



THE C. BOYDEN GRAY

Center *for the Study*  
*of the Administrative State*

ANTONIN SCALIA LAW SCHOOL • GEORGE MASON UNIVERSITY

---

# Delegation at the Founding

Julian Davis Mortenson  
Nicholas Bagley

CSAS Working Paper 20-29

*Delegations and Nondelegation After Gundy*

## Delegation at the Founding

by Julian Davis Mortenson and Nicholas Bagley\*

Forthcoming, 121 Columbia Law Review (2021)

*This Article refutes the claim that the Constitution was originally understood to contain a nondelegation doctrine. The founding generation didn't share anything remotely approaching a belief that the constitutional settlement imposed restrictions on the delegation of legislative power--let alone by empowering the judiciary to police legalized limits. To the contrary, the Founders saw nothing wrong with delegations as a matter of legal theory. The formal account just wasn't that complicated: Any particular use of coercive rulemaking authority could readily be characterized as the exercise of either executive or legislative power, and was thus formally valid regardless of the institution from which it issued.*

*Indeed, administrative rulemaking was so routine throughout the Anglo-American world that it would have been shocking if the Constitution had transformed the workaday business of administrative governance. Practice in the new regime quickly showed that the Founders had done no such thing. The early federal Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct for private parties on some of the most consequential policy questions of the era, with little if any guidance to direct them. Yet the people who drafted and debated the Constitution virtually never raised objections to delegation as such, even as they feuded bitterly over many other questions of constitutional meaning.*

---

\* Professors of Law, University of Michigan. Thanks for helpful comments to Greg Ablavsky, Jonathan Adler, Kevin Arlyck, Will Baude, Jack Beerman, Josh Chafetz, Katherine Mims Crocker, David Feldman, Will Foster, Brian Frye, Chris Green, Carissa Hessick, Andy Hessick, Don Herzog, Kristin Hickman, Andrew Kent, Guha Krishnamurthi, Marty Lederman, Gary Lawson, Rob Natelson, Adam Pritchard, Nicholson Price, Nick Parillo, Dave Pozen, Zach Price, Richard Primus, Richard Pierce, Andrew Lanham, Mike Rappaport, Matt Steilen, Rena Steinzor, Allen Sumrall, Etan Thomas, Joe Tomain, Chris Walker, Derek Walker, Matt Waxman, Adam White, and Ilan Wurman, as well as attendees at workshops at Arizona, George Mason, Harvard, Michigan, and Wisconsin law schools. We are particularly grateful for terrific substantive feedback from Sara Tofighbakhsh, outstanding excellent research assistance from Brian Remlinger and Ingrid Yin, and abiding inspiration from the Goofus and Gallant section of Highlights Magazine.

<i>Introduction</i> .....	3
<b>I. The Rise and Fall and Rise Again of the Modern Nondelegation Doctrine</b>	<b>5</b>
<b>A. Rise and Fall.</b> .....	<b>5</b>
<b>B. And Rise Again.</b> .....	<b>6</b>
<b>C. <i>Gundy v. United States</i></b> .....	<b>7</b>
<b>II. Before 1789</b> .....	<b>9</b>
<b>A. Legislative Power Could Be Delegated</b> .....	<b>11</b>
1. The Theory of Legislative Delegations before 1789 ....	11
2. The Practice of Legislative Delegations before 1789 ...	15
3. Hints of an Anti-Alienation Principle .....	19
<b>B. Rulemaking Pursuant to Statutory Authorization Was an Exercise of Executive Power</b>	<b>23</b>
1. The Legislative Act of Passing Statutes Could Accurately Be Described as an Exercise of Executive Power	24
2. The Legislative Act of Treaty-making Could Accurately Be Described as an Exercise of Executive Power	28
<b>III. After 1789</b> .....	<b>9</b>
<b>A. Delegations by the First Congress</b> .....	<b>33</b>
1. The Police Power in Federal Lands .....	34
2. Commercial Regulations.....	37
3. Commerce and Other Interactions with Native Americans	38
4. Social Welfare and Entitlement Benefits.....	39
5. Finance and Budget .....	40
6. Tax Assessment and Enforcement.....	41
7. Citizenship .....	42
8. Powers Arguably Within Another Branch’s Constitutional “Space”	42
<b>B. The Post Roads Debate</b> .....	<b>43</b>
<b>C. The Pattern in Later Congresses</b> .....	<b>47</b>
<i>Conclusion</i> .....	<b>53</b>

## INTRODUCTION

Like a bad penny, the nondelegation doctrine keeps turning up. Its persistence is puzzling. Apart from two cases in one exceptional year, the Supreme Court has never relied on the doctrine to invalidate an Act of Congress.<sup>1</sup> Its reinvigoration would mark a radical break with constitutional practice and could entail the wholesale repudiation of modern American governance. Yet some critics of the administrative state still claim that the Constitution was originally understood to contain an implicit bar on delegating legislative power. On their account, the zealous application of a nondelegation doctrine is necessary to bring “a second coming of the Constitution of liberty,”<sup>2</sup> one consistent with the Constitution’s original public meaning.<sup>3</sup>

These originalist arguments have recently found a receptive audience at the Supreme Court. In *Gundy v. United States*, Justice Gorsuch penned a long dissent bristling with citations to originalist scholars and calling on the Court to revive the nondelegation doctrine.<sup>4</sup> Chief Justice Roberts and Justice Thomas joined the opinion, and Justice Alito wrote separately to signal his “willing[ness] to reconsider the approach we have taken for the past 84 years.”<sup>5</sup> Although Justice Kavanaugh didn’t participate in *Gundy*, he issued a short opinion some months later in a different case signalling openness to reviving the nondelegation doctrine.<sup>6</sup> For the first time in modern history, a working majority on the Supreme Court may be poised to give the nondelegation doctrine real teeth.

