that there was no change in intellectual attitudes between the statute of proclamations in the mid-sixteenth century and the American Founding in the late eighteenth. They attempt to draw one clean line between 1539, the British practices of the seventeenth century, the American practices under the states and the confederation government in the third quarter of the eighteenth century, and the constitutional moment of 1787–88. But of course, much had changed over these 250 years. England underwent a civil war and a glorious revolution, and the American colonists, too, went through a

²⁰⁶ Mortenson & Bagley, *Delegation at the Founding*, at __ (cited in note __) (footnotes omitted) (quoting Wilson).

²⁰⁷ James Wilson, speech at the Pennsylvania Ratifying Convention.

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revolution and a “critical period” of experimentation between 1776 and 1787. It is implausible to suppose that the Statute of Proclamations and other such precedents support the proposition that the Founders would have accepted unlimited delegations. At least, such a supposition would have to be established. It is much more plausible to suppose that the Founders agreed with Blackstone that the Statute of Proclamations “was calculated to introduce the most despotic tyranny, and which must have proved fatal to the liberties of this kingdom, had it not been luckily repealed in the minority of his successor, about five years after.”²⁰⁸ The innovation of written constitutions would have prevented such a statute from ever becoming law in America.

The only strain of the Founders’ thinking that might plausibly suggest they did not adhere to a nondelegation principle is that they were distrustful of democracy. But, as explained above in Part II.C, the Framers accounted for this distrust by making lawmaking difficult. They distrusted democracy, yes, but they distrusted all exercises of government power. They were well versed in Aristotelian political theory; they understood that any type of regime could devolve from its ideal type: kingship into tyranny, aristocracy into oligarchy, and democracy into mob rule. In the American context, there was no doubt that the regime had to be republican. As Madison wrote,

The first question that offers itself is, whether the general form and aspect of the government be strictly republican. It is evident that no other form would be reconcilable with the genius of the people of America; with the fundamental principles of the Revolution; or with the honorable determination which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government. If the plan of the convention, therefore, be found to depart from the republican character, its advocates must abandon it as no longer defensible.²⁰⁹

The question was how to save republicanism from itself, how to prevent its deterioration into mob rule. The Framers thus devised “a republican remedy for the diseases most incident to republican government.”²¹⁰ Part of that remedy was to divide and constrain power.

In any event, turning away from the inapposite examples under the British Constitution, the only potential support after Ratification for the proposition that there was no limit to what Congress could delegate is a single statement in the post-roads debate and possibly another in the 1798 debate over raising a provisional army. Starting with the latter, Representative Lewis Sewall

²⁰⁸ 1 William Blackstone, *Commentaries*, 271.

²⁰⁹ The *Federalist* No. 39, at 236 (James Madison) (Clinton Rossiter ed., 1961).

²¹⁰ The *Federalist* No. 10, *id.* at 79 (James Madison).

said that, “[i]n a variety of cases, Congress did not exercise their Constitutional powers themselves; they were frequently obliged to authorize the President to act for them.”²¹¹ But even here he was responding to the concern that giving the President the power to raise the army “in case of declaration of war, of actual invasion, or of immediate danger of invasion” was an impermissible delegation of legislative power. “[N]othing more is intended to be done,” argued Sewall, “than to authorize the President to raise an army, in case of certain contingencies happening.”²¹² That sounds like the nondelegation doctrine of the nineteenth century.²¹³

As to the former debate about the post-roads, recall that even Sedgwick believed that there were limits to what Congress could delegate: he wanted to “leave the details of this business entirely to supreme Executive,” because he “thought it sufficient that the House should establish the principle, and then leave it to the Executive to carry it into effect.”²¹⁴ Only a single representative made any statement resembling the categorical claim that there was no limit to delegation. According to the reporter, Rep. Bourne argued that “[t]he 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.”²¹⁵ That’s all there is. Other than these two statements—and probably only Bourne’s statement—there are no other express statements in support of the proposition that Congress may freely delegate its legislative power.

IV. NONEXCLUSIVE POWERS

In the absence of any clear statements or other evidence for the proposition that there was no limit to what Congress could delegate, Professors Mortenson and Bagley rely on the concept of nonexclusive powers for their claim that there was no nondelegation doctrine at the Founding. “[T]he founders thought of constitutional powers in nonexclusive and relational terms,” they

²¹¹ 8 Annals of Congress 1635 (May 1798) [check edition of Annals].

²¹² *Id.*

²¹³ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 693 (1892) (“Legislative power was exercised when congress declared that the suspension should take effect upon a named contingency. What the president was required to do was simply in execution of the act of congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect. It was a part of the law itself, as it left the hands of congress, that the provisions, full and complete in themselves, permitting the free introduction of sugar, molasses, coffee, tea, and hides, from particular countries, should be suspended in a given contingency, and that in case of such suspension certain duties should be imposed.”).

²¹⁴ 3 Annals at 229.

²¹⁵ 3 Annals of Congress 232 (1791) (Bourne) (emphasis added).

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write.²¹⁶ Thus, Congress could be described “as an executive body inasmuch as it acted pursuant to authority vested in it by the people.”²¹⁷ And no matter how broadly Congress delegated authority to the Executive, in implementing Congress’s instruction the Executive would be executing law. “Any action authorized by law was an exercise of ‘executive power’ inasmuch as it served to execute the law.”²¹⁸ The critics of delegation, write Mortenson and Bagley, therefore misunderstand the nature of constitutional power when they argue that “rulemaking is an exercise of legislative power that may not be delegated by the legislature,” and that “rulemaking can’t qualify as an executive power, which is limited to the particularized application of existing rules.”²¹⁹ Professors Mortenson and Bagley, however, misunderstand the concept of nonexclusive power.

A. Nonexclusive and Exclusive Powers²²⁰

Professors Mortenson and Bagley argue that the founding generation understood that government power is “nonexclusive” and can be characterized as either legislative or executive. It is, however, a commonplace that some actions are legislative if done by the legislature and executive if done by the Executive. The act involved in the *INS v. Chadha* case supplies a familiar example.²²¹ When done by Congress, deciding that certain individuals should or should not be deported was a legislative act, which is why it required bicameral passage and presentment.²²² If done by the INS, it would be mere law execution.²²³

Consider also the following example, which I have written about elsewhere²²⁴ and which Professors Mortenson and Bagley discuss in a different context. One of the very first statutes required the new national government to make the payments to the disabled veterans of the revolutionary war that had been authorized by the Confederation Congress, “under such regulations as the President of the United States may direct.”²²⁵ President Washington and Secretary Knox promulgated a regulation—a “rulemaking,” if you will—stating that the payments were to be made in two equal installments and requiring

²¹⁶ Mortenson and Bagley, 4-5.

²¹⁷ M and B, 5.