There can be no second coming, however, if there has never been a first. As a group, originalists advance various versions of the nondelegation doctrine, lending a decidedly protean flavor to what is supposedly a rock-hard historical fact. But none of the variants on offer is supported by a serious review of the Founding-era evidence. There was no nondelegation doctrine if legislative power is defined as “the power to adopt generally applicable rules of conduct governing future actions by private persons.”<sup>7</sup> There was no nondelegation doctrine if legislative power is defined as regulation of “those important subjects, which must be entirely regulated by the legislature itself” rather than “those of less interest,” the details of which may be “fill[ed] up” by an exercise of executive power.<sup>8</sup> There was no nondelegation doctrine if legislative power is defined as “the power to make rules that b[i]nd or constrain[] subjects.”<sup>9</sup> There was no nondelegation doctrine if legislative power is defined as “the authority to make rules for the governance of society.”<sup>10</sup> And there was no nondelegation doctrine if legislative power is defined as the “discretion . . . to decide what conduct would be lawful or unlawful.”<sup>11</sup>

<sup>1</sup> See Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 322 (2000) (“We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).”).

<sup>2</sup> Douglas H. Ginsburg, *Delegation Running Riot*, 18 Regul. 83, 84, 87 (1995) (reviewing David Schoenbrod, *Power Without Responsibility: How Congress Abuses the People through Delegation* (1993)) (“[T]he odds on selling regulatory reform to Congress are at this moment a good deal better than the odds on selling the nondelegation doctrine to the Court.”).

<sup>3</sup> See, e.g., Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 334–35 (2002) (“[T]hose who reject a meaningful nondelegation doctrine . . . should not pretend to speak in the name of the Constitution.”).

<sup>4</sup> 139 S. Ct. 2116, 2131–48 (2019) (Gorsuch, J., dissenting).

<sup>5</sup> *Id.* at 2131 (Alito, J., concurring in the judgment).

<sup>6</sup> *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (“Justice Gorsuch’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

<sup>7</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Without resorting to reverse-engineered exceptions that appear nowhere in the Founding discussions, neither Justice Gorsuch’s thesis nor the other variants can be squared with the lack of a single nondelegation objection to the early Congresses’ adoption of laws delegating the police power in federal lands, the power to grant patents, the power to regulate all domestic interactions with Native Americans, the power to impose embargoes, the power to impose quarantines, and the power to determine direct taxes on real property. See *infra* sections III.A., III.C. The claims are likewise incompatible with the fact that the norm entrepreneurs, who eventually did start to press something resembling a nondelegation doctrine, challenged not restrictions on private rights or decisions of great moment, but laws that vested in the President the ability to site post roads or call a fixed number of volunteers for military service. See *infra* sections III.B.–.C.

<sup>8</sup> Gary Lawson & Guy Seidman, “A Great Power of Attorney”: Understanding the Fiduciary Constitution 118 (2017) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.)).

<sup>9</sup> Philip Hamburger, *Is Administrative Law Unlawful?* 83–109 (2014) [hereinafter *Hamburger, Is Administrative Law Unlawful?*].

<sup>10</sup> Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1305, 1329 (2003) (offering a definition of legislative power but taking no position on whether legislative power is delegable).

<sup>11</sup> Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & Liberty 718, 744 (2019).

In fact, the Constitution at the Founding contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control.<sup>12</sup> As we explain in Part I, originalists' arguments to the contrary bottom out on the insistence that the executive branch's exercise of certain highly discretionary powers is so legislative in nature that it cannot constitute an exercise of the "executive power."<sup>13</sup> The executive power, however, was simply the authority to execute the laws---an empty vessel for Congress to fill.<sup>14</sup> As such, it's not just confused but incoherent to ask whether an executive action is so legislative in nature as to fall outside of that basket. *Any* action authorized by law was an exercise of "executive power" inasmuch as it served to execute the law.<sup>15</sup>

As we demonstrate in Part II, much of the confusion arises because---contrary to our contemporary turn of mind<sup>16</sup>---the Founders thought of the separation of powers in nonexclusive and relational terms. No one doubted, for example, that Congress wielded legislative power when it passed a law. But the same act was also described as an exercise of executive power, inasmuch as it was undertaken pursuant to authority entrusted by the people.<sup>17</sup> By the same token, it was common ground that a diplomat participated in a legislative act when he concluded a treaty. But it was also an exercise of executive power to the extent that the diplomat's actions were undertaken pursuant to authorization by the relevant domestic authority.<sup>18</sup>

The Founders would thus have said that agencies wield legislative power to the extent they adopt rules that Congress could have enacted as legislation.<sup>19</sup> At the same time, the Founders would have said---indeed, they did say---that such rulemaking also constitutes an exercise of the executive power to the extent it is authorized by statute.<sup>20</sup> Either way, it's constitutional. Indeed, coercive administrative rulemaking was so routine throughout the Anglo-American world that it would have been astounding if the Constitution had prohibited it.<sup>21</sup>

But it did not. To the contrary, and as Part III shows, early Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct. Many of those laws would have run roughshod over any version of the nondelegation doctrine now endorsed by originalists. Yet, in roughly ten thousand pages of recorded debate during the Republic's first decade, the people who drafted and debated the Constitution rarely

---

<sup>12</sup> Professors Eric Posner and Adrian Vermeule have advanced the only version of this argument that we are aware of in the literature. See Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. Chi. L. Rev. 1721, 1762 (2002) [hereinafter Posner & Vermeule, *Interring*]; Eric A. Posner & Adrian Vermeule, *The Nondelegation Doctrine: A Post-Mortem*, 70 U. Chi. L. Rev. 1331, 1342 (2003). But they "aren't aware of any comprehensive professional treatment of the history of the nondelegation doctrine, so both the historical claims of nondelegation proponents and our discussion here should be taken as tentative and revisable." Posner & Vermeule, *Interring*, *supra*, at 1732.

After they wrote those words, Professor Jerry Mashaw penned a skillful description of the administrative schemes adopted by early Congresses. Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787--1801*, 115 Yale L.J. 1256, 1292--96, 1339--40 (2006) [hereinafter Mashaw, *Recovering American Administrative Law*]. Mashaw's goal, however, was to demonstrate that administration was not foreign to American law, and he addressed questions pertaining to the nondelegation doctrine---and to the originalists' arguments for such a doctrine---at a high level of generality. See *id.* In 2017, Professors Keith E. Whittington and Jason Iuliano supplied a detailed treatment of the nondelegation doctrine for the nineteenth and early twentieth centuries. See generally Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. Pa. L. Rev. 379 (2017) (compiling an exhaustive dataset of cases that involved a nondelegation challenge between 1789 and 1940). This Article aims to do the same for the Founders.

<sup>13</sup> See, e.g., Lawson, *supra* note 3, at 334 ("[A] statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a 'proper' executory statute.").

<sup>14</sup> See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 Colum. L. Rev. 1169, 1235--37 (2019) [hereinafter Mortenson, *Royal Prerogative*]; Julian Davis Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1269, 1336 (2020) [hereinafter Mortenson, *Executive Power Clause*].

<sup>15</sup> See *infra* section II.B.

<sup>16</sup> For a typical example of modern originalists' misunderstanding of the Founding framework, see, e.g., Ilan Wurman, *Nondelegation at the Founding*, forthcoming 130 Yale L.J. (forthcoming Mar. 2021) (manuscript at 24), <https://ssrn.com/abstract=3559867> (on file with the *Columbia Law Review*) [hereinafter Wurman, *Nondelegation*] ("Chief Justice Marshall seems to have recognized that there is a category of 'exclusively' legislative power . . ."). For one admirable exception, see Alexander & Prakash, *supra* note 10, at 1318--20 ("Perhaps the President exercises legislative power (making laws) in the process of exercising the executive power (executing the delegating statute).").

<sup>17</sup> See *infra* section II.B.1.

<sup>18</sup> See *infra* section II.B.2.

<sup>19</sup> Cf. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 488 (2001) (Stevens, J., concurring in part and concurring in the judgment) ("The proper characterization of governmental power should generally depend on the nature of the power, not on the identity of the person exercising it."). Thomas Merrill has pressed a structural argument along these lines. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 Colum. L. Rev. 2097, 2122--31 (2004).

<sup>20</sup> See *infra* section II.B.

<sup>21</sup> See *infra* section II.A.2.

even gestured at nondelegation objections to laws that would supposedly have been anathema to them---even as they feuded bitterly and at punishing length over many other questions of constitutional meaning.<sup>22</sup> If the nondelegation doctrine had brooded secretly in the interstices of the Constitution's Vesting Clauses, it would have precluded much early legislation and shown up repeatedly in extensive debates. Its absence speaks volumes. As the 1790s wore on, creative lawyers did very occasionally express their opposition to proposed legislation in constitutional terms.<sup>23</sup> But their arguments never carried the day in legislative debates. Worse still for originalists, they almost exclusively objected to laws that would *not* violate any version of the nondelegation doctrine on offer today.

Our conclusion is straightforward. The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can't be both.

## I. THE RISE AND FALL AND RISE AGAIN OF THE MODERN NONDELEGATION DOCTRINE

### A. Rise and Fall

The origins of the nondelegation doctrine are somewhat obscure. Apart from the Supreme Court's rejection of what might have been a nondelegation argument in 1813,<sup>24</sup> no claims even resembling the modern doctrine appear in its case law until almost four decades after ratification.<sup>25</sup> Even then, Chief Justice Marshall's famous dictum in the 1825 case of *Wayman v. Southard* that "[i]t will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative," is best read as a restatement of the anti-alienation principle---explaining why it was a clarification, not a contradiction, when Marshall immediately went on to say that "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."<sup>26</sup>

Something closer to the modern version of the nondelegation doctrine began to crop up in state courts in the mid-nineteenth century, often in connection with legislatively authorized referenda and assignments of authority to municipal corporations.<sup>27</sup> But the actual invalidation of legislative enactments was rare in state courts and unheard of in federal courts, as Professors Keith Whittington and Jason Iuliano document: "[T]here was never a time in which the courts used the nondelegation doctrine to limit legislative delegations of power."<sup>28</sup> Not until 1892 did the Supreme Court say that a law vesting the president with too much discretion might constitute an unconstitutional delegation of the legislative power.<sup>29</sup> Even then, however, the Court upheld the statute in question.<sup>30</sup>

Over the next forty years, the Supreme Court continued to sustain laws that delegated broad discretion to adopt obligatory rules affecting private rights.<sup>31</sup> In 1928, the Court took it as a given that "Congress may use executive officers in the application and enforcement of a policy declared in law by Congress and authorize such officers in the application of

<sup>22</sup> See *infra* Parts II--III. The primary historical sources reviewed for this Article include the Annals of Congress, House Journals, and Senate Journals for the first five Congresses; the Documentary History of the First Congress; the pre-ratification state and national records that are described in Mortenson, Executive Power Clause, *supra* note 14, at 1306--09 & nn.169--193; and the contemporary political and legal theory literature that are described in Mortenson, Royal Prerogative, *supra* note 14, at 1187 n.63. For more on how the Founders were influenced by the literature extant in their period, see *id.* at 1188--91.