²¹⁸ M&B, 4 (emphasis in original).

²¹⁹ M&B, at 21-22.

²²⁰ Significant portions of this subsection previously appeared in Ilan Wurman, *No Nondelegation at the Founding? Not So Fast....*

²²¹ *INS v. Chadha*, 462 U.S. 919 (1983).

²²² *Id.* at __.

²²³ *Id.* at __ n.16.

²²⁴ Wurman, *The Specification Power*, at __ (cited in note __).

²²⁵ Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

affidavits as evidence of injury and entitlement to payment.²²⁶ Was this something Congress could have done? Of course. This kind of rulemaking is “legislative” in the sense that Congress could have adopted it, or some variant of it, on its own. But it is not the kind of regulation that Congress *has* to be the one to decide. Such a regulation could also be considered executive. Congress had decided all the important questions—that the disabled veterans should be paid pensions, and the amount of those pensions. President Washington’s rulemaking was entirely about implementation. This power is partly legislative, but also partly executive—indeed, sufficiently executive that it is acceptable for the Executive to make them. I have previously described the exercise of this rulemaking authority as “nonexclusive legislative power”: Congress may but need not exercise this power itself.²²⁷

Professors Mortenson and Bagley are therefore wrong when they argue that originalists have missed nonexclusive powers. It is to caricature originalist arguments to say that originalists believe that “rulemaking is an exercise of legislative power that may not be delegated by the legislature,” and that “rulemaking can’t qualify as an executive power, which is limited to the particularized application of existing rules.”²²⁸ That view would be preposterous—President Washington issued a regulation pursuant to one of the earliest statutes specifically authorizing him to make regulations to help implement the payments to the invalid pensioners of the Revolutionary War. The question is not whether rulemaking is always legislative or can never be characterized as executive. Rulemakings can often be done by both Congress and the Executive. The question is whether there are certain *kinds* of rulemakings that *have* to be done by Congress, even if there are many other kinds of rulemaking that can be done by either. The existence of nonexclusive powers does not mean that every exercise of governmental power is nonexclusive, yet that is what Mortenson and Bagley proceed to assume.

Indeed, Chief Justice John Marshall, in his famous dictum in *Wayman v. Southard*, assumed there was a difference between exclusive legislative power that Congress could not delegate and nonexclusive legislative power that Congress could either exercise or delegate. “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative,” but “Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.”²²⁹ Professors Mortenson and Bagley argue that in the first of these statements Marshall is

²²⁶ These regulations can be viewed at An Act Providing for the Payment of the Invalid Pensioners of the United States, (Oct. 13, 1789), *reprinted in* Library of Congress, <https://www.loc.gov/resource/rbpe.21201200/?sp=1> [<https://perma.cc/R29C-C9SU>].

²²⁷ Wurman, *The Specification Power*, at __ (cited in note __).

²²⁸ M&B. They repeat this statement elsewhere, e.g. at __ (“Endless ink has been spilt showing that the Constitution can easily be understood to accommodate the practice of delegating to the executive the power to make rules.”).

²²⁹ *Wayman v. Southard*, 23 U.S. 1, 42–43 (1825).

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simply restating Locke's anti-alienation principle, "which explains why it was a clarification rather than a contradiction when Marshall immediately went on to say that 'Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself.'"²³⁰ But it is not a contradiction at all if there are both exclusive and nonexclusive powers. Marshall was saying nothing more nor less than some power is "exclusively" legislative and cannot be delegated, and some power is "nonexclusive" and can be exercised by more than one department. That is the most natural reading of Marshall's passage.²³¹ It is also responsive to the defendant's argument in the case.²³²

In arguing that the Founders understood all legislative and executive power to be "nonexclusive," Professor Mortenson and Bagley also rely on James Madison's statements on the indeterminacy of language and of the line separating legislative and executive power. "The [originalists'] mistake," they write, "comes in assuming that executive rulemaking can *only* be described as an exercise of executive power. To the contrary, sophisticated discussions from the founding recognize that efforts to classify government action in the abstract are irreducibly indeterminate."²³³ For this they principally rely on Madison in Federalist 37 on indeterminacy,²³⁴ but ignore Madison in the post-roads debate: "However difficult it may be to determine with precision the exact boundaries of the legislative and executive powers, he [Madison] was of opinion that those arguments were not well founded, for they admit of such a construction as will lead to blending those powers so as to leave no line of separation whatever."²³⁵ And in the Constitutional Convention, Madison argued that "certain powers were in their nature Executive, and must be given to that departmt."²³⁶ Perhaps some in the founding generation thought efforts to classify government action was "irreducibly indeterminate," but Madison was not among them.

²³⁰ M&B

²³¹ And, to repeat, the founding generation did not appear to distinguish between delegation and alienation. See *supra* Part II.B.

²³² *Wayman*, 23 U.S. at 13 ("In support of the second point, that Congress could not delegate its authority of regulating process (whatever might be the extent of it) to the Courts of the Union, it was argued, that by the general principles of all free and limited government, as well as the particular provisions of the Federal constitution, the legislative, executive, and judicial powers, are vested in separate bodies of magistracy. All the legislative power is vested exclusively in Congress. Supposing Congress to have power, under the clause, for making all laws necessary and proper, &c. to make laws for executing the judicial power of the Union, it cannot delegate such power to the judiciary. The rules by which the citizen shall be deprived of his liberty or property, to enforce a judicial sentence, ought to be prescribed and known; and the power to prescribe such rules belongs exclusively to the legislative department. Congress could not delegate this power to the judiciary, or to any other department of the government.").

²³³ *Id.* at [39]

²³⁴ *Id.* at [40-41]. For example, in Federalist No. 37, Madison wrote that "no skill in the science of Government has yet been able to discriminate and define, with sufficient certainty, its three great provinces, the Legislative, Executive and Judiciary."

²³⁵ 3 Annals of Cong. 238 (1791).

²³⁶ 1 Farrand 67.

B. Law-Making, Law-Execution, and Treaties

Professors Mortenson and Bagley also rely on a narrow understanding of “executive power,” which, they argue, “had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.”²³⁷ “The upshot for nondelegation debates is straightforward,” they write, because “[t]he founders unanimously understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.”²³⁸ Thus “agency rulemaking pursuant to statutory authorization would qualify as an exercise of executive power, for the simple but decisive reason that the agency is carrying out legislative instructions.”²³⁹

This observation, however, is not novel. As Elizabeth Magill has written, “[T]here is no well-accepted doctrine or theory that offers a way to identify the differences among the governmental functions in contested cases. . . . The sporadic judicial efforts to identify the differences among the governmental powers are nearly universally thought to be unhelpful.”²⁴⁰ For example,

consider the granting of licenses. Congress authorizes the Federal Energy Regulatory Commission (FERC) to grant licenses when they are “in the public interest” and sets forth a list of factors that indicate when the license would be in the public interest. In determining which of the various applicants should obtain a license, the FERC would be implementing that law. And, just as clearly, by granting or denying a license, the FERC would govern the rights and obligations of a third party [and thus would be legislating].²⁴¹

As Professor Magill then argued, and as Professors Mortenson and Bagley now argue, implementing broad laws by making regulations can be considered both executive and legislative. But there may still be a point at which the law might be so broad that by “implementing” the law, the Executive is really implementing it *by exercising legislative power*. To draw a parallel, when Congress exercises its duties and powers that we the people delegated to it, Congress is “executing” our instructions and thus can be considered “executive” in the standard English definition of that adjective, as Mortenson and Bagley

²³⁷ Mortenson and Bagley [38]

²³⁸ *Id.* [39-40]

²³⁹ *Id.* [40]

²⁴⁰ M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 *U. Penn. L. Rev.* 603, 612 (2001).

²⁴¹ *Id.* at 618-19 (footnote omitted) (quoting 16 U.S.C. § 797(e)).

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argue.²⁴² But that does not mean Congress, by “executing” our instructions, is exercising *executive power*. It is executing our instructions by exercising the *legislative* powers we have delegated to it. Similarly, there may come a point at which the Executive is “executing” Congress’s laws not by exercising the executive power, but by impermissibly exercising legislative power. We all “execute” all sorts of things all the time—wills, business plans, the day’s tasks—but that doesn’t mean we all exercise “the executive power” in our daily lives. The executive power presupposes a proper legislative act to execute. The question depends entirely on what is a proper exercise of legislative power, not on narrow definitions of what it means to “execute” instructions.

Mortenson and Bagley’s discussion of the treaty power supports this point. They correctly note that the consensus in the founding era was that treaty-making was a legislative act.²⁴³ But “once in a great while” some at the founding described treaty-making “as an exercise of executive power.”²⁴⁴ The reason, they explain, is because diplomats often had authorizing instructions from Congress.²⁴⁵ This does not, however, demonstrate “the essential indeterminacy of characterizing government power.”²⁴⁶ Indeed, it is questionable whether the act of negotiating a treaty is legislative; that, surely, is “executive” or at least “federative” in the sense that it involves foreign affairs and ongoing interactions with foreign officials. The treaty is not made until the President and Senate consent and ratify the treaty. *Those* are the legislative acts. But even if treaty negotiations were “legislative,” all that would show is that the President undertook some acts that were legislative in nature *when specifically assigned those powers in the Constitution*. As Professor Mortenson has written elsewhere, the legislative veto was also a legislative, not an executive power.²⁴⁷ The reason the President, as the nation’s Executive, could exercise these legislative powers was because they were specifically granted to the President in the Constitution.

In short, Mortenson and Bagley make a lot of the founding generation’s understanding that power was often nonexclusive. But they have not shown that the Founders believed that all power was nonexclusive, nor have they demonstrated that all exercises of government power are in fact nonexclusive.

²⁴² Mortenson and Bagley at [46-52]. See, e.g., *id.* at __ (“And in that sense, Congress and its delegates were acting in an executive capacity in carrying out the people’s will.”); *id.* at __ (“[E]lected officials serving in the legislature could both accurately and meaningfully be described as the executive agents of an underlying principal.”); *id.* at __ (“When taken as the agent of the authorizations and instructions issued by its electoral principal, the Continental Congress was indeed acting in an executive capacity.”).

²⁴³ Mortenson and Bagley [52-55]. Although some dispute this point. See John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self Execution, and the Original Understanding*, 99 Colum. L. Rev. 1955, 1966 (1999) (arguing that treaty-making was understood to be executive).

²⁴⁴ [55].

²⁴⁵ *Id.* at [55-56].

²⁴⁶ [58]

²⁴⁷ Mortenson, Columbia paper.

Indeed, the founding-era views on treaty-making point toward a nondelegation doctrine. If treaty-making was a legislative and not an executive power, the President could engage in that act of legislative power because the Constitution expressly authorized it. The same can be said of the veto. Nothing in the Constitution, however, expressly authorizes the President to exercise other legislative powers.²⁴⁸

V. EARLY PRACTICE

Turning finally to early practice, consider three possible conceptions of nondelegation.²⁴⁹ The first conception is the one advocated by many originalists today: any rule governing private conduct or altering private rights is “legislative.”²⁵⁰ The second conception is the one that Professors Mortenson and Bagley advance: there was no limit on what Congress could delegate. A third conception is Chief Justice Marshall’s in *Wayman v. Southard*, which is similar to the first conception but more nuanced: there is a category of exclusively legislative power over “important subjects,” but also a nonexclusive power “to fill up the details.”²⁵¹ Important subjects on which Congress must legislate might include the formulation of rules of private conduct, and might not include matters involving governmental employees or managing public lands, for instance. None of the early statutes that Professors Bagley, Chabot, and Mortenson discuss disproves the first conception, and certainly all are plausibly consistent with the third, important-subjects conception. The direct tax legislation of 1798 is more complicated and may suggest that Congress could delegate at least some significant discretion over private rights. This Part begins with the overview of the First Congress provided by Mortenson and Bagley, before turning to Professor Chabot’s and Professor Parrillo’s more in-depth analyses of specific statutes.

A. Overview

Mortenson and Bagley’s Article first rehearses the broad delegations of authority under the British constitution, including the Statute of Proclamations,²⁵² which, as explained, should be discounted.²⁵³ They also rely

²⁴⁸ The *expressio unius canon* provides support for this argument. *NLRB v. SW Gen., Inc.*, 137 S. Ct. 929, 940 (2017) (discussing the canon).

²⁴⁹ Some of Part V is taken from Wurman, *No Nondelegation at the Founding? No So Fast* (cited in note __).

²⁵⁰ *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring); *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); Philip Hamburger, *Is Administrative Law Unlawful?* __ ().

²⁵¹ 23 U.S. at 43.

²⁵² Mortenson and Bagley [61-63].

²⁵³ *Supra*

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on numerous examples from the Continental and Confederation Congress,²⁵⁴ but these, too, should be discounted: there was no separation of powers under the Articles of Confederation and the Congress could always exercise plenary control over its delegatee, much like the President can control inferior executive officers. None of these examples occurred under the Federal Constitution of 1787, and none addresses the concern of John Randolph and the many other proponents of a nondelegation doctrine after Ratification: that Congress's delegations of legislative power to the Executive would be unconstitutional transfers of power to an institution over which Congress did not have direct control.