<sup>23</sup> See *infra* section III.C.

<sup>24</sup> See *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). The statute in question suspended trade with Great Britain and France, but authorized the president to lift the embargo if he determined that either country had decided to respect the neutral commerce of the United States. *Id.* at 383--84. The Supreme Court did not respond directly to the *Brig Aurora's* argument that "Congress could not transfer the legislative power to the President." *Id.* at 386. It wrote only that "we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the [law allowing trade], either expressly or conditionally, as their judgment should direct." *Id.* at 388.

<sup>25</sup> See *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42 (1825).

<sup>26</sup> *Id.* at 42--43; see also Posner & Vermeule, *Interring*, *supra* note 12, at 1738--39 (advancing this interpretation of *Wayman*).

<sup>27</sup> See Whittington & Iuliano, *supra* note 12, at 422--24; see also Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 Colum. L. Rev. 561, 562--66 (1947).

<sup>28</sup> Whittington & Iuliano, *supra* note 12, at 381; see also *id.* at 392--417 (providing an exhaustive survey of the nondelegation doctrine in the nineteenth and early twentieth centuries).

<sup>29</sup> See *Field v. Clark*, 143 U.S. 649, 692 (1892) ("That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.").

<sup>30</sup> *Id.* (concluding that the law in question "does not, in any real sense, invest the President with the power of legislation").

<sup>31</sup> See, e.g., *Mulford v. Smith*, 307 U.S. 38, 48--49 (1939) (upholding a law enabling the Secretary of Agriculture to set farm quotas); *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 21, 25--26 (1932) (sustaining a law granting the Interstate Commerce Commission the power to approve consolidations "in the public interest"); *United States v. Grimaud*, 220 U.S. 506, 521 (1911) (rejecting a nondelegation challenge to grazing regulations adopted by the Secretary of Agriculture for forest reserves).

the Congressional declaration to enforce it by regulation equivalent to law.”<sup>32</sup> All Congress needed to supply, the Court said, was an “intelligible principle” to guide the exercise of that authority.<sup>33</sup>

Which takes us to 1935, and the only two cases in which the Supreme Court has struck down a federal law for violating the nondelegation doctrine.<sup>34</sup> In *Panama Refining Co. v. Ryan*, the Court declared unconstitutional a provision of the National Industrial Recovery Act empowering the President to prohibit the transportation of any oil extracted in excess of established quotas.<sup>35</sup> And in *A.L.A. Schechter Poultry Corp. v. United States*, the Court invalidated another provision in the same act authorizing the president to approve “codes of fair competition” submitted to him by trade associations on issues ranging from labor practices to minimum wages.<sup>36</sup>

In placing justiciable limits on Congress’s authority, the 1935 cases were of a piece with the Supreme Court’s contemporaneous efforts to cabin Congress’s power to regulate interstate commerce.<sup>37</sup> And so the Court’s reversal of its approach to the Commerce Clause in *NLRB v. Jones & Laughlin Steel Corp.* signaled a similar retreat from the nondelegation doctrine.<sup>38</sup> Already by 1940, the Supreme Court was rejecting a nondelegation challenge to statutory authorization for a commission to set coal prices “in the public interest.”<sup>39</sup> That pattern held for the next eighty years. As late as 2001 the Supreme Court in *Whitman v. American Trucking* unanimously concluded that a vague legislative standard in the Clean Air Act---“requisite to protect the public health”---was sufficiently intelligible for purposes of the nondelegation doctrine.<sup>40</sup>

The nondelegation doctrine thus had no illustrious birth at the Founding; it had no vibrant nineteenth-century adolescence; and its one moment of glory in 1935 was bookended by repeated refusals to invalidate laws vesting broad discretion in the executive branch. Forget the debate over whether the nondelegation doctrine is dead. It was never alive to begin with.

## B. And Rise Again.

Yet here we are. In *American Trucking*, Justice Thomas wrote separately to say that “[o]n a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>41</sup> Scholars immediately took up his call to build an originalist case for the nondelegation doctrine. In 2002, Professor Gary Lawson theorized that the nondelegation doctrine is implicit in the Constitution’s division of legislative, executive, and judicial power.<sup>42</sup> For him, a law authorizing the executive branch to

<sup>32</sup> *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

<sup>33</sup> *Id.*

<sup>34</sup> See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541--42 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 430 (1935). In *Carter v. Carter Coal Co.*, the Court invalidated a law that would have established minimum wages and maximum hours for coal companies once those wages and hours were adopted by a sufficient fraction of the industry. 298 U.S. 238, 311--12 (1936). Though the Court voiced nondelegation concerns similar to those in *Schechter Poultry*, the case has been taken to stand for the proposition that “it violates due process for Congress to give a self-interested entity rulemaking authority over its competitors.” *Ass’n of Am. R.Rs. v. U.S. Dep’t of Transp.*, 821 F.3d 19, 27--28 (D.C. Cir. 2016).