Professors Mortenson and Bagley cite to two delegations from the Virginia and Maryland legislatures to other bodies prior to 1787.²⁵⁵ It is questionable whether these were actually delegations of legislative power.²⁵⁶ But even if they were, there was no independent executive in the early constitutions of these states. A far better example would be from New York, where there was an independent governor with a veto power. And here, when the state legislature tried to delegate legislative and executive powers to a committee of public safety in 1780, the governor's council of revision justified a veto of the legislation on nondelegation grounds: "Because to take the several measures in the bill directed to be taken, the person administering the Government, with the Council therein provided, must exercise the power of legislation; which, by the Constitution, is vested in the Senate and Assembly, and cannot by them be delegated to others."²⁵⁷

In any event, the most relevant evidence is from the First Congress, and here Professors Mortenson and Bagley are thorough, but each example is consistent with nondelegation principles.²⁵⁸ Mortenson and Bagley spend a number of pages describing a variety of military pension statutes granting regulatory authority to the President.²⁵⁹ I mentioned one such statute previously.²⁶⁰ In that statute, Congress decided all the important subjects: that the disabled veterans shall be paid, and how much.²⁶¹ The President then merely

²⁵⁴ Mortenson and Bagley, [63-67]

²⁵⁵ *Id.* at [62].

²⁵⁶ TBD—the Virginia example is from an editor's note, they don't cite to any actual legislation. Waiting for their response on this. Maryland: provided that the sheriff shall determine just compensation for any land taken for purpose of ceding to the federal government for the new national capital.

²⁵⁷ 2 State of New York: Messages from the Governors 113 (Charles Z. Lincoln ed., 1909). This episode is recounted in Charles C. Thach Jr., *The Creation of the Presidency, 1775-1789: A Study in Constitutional History* 42 (1922).

²⁵⁸ *Id.* at ___

²⁵⁹ Mortenson and Bagley at ___ [77-79]

²⁶⁰ See Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95 (cited in note ___).

²⁶¹ The statute, a mere sentence long, provided that the pensions that the Confederation Congress had been paying pursuant to prior acts of the Confederation Congress "shall be

had to decide when the payments should be made—the statute required they be made within one year; President Washington chose two equal payments three months apart—and what proofs would be necessary.²⁶²

Professors Mortenson and Bagley describe another statute that, on their telling, appears to have given the President even more discretion, setting only upper limits on the pension amounts to disabled veterans.²⁶³ “Apart from placing upper limits on the size of awards, however, Congress offered no guidance of any kind,” they write.²⁶⁴ The statute, however, tells a different story. The statute spells out the pay of a variety of officers in detail.²⁶⁵ The pension provision then provides, in full:

That if any commissioned officer, non-commissioned officer, private or musician aforesaid, shall be wounded or disabled while in the line of his duty in public service, he shall be placed on the list of the invalids of the United States, at such rate of pay, and under such regulations as shall be directed by the President of the United States, for the time being: *Provided always*, That the rate of compensation for such wounds or disabilities, shall never exceed for the highest disability, half the monthly pay received by any commissioned officer, at the time of being so wounded or disabled; and that the rate of compensation to non-commissioned officers, privates and musicians, shall never exceed five dollars per month. *And provided also*, That all inferior disabilities shall entitle the persons so disabled, to receive only a sum in proportion to the highest disability.²⁶⁶

This regulation was incredibly specific. There can be no doubt what Congress had in mind. After specifying the pay of officers in detail, Congress provided that a totally disabled officer would receive half his pay as a pension, whereas non-officers who became totally disabled would receive five dollars. Every other disabled servicemember would be paid in proportion to the severity of their disability, as compared to this top amount for the totally disabled. To be sure, the President could lower the amount of the top pensions—but that was the only discretion the law accorded to the President. If this was done, every other

continued and paid by the United States, from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct.” *Id.*

²⁶² Again, the regulations can be viewed at An Act Providing for the Payment of the Invalid Pensioners of the United States, (Oct. 13, 1789), *reprinted in* Library of Congress, <https://www.loc.gov/resource/rbpe.21201200/?sp=1> [<https://perma.cc/R29C-C9SU>].

²⁶³ Act of Apr. 30, 1790, 1 Stat. 119, 121.

²⁶⁴ Mortenson and Bagley, at __.

²⁶⁵ 1 Stat. 119, 120, at § 5.

²⁶⁶ *Id.* at 121, at § 11.

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pension payment would fall proportionally. Quite the opposite of being striking for the breadth of its delegation, this statute is striking for the extraordinary detail that Congress established in this and other sections.²⁶⁷

Mortenson and Bagley's Article also describes delegations in the maritime context, including statutes authorizing port-of-entry collectors to let inspectors "examine the cargo or contents" of ships and authorizing them to direct inspectors "to perform such other duties *according to law* . . . to perform the better securing the collection of the duties."²⁶⁸ Another law authorized collectors to conduct searches and seizures when they were "suspicious of fraud" or "suspected a concealment."²⁶⁹ In none of these statutes, Mortenson and Bagley argue, "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."²⁷⁰ And the Secretary of Treasury was granted authority to remit fines "if in his opinion" the penalty "did not arise from willful negligence or fraud."²⁷¹ Congress, their Article claims, "offered no guidance on what factors should inform the exercise of that judgment."²⁷²

These statutes do not support Mortenson and Bagley's thesis. None delegated to customs officials the power to decide what items shall be subject to a duty. None delegated the power to decide tariff rates. None delegated the power to decide whether fraud was prohibited or not. On the contrary, the statutes resolved all these important questions involving the private rights and obligations of private individuals, and even specified the more important of the means that would be used by government officials in executing the law such as the searches and seizures described above. Any subsequent regulation by a collector would merely have been an instruction to other government officers as to how to conduct their law-execution functions.²⁷³ It is difficult to imagine what

²⁶⁷ The Article also points to a statute authorizing the President to pay supervisors and inspectors of distilleries "as he shall deem reasonable and proper." M&B [84] (quoting Act of Mar. 3, 1791, 1 Stat. 199, 213). But what the Article neglects to mention is that the payments were to be made entirely out of the duties collected under the Act, and that the total pay could not exceed seven percent of the duties collected. 1 Stat. 199, 213.

²⁶⁸ Mortenson and Bagley, at [81-82] (quoting Act of Aug. 4, 1790, 1 Stat. 145, 164)

²⁶⁹ *Id.* at ___ (quoting Act of July 31, 1789, 1 Stat. 29, 43).

²⁷⁰ *Id.* at ___

²⁷¹ M&B, 85 (quoting Act of May 26, 1790, 1 Stat. 122, 123; Act of Mar. 3, 1791, 1 Stat. 199, 209).

²⁷² *Id.*

²⁷³ Their example of the distillery law which authorized inspectors to enter into any distillery upon request similarly falls short. M&B [84] (citing Act of Mar. 3, 1791, 1 Stat. 199, 206). This seems indisputably "executive." It is no different than authorizing FBI agents to enter into houses where there is "probable cause" that a crime has been committed, but the law does not tell them which types of crimes or criminals to prioritize. In this case, the law authorized federal agents to enter into a distillery at any time upon request. All the private rights have been determined by Congress; there is nothing left but law-execution.

more Congress could have been expected to do. And, of course, the standard “willful negligence or fraud” is quite specific. The latter statutes the Article cites did not give the Secretary of Treasury authority to remit fines whenever he pleased.

On naturalization, Professors Mortenson and Bagley write: “Under a 1790 statute, Congress gave to ‘any common law court of record’ the authority to grant U.S. citizenship to any free white persons who had lived in the country for two years after ‘making proof to the satisfaction of such court, that he is a person of good character.’”²⁷⁴ But if this is a delegation of legislative power, then it is hard to know what would not be such a delegation. The statute is a delegation of *authority*—every statute is a delegation in this sense—but it is unclear why Mortenson and Bagley think it constitutes a delegation of *legislative power*. The statute did not authorize a court to decide what types of people should be made citizens, whether there should be naturalization at all, what residency requirements there should be, or anything else of the sort.²⁷⁵ Congress decided all these important questions, leaving admittedly some discretion in applying the law. But no originalist claims that the existence of discretion in law-application, which is inevitable, suggests an unlawful delegation of legislative power.²⁷⁶

Professors Mortenson and Bagley also rely on a statute prohibiting commercial intercourse with Native American tribes without a license from the executive branch, and giving the Executive complete discretion to decide whether, to whom, and why to grant such licenses.²⁷⁷ This was indeed a broad statute that delegated authority to regulate private conduct. But it is also a delegation in the context of the President’s treaty and commander-in-chief power: the idea was to avoid conflict and violence with Native American tribes. As Michael McConnell argues in a forthcoming book, it may have been understood at the time of the founding that Congress had more power to delegate old royal prerogative authorities back to the President than it had power to delegate other legislative powers.²⁷⁸ And Philip Hamburger has written that this licensing scheme may have been justified because it governed behavior outside

²⁷⁴ Mortenson and Bagley, at [83] (quoting Act of Mar. 26, 1790, 1 Stat. 103)

²⁷⁵ Moreover, as Aaron Gordon points out, the good-character qualification was apparently easy to satisfy, requiring merely an affidavit or personal testimony to that effect. Aaron Gordon, working paper.

²⁷⁶ See, e.g., *Mistretta v. United States*, 488 U.S. 361, __ (1989) (Scalia, J., dissenting) (“The whole theory of *lawful* congressional “delegation” is not that Congress is sometimes too busy or too divided and can therefore assign its responsibility of making law to someone else; but rather that a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine—up to a point—how small or how large that degree shall be.”). Indeed, prosecutorial discretion, a function largely understood to be executive in nature, suggests that executive discretion is acceptable (and inevitable).

²⁷⁷ M&B [75-77]

²⁷⁸ McConnell, *The President Who Would Not Be King*, __.

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the domestic territory.²⁷⁹ At a minimum the special context of this delegation militates against drawing any general conclusion from it.

The Article also points to statutes delegating authority to *local* governments to exercise *local* powers—like to the territories and to the District of Columbia.²⁸⁰ Surely Congress does not have to create a code of tort law for the District of Columbia, which effectively exercises the power of a distinct sovereign. This is also why judges in the territories are not required to have lifetime tenure and salary protections.²⁸¹ These governments do not exercise the judicial power “of the United States,”²⁸² nor the legislative or executive power of the United States.

Their Article also discusses two examples of delegations of authority within the “constitutional space” of another branch—the authority of the President to call forth the militia when he deemed it necessary for “protecting the inhabitants of the frontiers of the United States.”²⁸³ This statute meets nondelegation principles. Surely Congress need not have specified a particular death toll on the frontier before the President could call forth the militia. Providing that the President could only call forth the militia for the purpose of “protecting” the inhabitants is all that could reasonably be expected of Congress. The second example in this category of statutes is the delegation to the courts in the first Judiciary Act to “make and establish all necessary rules for the orderly conducting [of] business in the said courts, provided such rules are not repugnant to the laws of the United States.”²⁸⁴ This is exactly the kind of delegation that Chief Justice Marshall would have described as one of nonexclusive legislative power. Surely Congress could have specified the procedures of the courts, but it did not have to do so because no private rights or conduct are affected.

B. Borrowing and Paying the Debt

Professors Mortenson and Bagley also point to statutes granting the Executive discretion to decide in what order of priority to pay off foreign debt and discretion to purchase domestic debt from the public.²⁸⁵ Professor Chabot focuses on these statutes in a recent Article arguing that Congress delegating decisional authority over important matters to the Executive.²⁸⁶ Chabot argues that “[t]he capacious language in founding-era statutes granted executive officers

²⁷⁹ Philip Hamburger, *Is Administrative Law Unlawful?* 104–05.

²⁸⁰ M&B [70–74].

²⁸¹ See William Baude, *Adjudication Outside of Article III*, 133 Harv. L. Rev. 1511, 1523–40 (2020).

²⁸² *Id.*

²⁸³ M&B [87] (quoting Apr. 30, 1790, 1 Stat. 119, 121).

²⁸⁴ M&B [87] (quoting Act of Sept. 24, 1789, 1 Stat. 73, 83 (First Judiciary Act)).

²⁸⁵ M&B, [81–83].

²⁸⁶ Chabot

powers that went far beyond finding facts and filling up details.”²⁸⁷ These early statutes “are flatly inconsistent with a rigorous doctrine that requires Congress to address all “important subjects.”²⁸⁸

Professor Chabot examines a number of early borrowing statute. The most important of these was a combination of statutes authorizing the President to borrow *up to* 12 million dollars for the purpose of refinancing the foreign revolutionary war debt, and 2 million dollars for the domestic debt.²⁸⁹ The only limitations were those upper limits, and the new loans had to be “on terms advantageous to the United States.”²⁹⁰ That is, it had to be a *refinancing* at an overall lower interest rate. Chabot discounts these rather significant limits. The act respecting foreign debt, she writes, “at most presumed that ‘advantageous terms’ for refinancing would result in a rate lower than those the US was currently paying in interest,” but that “[i]t remained up to the President to determine how advantageous the new interest rate would be,” for example a \$12 million loan at a 5 percent or a 4 percent rate of interest.²⁹¹ “No one” in Congress, Chabot writes, “proposed statutory language to limit executive discretion by having Congress specify critical parameters such as limits on the interest rate, discounts or commission fees commonly taken out as a percentage of the loans, or which foreign loans to repay first.”²⁹²