<sup>35</sup> 293 U.S. at 430.

<sup>36</sup> 295 U.S. at 541--42.

<sup>37</sup> See Daniel R. Ernst, *Tocqueville’s Nightmare: The Administrative State Emerges in America, 1900--1940*, at 59--60 (2014) (noting how the Court used both types of decisions to signal “the depth of the Court’s opposition to the New Deal’s corporatist adventure”). Indeed, *Schechter Poultry* rejected the codes of fair competition on both nondelegation and Commerce Clause grounds. 295 U.S. at 542--51.

<sup>38</sup> 301 U.S. 1, 36--37 (1937); see also John Hart Ely, *Democracy and Distrust* 132 (1980) (“Coming along when it did, the nondelegation doctrine became identified with others that were used in the early thirties to invalidate reform legislation, such as substantive due process and a restrictive interpretation of the commerce power . . . when those doctrines died the nondelegation doctrine died along with them.”).

<sup>39</sup> *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397 (1940). At least two other contemporaneous cases rejected similar nondelegation challenges. See *Yakus v. United States*, 321 U.S. 414, 420 (1944) (sustaining the Emergency Price Control Act’s authorization of the Office of Price Administration to set prices that “will be generally fair and equitable and will effectuate the purposes of this Act” for commodities and rents nationwide); *NBC v. United States*, 319 U.S. 190, 194, 226 (1943) (sustaining against a nondelegation argument a law empowering the Federal Communications Commission to regulate “in the ‘public interest, convenience, or necessity’”).

<sup>40</sup> *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 473--76 (2001).

<sup>41</sup> *Id.* at 487 (Thomas, J., concurring).

<sup>42</sup> See Lawson, *supra* note 3, at 333; see also Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 Tul. L. Rev. 265, 271 (2001) (building an originalist argument for a version of the doctrine that applies “selectively” in certain domains).

do something that too closely resembles lawmaking is unconstitutional when it purports to empower the executive to act outside its assigned sphere of activity.<sup>43</sup>

Because Lawson's claim was primarily structural, not historical,<sup>44</sup> Professors Larry Alexander and Saikrishna Prakash were left to muster evidence for the claim that the nondelegation doctrine has been with us from the start.<sup>45</sup> That evidence was heavy on citations to theorists like Locke, Montesquieu, and Blackstone, but light on concrete evidence from the Founding.<sup>46</sup> Alexander and Prakash do draw on a handful of citations to the Philadelphia convention, several state conventions, and the Federalist Papers to support the different and uncontroversial point that "the legislative power was understood as the authority to make rules for the governance of society."<sup>47</sup> As they forthrightly acknowledge, however, it doesn't follow from that observation that the Founders would have understood the Constitution to preclude the executive branch from making rules.<sup>48</sup>

The next installment in the campaign to give originalist bona fides to the nondelegation doctrine came in Professor Philip Hamburger's 2014 treatment, *Is Administrative Law Unlawful?*<sup>49</sup> Hamburger argues that modern administrative law constitutes an "extralegal" expression of "absolute power" that is anathema to the Anglo-American legal tradition.<sup>50</sup> To establish this proposition, however, Hamburger relies almost entirely on selected medieval and early-modern English material and misunderstands not just its political and intellectual context, but the basic legal framework in which it is embedded.<sup>51</sup> More to the point, he only glances at the evidence of what the Founding generation actually said about the original public meaning of the Constitution.<sup>52</sup>

Thin historical sourcing notwithstanding, the new wave of originalist scholarship proved popular on the bench. In 2015, Justice Thomas wrote a separate opinion that drew liberally from Hamburger in arguing that "[w]e should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power."<sup>53</sup> The following month, then-Tenth Circuit Judge Gorsuch wrote an opinion of his own to similar effect.<sup>54</sup> Two years later, he was tapped for a spot on the Supreme Court.<sup>55</sup>

### C. *Gundy v. United States*

Formally, the Supreme Court in *Gundy v. United States* rejected a nondelegation challenge to Congress's conferral of authority on the Attorney General to decide whether to apply provisions of a new sex offender registry law to people who

<sup>43</sup> Lawson, *supra* note 3, at 342--43 ("However difficult it may be to distinguish the legislative, executive, and judicial powers at the margins, the Constitution of 1788--89 clearly places such a distinction at the center of its structure. There are constitutional lines that the executive and judicial powers may not cross.").

<sup>44</sup> *Id.* at 395 n.263 ("I am more inclined to view [key constitutional] terms as having an 'essentialist' meaning that does not depend on historical usage.").

<sup>45</sup> Alexander & Prakash, *supra* note 10, at 1310.

<sup>46</sup> *Id.* at 1310--14.

<sup>47</sup> See *id.* at 1305, 1314--17.

<sup>48</sup> See *id.* at 1329 ("[E]ven if one agreed with everything we have said, what remains to be answered is the important question of whether the Constitution actually authorizes the delegation of Congress's legislative powers.").

<sup>49</sup> See Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9; see also Karen Orren & Stephen Skowronek, *The Policy State: An American Predicament* 7 (2017) (arguing that "the policy state" has "mangled [government's] forms, helped polarize its politics, and eroded confidence in its basic operations").

<sup>50</sup> See Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9, at 6.