It is not at all clear, however, that Congress really left out the important terms. Indeed, what more could one reasonably expect Congress to have done? It was not even knowable whether there were lenders *willing* to lend \$12-14 million to the United States. That is why an upper limit was all that could be expected. And certainly it was not knowable at what interest rate any lenders would be willing to loan such a large sum of money. Under the circumstances, when negotiation would be key and the terms were inherently unknowable in advance, what more could Congress have done than set an upper limit on the amount and an upper limit on the interest rate, namely that the refinancing must be in the “interest” of the United States, i.e., at a lower rate than the existing loans? Under the circumstances, it is not at all clear that commission fees and more specific instructions on interest rates were truly “important subjects” that Congress had to decide. It is true that one representative, William Smith, appears to have raised an initial nondelegation objection.²⁹³ But few seemed to bite.²⁹⁴ Indeed, Rep. Huntington responded that Congress need not “turn borrowers themselves”—illustrating exactly the point that

²⁸⁷ Chabot paper at 2

²⁸⁸ Chabot paper at 10

²⁸⁹ 1 Stat. 138, § 2; 1 Stat. 186.

²⁹⁰ 1 Stat. 138.

²⁹¹ Chabot paper at 20.

²⁹² Chabot paper at 15

²⁹³ Chabot paper at 14; Lloyd’s Notes from May 19, 1790, Debates in the House of Representatives, in XIII DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA 1349.

²⁹⁴ Rep. Stone argued the legislation would authorize the borrowing of a “particular sum,” *Lloyd’s Notes* at 1349. Other than the statement of Rep. Huntington, discussed next, it does not appear that anyone else addressed this concern in the reporter’s 13 pages of notes.

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the terms of such a big loan had to be left to negotiations, which only the President could undertake.²⁹⁵

Professor Chabot also examines the Sinking Fund legislation that allowed a commission comprising the Secretary of Treasury, Secretary of State, Vice President, Attorney General, and Chief Justice of the United States, at the President's direction, to "purchase debt of the United States" in "such manner, and under such regulations as shall appear to them best calculated to fulfill the intent of this act," which intent was to "effect a reduction in the amount of public debt" and to benefit "creditors of the United States, by raising the price of their stock."²⁹⁶ Chabot argues that "[t]he Act afforded the Commission tremendous discretion to decide when and in what amount to enter the market and buy U.S. securities."²⁹⁷ Although "[a]ll purchases of U.S. securities would serve the Act's first goal of reducing the amount of debt," the "second goal of raising the value of U.S. securities required the Commission to exercise great discretion."²⁹⁸ That is, "[t]he Commission had to apply expert financial judgment to determine the timing and magnitude of purchases needed to raise the value of U.S. securities."²⁹⁹

There were, however, quite specific limitations by statute. The purchases had to be at market price "if not exceeding the par or true value thereof."³⁰⁰ And the money applied to such purchases was limited to "such surplus of the revenue as may remain after satisfying the purposes for which appropriations shall have been made by law."³⁰¹ Indeed, the statute provided that such surplus *shall* be applied to the purchase of the public debt, although reservations could be made if necessary to ensure interest payments on existing debt.³⁰² The statute also authorized the President to borrow up to \$2 million, at a rate of no more than five percent interest, for the purpose of purchasing such U.S. securities.³⁰³

Nevertheless, Professor Chabot argues, an important issue arose during the financial panic of 1792. Could the Commission purchase distressed U.S. securities? Secretary Jefferson and Attorney General Randolph thought such purchases unlawful because not at true value. Secretary Hamilton and Vice President Adams disagreed. Chief Justice John Jay then gave his legal opinion that the statute authorized the purchases. Indeed, the statute provided that purchases could be made "if not exceeding the par or true value thereof."³⁰⁴ Chabot argues that this episode illustrates that the Commission had "broad discretion to implement monetary policy by investing large amounts of money in purchases of U.S. securities, when in their judgment the purchases were needed to check a declining market

²⁹⁵ Lloyd's Notes, 1351.

²⁹⁶ Chabot, paper at 22-25; 1 Stat. 186.

²⁹⁷ Chabot, paper at 23.

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ 1 Stat. 186, § 1.

³⁰¹ *Id.*

³⁰² *Id.* §§ 1-2.

³⁰³ *Id.* § 4.

³⁰⁴ Chabot, 24-25.

that threatened the long-term viability of U.S. credit.”³⁰⁵ But of course, the statute *authorized* precisely such purchases. The statute authorized any purchase below par value, with the stated purpose of raising the value of U.S. securities. The Commission’s actions comported precisely with the statutory directions.

C. Early Patent Statutes

Professors Bagley, Chabot, and Mortenson all discuss the early patent statute. The statute authorized the granting of patents that were “useful” and “important.”³⁰⁶ This certainly leaves a lot of discretion, and eventually the executive officers charged with enforcing the law came up with rules clarifying these two standards. (It is not entirely clear that the rules were ever formally promulgated.) Professors Mortenson and Bagley write that Thomas Jefferson explained that several rules had been “established by the board,” for example that a patent would not issue for a change in the application of an earlier invention.³⁰⁷ If this indeed had been made into a general rule, such a rule would alter the rights of private persons as opposed to official conduct. Such a rule in the patent context might suggest that the executive did make at least some rules specifying the details of more general legislative provision and these rules could and did sometimes affect private rights and conduct. Although Mortenson and Bagley do not get this far ahead in history, in the 1852 steamboat legislation Congress authorized the making of rules imposing passenger limits on ships and rules for the passing of ships—rules that would have altered private rights and obligations in at least some ways.³⁰⁸

Alternatively, some originalists have proposed that the distinction between “private rights” and public rights/privileges, like pensions, plays a role in nondelegation challenges.³⁰⁹ This might also explain the patent context.³¹⁰ Perhaps Congress had more power to delegate authority to establish public privileges. I agree, but the distinction cannot be dispositive. Surely it would be just as impermissible to delegate authority to the President to decide *whether* the national government should grant patents, or *whether* the national government should provide pensions to veterans. But that’s not to say the public-private rights distinction does not matter at all: it would certainly matter for an “important subjects” theory of nondelegation. Congress cannot delegate to the President the decision whether to establish a pension system—that is too

³⁰⁵ Chabot, 25.

³⁰⁶ M&B [75] (quoting Act of Apr. 10, 1790, 1 Stat. 109, 110).

³⁰⁷ M&B __ (quoting Jefferson letter)

³⁰⁸ 10 Stat. 61, __ (§§ 10, 29).

³⁰⁹ Aditya Bamzai, Delegation and Interpretive Discretion, 133 Harv. L. Rev. 164, 180–82 (2019).

³¹⁰ See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365 (2018) (suggesting that patents are matters of public rights).

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important—but some additional leeway might be permissible with respect to public privileges because they are *less* important than private rights.