<sup>51</sup> See, e.g., *id.* at 12--13, 21--33 (conflating the royal prerogative and statutory powers). For a devastatingly polite demolition of Hamburger's historical claims, see Paul Craig, *The Legitimacy of US Administrative Law and the Foundations of English Administrative Law: Setting the Historical Record Straight* (Oxford Legal Stud. Rsch. Paper, Paper No. 44, 2016), <https://ssrn.com/abstract=2802784> (on file with the *Columbia Law Review*) [hereinafter Craig, *Legitimacy of US Administrative Law*]. For their further exchange, see generally Philip Hamburger, *Early Prerogative and Administrative Power: A Response to Paul Craig*, 81 *Mo. L. Rev.* 939 (2016); Paul Craig, *English Foundations of US Administrative Law: Four Central Errors* 3, 40 (Oxford Legal Stud. Rsch. Paper, Paper No. 3, 2017) <https://ssrn.com/abstract=2852835> (on file with the *Columbia Law Review*) [hereinafter Craig, *Four Central Errors*].

<sup>52</sup> See Adrian Vermeule, No, 93 *Tex. L. Rev.* 1547, 1551 (2015) (reviewing Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9) ("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.").

<sup>53</sup> See *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 135 S. Ct. 1225, 1252 (2015) (Thomas, J., concurring in the judgment).

<sup>54</sup> See *United States v. Nichols*, 784 F.3d 666, 670, 670 n.2 (10th Cir. 2015) (Gorsuch, J., dissenting from the denial of rehearing en banc) (citing to both Lawson and Hamburger).

<sup>55</sup> Adam Liptak & Matt Flegenheimer, *Neil Gorsuch Confirmed by Senate as Supreme Court Justice*, *N.Y. Times* (Apr. 7, 2017), <https://www.nytimes.com/2017/04/07/us/politics/neil-gorsuch-supreme-court.html> (on file with the *Columbia Law Review*).

had been convicted prior to the law's enactment.<sup>56</sup> Yet Justice Gorsuch's dissent still managed to shock. It wasn't that Justice Gorsuch reiterated views about the nondelegation doctrine that he had previously espoused on the Tenth Circuit, nor was it that Justice Thomas joined him or that Justice Alito expressed openness to the argument.<sup>57</sup> It was that Chief Justice Roberts---whom many expected to be more institutionally cautious---joined the opinion in full.<sup>58</sup> If Justice Kavanaugh is similarly inclined---and he may well be<sup>59</sup>---the nondelegation doctrine may soon become a genuine limit on Congress's power to enlist agencies in the task of governance.

That sort of countermajoritarian tampering with the cornerstone of American governance could prove immensely destabilizing. Justice Gorsuch's opinion calls for abandoning the intelligible principle standard in favor of a test that would distinguish between those statutes allowing the executive to "fill up the details" and those conferring policymaking discretion.<sup>60</sup> Were it to become law, Gorsuch's approach would force courts to make subjective and contestable judgments about what counts as a detail and what counts as something more.<sup>61</sup> Almost any statute could flunk a test that mushy. Indeed, it's telling that Gorsuch's thirty-three page opinion doesn't so much as cite to *Whitman v. American Trucking*, the seminal nondelegation case of the modern era, even as it exhaustively canvasses the rest of the nondelegation case law.<sup>62</sup> It is hard to resist the conclusion that Gorsuch thinks the Supreme Court botched *American Trucking* and that the Clean Air Act should have fallen by the wayside.

Maybe the Supreme Court won't pull the trigger. In *Gundy's* wake, canny observers argued that, as with the Commerce Clause, the Court might issue one or two symbolic opinions invalidating statutes of little importance, but it won't have the stomach to do more.<sup>63</sup> That may be right: It's hard to believe the Court will strike down cabinet agencies anytime soon. At the same time, it seems fair to take the conservative justices at their word. And if they do in fact mean what they say, Justice Kagan is right that "most of Government is unconstitutional---dependent as Congress is on the need to give discretion to executive officials."<sup>64</sup>

The Court doesn't have to invalidate many statutes to sow discord. By claiming the power to draw arbitrary lines based on their own sense of which delegations are acceptable, the Court would generate enormous uncertainty about every aspect of government action. Nondelegation lawsuits would proliferate, and their targets would be the agencies that we've come to rely on for cleaner air, effective drugs, and safer roads. Lower courts might enter injunctions, perhaps nationwide, against the implementation of statutes they find objectionable. Of perhaps greater long-term consequence, the courts will be sorely tempted to narrowly construe statutes to avoid newly perceived constitutional difficulties, which would itself frustrate Congress's ends. With an increasingly polarized federal bench, it's not difficult to imagine serious disruptions in basic governance. In the meantime, the ever-present possibility of invalidation on nondelegation grounds means that some legislative deals will be too risky to be worth chasing, contributing to further gridlock in Congress. Don't discount, too, the diffuse ways that Supreme Court rhetoric about the fundamental incompatibility of the administrative state with the Constitution will warp the broader legal culture, with consequences that are hard to pin down but which will probably not conduce to effective governance.

This is radical stuff. To make it go down easier, Justice Gorsuch appeals to originalism: "The framers understood . . . that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."<sup>65</sup> For support, Gorsuch quotes Chief Justice Marshall's dictum from *Wayman v. Southard* before invoking John Locke's argument that "[t]he legislative cannot transfer the power of making laws to any other hands."<sup>66</sup>

<sup>56</sup> 139 S. Ct. 2116, 2129 (2019).

<sup>57</sup> See *Id.* at 2131 (Alito, J., concurring in the judgment).

<sup>58</sup> See, e.g., Gillian Metzger, John Roberts the Institutionalizer?, *Take Care* (June 22, 2019), <https://takecareblog.com/blog/john-roberts-the-institutionalist> [<https://perma.cc/CS9Z-9HR4>].

<sup>59</sup> See *Paul v. United States*, 140 S. Ct. 342, 140 (2019) (Kavanaugh, J., respecting the denial of certiorari).

<sup>60</sup> *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting).

<sup>61</sup> See *Mistretta v. United States*, 488 U.S. 361, 415--16 (1989) (Scalia, J., dissenting) ("[I]t is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.").

<sup>62</sup> See *Gundy*, 139 S. Ct. at 2137--41 (Gorsuch, J., dissenting).

<sup>63</sup> Gerard Magliocca called it "[t]he [c]oming *Lopez* [m]oment for [n]on-[d]elegation." Gerard Magliocca, *The Coming Lopez Moment for Non-Delegation*, *PrawfsBlawg* (June 21, 2019), <https://prawfsblawg.blogs.com/prawfsblawg/2019/06/the-coming-lopez-moment-for-non-delegation.html> [<https://perma.cc/239Y-DNDR>] (analogizing to *United States v. Lopez*, 514 U.S. 549 (1995), which struck down a federal statute banning guns in school zones on grounds that Congress had exceeded its authority under the Commerce Clause for the first time in almost sixty years).

<sup>64</sup> *Gundy*, 139 S. Ct. at 2130.

<sup>65</sup> *Id.* at 2133 (Gorsuch, J., dissenting).

<sup>66</sup> *Id.* (quoting John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government* (1690) [hereinafter *Locke, Second Treatise*], reprinted in *Two Treatises of Government and a Letter Concerning Toleration* ch. XII, § 141, at 163 (Ian Shapiro ed., Yale Univ. Press 2003) [hereinafter *Two Treatises of Government*]). Gorsuch says that Locke was "one of the thinkers who most influenced the framers' understanding of the

On the key point, that's all there is. Though littered with assertions about the Framers' beliefs, the only actual quotes from historical sources 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.<sup>67</sup> None of the sources address whether the Founders believed that a law passed by both houses of Congress and signed by the President was unconstitutional if it delegated too much authority or authority of the wrong kind. Instead, the opinion's rhetorical force comes from the invocation of modern thinkers who argue that delegation threatens liberty and erodes accountability.<sup>68</sup> If the Founders didn't believe in the doctrine, Gorsuch claims---quoting Lawson---"the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'" <sup>69</sup> As the remainder of this Article shows, that simply isn't true.

## II. BEFORE 1789

To show that there was no nondelegation doctrine at the Founding, this Article reviews two comprehensive bodies of historical evidence. Part II lays the groundwork with pre-ratification evidence about the background understandings of legislative delegations. This includes the political and legal theory literature on which the Founding generation was raised and in which its discussions were steeped, as well as evidence of judicial, political, and legal practice during the period leading up to the ratification of the Constitution. Part III then compiles evidence on the actual political practice of the new republic under the ratified Constitution: what types of delegations politicians considered, what they said about the proposals, and the results of these deliberations.

In this Part, we begin with background understandings. Before the Constitution was drafted and ratified, what would a reasonable North American lawyer have thought about the permissibility of legislative delegations under the salient legal customs, practices and, traditions? Whichever variant is under discussion, originalist arguments for the nondelegation doctrine all rest on one or both of two descriptive claims about the Anglo-American legal order. First, nondelegation advocates claim that the public at large in 1789 would generally have understood that legislative power (or perhaps just aspects of it deemed core or essential) could not be delegated.<sup>70</sup> Second, nondelegation advocates claim that certain activities---usually the formulation of coercive and generally applicable rules---could not qualify as a valid exercise of executive power.<sup>71</sup>

No version of either claim has ever been historically substantiated. To the contrary, both are refuted by the preratification evidence we have compiled.<sup>72</sup> As section II.B. shows, eighteenth-century British legal and political theorists thought legislative power simply meant the authority to issue authoritative instructions---and they agreed that it could be delegated by whomever happened to hold it. And as Part II.C shows, it was a perfectly intelligible move for eighteenth-century commentators to describe the exercise of delegated rulemaking authority as executive. The Founders' discussion of legislative and diplomatic service demonstrates the error---indeed, the confusion---of insisting that any particular government act must be classified as the exercise of one and only one power.

---

separation of powers . . . ." Id. As Professor Richard Primus has noted, however, Gorsuch "cites no authority for the proposition," and there is in fact reason to doubt it. Richard Primus, John Locke, Justice Gorsuch, and *Gundy v. United States*, Balkinization (July 22, 2019) [hereinafter Primus, Locke, Gorsuch, and Gundy], <https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html> [https://perma.cc/2EMD-78BT].

<sup>67</sup> See, e.g., *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (saying that "the framers understood" and that "[t]he framers understood, too . . ."); id. at 2134 (referencing the Framers' intentions no less than nine times, including claims about what they "insist[ed]" and "believed" "in their words," and about how "the framers went to great lengths" in "the framers' design"); id. at 2135 (continuing to say that "[t]he framers warned us" and "[a]s Madison explained," including what "[t]he framers knew, too," what "the framers afforded [the judiciary]," and what both "Madison acknowledged" and "Chief Justice Marshall agreed"); id. ("[T]he framers took this responsibility seriously . . ."); id. at 2144 (tying these claims and "all the alarms the founders left for us" to the statute at issue).