Still, to be sure, the early patent legislation did leave many seemingly “important” questions potentially unanswered. Professor Chabot notes particularly the absence of any decision from Congress whether the Patent Board could even conduct interference proceedings when there was more than one claimant to a patent, and whether the standard would be the first-to-file rule.³¹¹ Yet perhaps for this very reason, the Patent Board never resolved the first interference case that came before it. It instead granted distinct although overlapping patents to the various inventors.³¹² Moreover, Congress did seem to indicate a preference for a first-to-file policy. Although it did not provide for *ex ante* interference proceedings, it *did* provide for *ex-post* judicial challenges where the first-to-file rule would prevail.³¹³ I do not contend that the Patent Act answered all of the important questions, but it surely addressed most of them. The statute may have left gaps, but it is not entirely clear that it actually authorized the Patent Board to *fill* those gaps—at least if they were of significant importance, such as establishing interference proceedings and a first-to-file rule.

D. The Direct Tax of 1798

Professor Nicholas Parrillo, in a long Article in this volume, agrees that originalists can explain away most early delegations as involving foreign affairs or public rights. But, he argues, the 1798 direct tax legislation was the first major legislation involving private rights, and here federal tax officials in each state were given broad discretion to value houses under the vague mandate that the valuations reflect what the houses or lands were “worth in money.”³¹⁴ More still, higher-level tax commissioners had the power to adjust valuations of land and houses on district-wide levels so long as such adjustments were “just and equitable.”³¹⁵

This delegation, however, is not as troubling as it may seem on the surface. As Parrillo himself recognizes, Congress decided at least a series of the most important questions: First, Congress decided that \$2 million should be raised. Second, because the Constitution provided that direct taxes were to be in proportion to the population of the various states, Congress decided how each state was to contribute its share. Each state would meet its allotment first by a 50-cent head tax on every slave; next, by a valuation of houses, which were to be taxed at a rate fixed by Congress, depending on the valuation; and finally, any shortfall was to be made up by a tax on land at a rate necessary to achieve

³¹¹ Chabot, paper at 31-35.

³¹² *Id.*

³¹³ *Id.* at 30; 1 Stat. 109, § 5.

³¹⁴ 1 Stat. 580, 585 (1798).

³¹⁵ 1 Stat. 580, 588 (1798).

the state's proportional amount of the tax.³¹⁶ Third and perhaps most significantly, Congress resolved for itself the most politically controversial issue: whether houses should be taxed separately from land, to ensure that most of the tax burden would fall upon wealthy city dwellers with large houses, as opposed to rural farmers with large tracts of land but more modest accommodations.³¹⁷

Professor Parrillo's central argument is nevertheless that the requirement to value houses and land based on what they are "worth in money" was vague and gave broad discretion to the tax boards in the various states. Additionally, he highlights the provision that allowed the board of tax commissioners to adjust the valuations within an assessment district up or down as a whole based on what was just and equitable. And, of course, the ultimate amount of the valuation would directly affect the tax assessment, which involves one of the most important private rights of all.³¹⁸

It is certainly true that Congress could have chosen a method of valuation that was less amenable to discretion. Congress could have decided to value each house or tract based on the number of bedrooms, chimneys, or windows, the acreage, and the like. Indeed, Professor Parrillo shows that some state legislatures had legislated average per-acre values of parcels in that era.³¹⁹ But at least three state legislatures adopted a scheme much like the federal direct tax legislation: they apportioned tax burden among the counties, but it was up to front-line assessors and then countywide boards to value and apportion within the respective counties.³²⁰ And Parrillo argues that at least three other states left the intra-county distributions to frontline officials.³²¹ To the other extreme, some state legislatures were even more heavily involved, apportioning the tax burden among all the towns.³²² Quite the opposite of suggesting that Congress somehow abdicated responsibility that was acknowledged at the time to be legislative, the diversity of state approaches shows that there was no consensus on how detailed a legislature had to be with valuation processes.

Moreover, at least as to houses—whose owners would bear the brunt of the tax, and the valuations of which were even trickier than valuations of land—a more specific standard, such as a per-bedroom or per-window valuation, would likely not accurately capture many differences in actual value even if it did reduce discretion. Such an approach would have the added shortfall of being open to manipulation. One recalls the famous window tax in England in the late seventeenth century. Homeowners simply bricked up their windows to avoid the

³¹⁶ Parrillo at 21. 1 Stat. 597, 598.

³¹⁷ For a sampling of the congressional debate over this issue, see 8 *Annals of Cong.* 1838-41.

³¹⁸ Parrillo, paper at 10, 13, __; 1 Stat. 580, 585, 589.

³¹⁹ Parrillo, paper at 13; Part III generally.

³²⁰ Parrillo, paper at 61 (New York, Pennsylvania, New Jersey).

³²¹ *Id.* (noting Delaware, Maryland, and Virginia).

³²² *Id.* (Massachusetts, Rhode Island, New Hampshire).

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tax.³²³ Additionally, a given standard for valuation did not always make sense everywhere. Hence sales prices could be a guide in cities but less in rural areas, and in New York even rent could be included—a measure obviously inapplicable in most other places in that period.³²⁴ South Carolina could value land based on the quality of the “tide swamp,” a feature surely inapplicable to the northern parts of the country.³²⁵ Connecticut and Rhode Island could insist on historical sales prices for land, not just for houses, because of detailed records.³²⁶ Professor Parrillo offers this variety of standards as evidence of the broad discretionary authority delegated to these administrative officers over private rights. But on the contrary, this variety shows the wisdom of Congress’s choice to let different boards establish standards that were both useful and obtainable for their particular states so that in all states valuations could be conducted in a manner that would most nearly approximated the true value “in money” of every property.

Arguably, the actual valuations were also factual rather than policy questions. Professor Parrillo anticipates this response, at least as to the revisionary power of the commissioners. “Labeling the federal boards’ mass revisions as factual would cause them to fall within Justice Thomas and Justice Gorsuch’s exceptions for factual determinations, making the rulemakings technically consistent with those Justices’ theories,” Parrillo writes. “But if the [nondelegation] skeptics do this, then the 1798 legislation becomes originalist precedent for construing those Justices’ factual exceptions to a constitutional ban on rulemaking very broadly.”³²⁷ Perhaps. But it is certainly not obvious that discretion to determine value is less factual than the discretion to determine whether France and England continued to violate the neutral commerce of the United States.³²⁸ And there is also no doubt that the question of valuations is very different in kind from the questions Congress did, and arguably had to, resolve. Whether houses should be treated along with the land or separate from it, whether the burden should fall more on city-dweller than farmers, and what the actual tax assessment on value should be, cannot be considered factual questions in any dimension. Those are pure questions of policy. The question of *how best to determine* value is also question of policy, and Congress arguably answered that, too—by letting assessors use any standards and metrics at their disposal to make as good an estimate of the true value of the property “in money” in their particular geography and circumstances. Such standards and metrics would vary from place to place, and it was therefore not thought wise or

³²³ Authoritative cite.

³²⁴ Parrillo at 52-53 (discussing the data Secretary Wolcott suggested the assessors collect).

³²⁵ Parrillo paper at 54 (discussing newspaper excerpt summarizing the standards set by South Carolina’s commissioners).

³²⁶ Parrillo paper at 55 (

³²⁷ Parrillo, paper at 15-16.

³²⁸ *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813) (holding that such a factual determination did not violate the nondelegation doctrine).

necessary to fix the same standards. That Congress could have chosen a policy that would have left less discretion to assessors and commissioners does not mean it did not answer the important policy question itself.

Professor Parrillo focuses heavily on the provision of the direct tax legislation that allowed the higher-level commissioners to make adjustments, on a district-wide scale, if they believed such adjustments were “just and equitable.” This provision, however, was merely the third part of the process for determining what the proper valuations actually were. The first valuations were made by assistant assessors; these could be appealed to the principal assessor of each district; and then the board had discretion to adjust all of the valuations in particular assessment districts up or down by a percentage if they felt it was equitable to do so, after comparing all the valuations in the various districts.³²⁹ These three layers of review ensured that the final valuations were as close as possible to the actual value in money of the various properties. The motivating concern was that some local assessors might systematically favor their local area by reducing the overall valuation to lower the resulting tax burden.³³⁰ The approach of course left significant discretion for the boards to exercise, but the inclusion of this power was actually intended to *reduce* discretion overall. As Representative Gallatin observed in debate over an earlier version of the bill,

Assessors will assess in different places on different principles, and there will be no way of remedying the defect. What security should he or his constituents have that the assessors of Philadelphia will assess their houses according to their real value? Or what security have the citizens of Philadelphia that the people beyond the Alleghany mountains will assess their property according to its real value? None. Unless Commissioners were employed to adjust the various assessments which are made, no equality of taxation could be expected.³³¹

Moreover, at the initial appeal to the principal assessor, the principal assessor was empowered to “*equalize* the valuations as shall appear just and equitable.”³³² Although the term “equalize” did not appear in section 22 of the act granting the commissioners authority to implement district-wide changes at the last stage, the intent of the statute seems clear: it was to ensure fairness and accuracy and avoid local partiality. Indeed, Treasury Secretary Wolcott understood that the intent of Section 22 was to equalize valuations. In suggesting that the commissioners implement some “standards” suitable to their locales in advance of the initial valuations, Wolcott suggested that without some standards

³²⁹ Parrillo, paper at 26-28.

³³⁰ For this concern, see 8 *Annals of Cong.* 1838.

³³¹ 8 *Annals of Cong.* 1848.

³³² 1 *Stat.* 580, 588, § 20.

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applicable to the particular districts “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.”³³³ The terms “just and equitable” may seem vague to us, but to the administrators tasked with enforcing the law, they were understood to have more specific meaning. Implementing this mandate still required discretion, but perhaps not so much as to defeat private-rights theory of nondelegation.

E. Summary

That some originalists might be wrong about their particular test for nondelegation does not prove that there were no limits on delegation at all. The First Congress did not come even close to testing that proposition—its statutes were not nearly as broad as recent scholars have claimed, it rarely authorized the creation of rules that actually altered private rights and obligations (if it did so at all), and when it might have done so the rules did not alter rights or obligations in any significant way or the rules were in the context of presidential powers. The borrowing statutes and patent statutes are no different in this regard: they were not particularly broad, and in any event those do not necessarily involve matters of private rights.

Nor did the practice of Congress change over the decade. To be sure, the direct tax legislation is the clearest challenge to the nondelegation thesis. But even if that delegation were one over private rights, one swallow does not make a summer. And Congress did make the important decisions—the amount to be raised, the actual assessment rates, that houses and land shall be treated separately, that city dwellers should bear the burden of the tax, and that valuations should approximate as near the true value as possible. Certainly Congress could not have conducted the valuations itself.

Early practice is thus consistent with an “important subjects” theory of nondelegation, one that gives more leeway to delegate on matters of official conduct than private conduct, that gives more leeway to delegate authority over public rights than over private rights, and that gives more leeway to delegate authority over means than over, say, jurisdictional or purpose questions.³³⁴ This is consistent also with Madison’s Report of 1800, in which he wrote that “[t]o determine . . . whether the appropriate powers of the distinct departments are united by the act authorising the executive to remove aliens, it must be enquired whether it contains such details, definitions, and rules, as appertain to the true character of a law,” and, he continued, “*especially*, a law by which personal

³³³ Parrillo at 53 (quoting Circular to the Commissioners for Assessing Direct Tax 3 (Aug. 7, 1798), Box 21, Folder 17, Oliver Wolcott Jr. Papers, Connecticut Historical Society, Hartford, CT).

³³⁴ Wurman, *As-Applied Nondelegation*, at 1009–10 (cited in note ___).

liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.”³³⁵ No scholar to my knowledge has improved upon Madison’s formulation.

CONCLUSION

The recent contributions to the nondelegation literature are extremely valuable and unearth a wealth of information about early practice. But the strongest claims of this scholarship collapse upon examination. To prove the proposition advanced by Professors Mortenson and Bagley—that there was no nondelegation doctrine at the founding—they would have to uncover statutes more like the following: “Any common law court shall decide who shall be a citizen, for whatever reason the court sees fit to declare someone a citizen.” Or, “The patent office shall decide whether the United States government should give patents, the term of years, and the grounds on which to grant patents.” Or, “The President may issue regulations carrying into effect any of the powers vested in Congress in Article I, Section 8.” Their Article points to no such statutes. It does not prove that these kinds of statutes would have been permissible. It does not demonstrate that there was no nondelegation principle at the founding. The evidence of what the Founders “said” is also overwhelmingly in favor of a nondelegation doctrine at the founding, although admittedly the history is not unequivocal. Yet nondelegation is at least consistent with discussions in the First Congress over a nondelegation amendment, in the Second Congress over the post roads, in discussions over the Alien Friends Act, and in many other deliberations and adjudications, while the evidence that there was no limit on what Congress could delegate is scant at best.

Originalists might, however, have to rethink the limitations of their current “private conduct” theory of nondelegation, and focus more on an “important subjects” theory in its place. Private rights and conduct are undoubtedly more important than official conduct or public privileges, but that does not mean Congress could delegate unlimited discretion over the latter, and no discretion over the former. At a minimum, all can agree that originalists will have to contend with the wealth of new data from early practice.

³³⁵ Report of 1800 (emphasis added).