<sup>68</sup> See, e.g., id. at 2140 n.62.

<sup>69</sup> Id. at 2134--35 (quoting Lawson, *supra* note 3, at 340) (alteration in original).

<sup>70</sup> Id. at 2133 ("As Chief Justice Marshall explained, Congress may not 'delegate . . . powers which are strictly and exclusively legislative.'" (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42--43, (1825)); see also, e.g., Alexander & Prakash, *supra* note 10, at 1297 (noting commentators' assumption that Congress's "delegated power to make laws could not be transferred to third parties"); Lawson, *supra* note 3, at 333--34 ("Justice Stevens is wrong---and quite fundamentally wrong---to suggest that the Constitution contemplates delegations of legislative power").

<sup>71</sup> See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (distinguishing between the implementation of statutes "over matters already within the scope of executive power" and statutes outside of that scope (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223, 1260 (1985)); *Panama Refining Co v. Ryan*, 293 U.S. 388, 418--19 (1935) (distinguishing "such a breadth of authorized action as essentially to commit to the President the functions of a Legislature, rather than those of an executive or administrative officer executing a declared legislative policy"); see also, e.g., Lawson, *supra* note 3, at 334 ("[A] statute that leaves to executive (or judicial) discretion matters that are of basic importance to the statutory scheme is not a 'proper' executory statute."); Wurman, *Nondelegation*, *supra* note 16 (manuscript at 24) (regulatory authority can "be characterized as executive power" if it "involve[s] mere matters of detail").

<sup>72</sup> See *supra* note 22 for a description of the full range of historical materials on which our conclusions in this Article are grounded.

## A. Methodology

Before plunging into the evidence, however, we offer a brief word about methodology. Whatever else might be said for Justice Gorsuch's dissent in *Gundy*, the nondelegation doctrine is not a logically required implication of the bare constitutional text. History is thus the linchpin of the originalist case. Without it, the doctrine's defenders are reduced to ambitious textual arguments that are unpersuasive on their own terms<sup>73</sup> and flatly inconsistent with two centuries of established practice in the United States.<sup>74</sup> With it, they can plausibly resolve textual ambiguities by pointing to common background understandings as a tiebreaker.

The original public meaning of constitutional text, however, can't be a secret or hidden meaning. For originalists to carry their argument, the historical evidence ought to show that most everyone at the Founding would have understood the Constitution to bar the delegation of too much power or power of the wrong kind. Without such evidence, originalist arguments reduce to the claim that specific provisions governing the separation of powers---in particular, the allocation of executive, legislative, and judicial authorities to different branches---imply a nontextual nondelegation doctrine.<sup>75</sup> But that's no different from the argument---one that originalists have traditionally delighted in excoriating---that the specific constitutional provisions protecting privacy imply a general commitment to substantive due process.<sup>76</sup> Penumbras for me, but not for thee.<sup>77</sup>

Moreover, the evidence has to be both consistent and specific: If originalists argue for a doctrine that applies only to rules binding private persons, but not to those conferring "certain non-legislative responsibilities" on the executive,<sup>78</sup> there ought to be persistent evidence that the Founders actually carved the world that way. It won't do for originalists to infer hard-edged legalized limitations on the political process from ambiguous first principles animating the constitutional structure. Yes, the Framers were concerned about consolidated power and they cared about public accountability. But it doesn't follow that they had well-developed views---or indeed views of any kind---about the impropriety of laws that delegated excessive discretionary authority. Still less does it follow that they would have agreed, even at a high level of abstraction, about what counted as "excessive." (Even modern-day originalists can't agree on that.)<sup>79</sup>

These are stern evidentiary demands. Fortunately, the Founding is an evidence-rich environment. The Constitution emerged in a period of extraordinary intellectual ferment in which the brightest minds in political theory sought to reconcile the competing demands of popular sovereignty, individual liberty, and energetic governance.<sup>80</sup> It was debated extensively at the Philadelphia convention, in the press, and in the state ratifying conventions.<sup>81</sup> Nor did discussion end

<sup>73</sup> For a typical example, see Lawson, *supra* note 3, at 333--43; see also *supra* notes 42--48 and accompanying text. Endless ink has been spilt in rebuttal, demonstrating that the constitutional text can easily be read to accommodate the practice of delegating to the executive the power to make rules. See, e.g., John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 Harv. L. Rev. 1939, 2019 (2011) ("Even though the resulting agency regulation would look like a statute and carry the same legal force as one, nothing in the text of the Constitution compels the conclusion that the agency is thereby exercising delegated 'legislative Power[].'" (alteration in original)); Merrill, *supra* note 19, at 2101 (arguing that the Necessary and Proper Clause permits the delegation of legislative power "in order to 'carry[] into Execution' the enumerated powers granted to Congress"); Posner & Vermeule, *Interring*, *supra* note 12, at 1723 ("A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power.").

<sup>74</sup> See generally Jerry L. Mashaw, *Creating the Administrative Constitution: The Lost One Hundred Years of Administrative Law* (2012) (documenting the establishment and growth of the administrative state from the Founding).

<sup>75</sup> See Manning, *supra* note 73, at 1945 ("By invalidating schemes . . . [because] they offend a freestanding norm of strict separation, formalists undervalue the *indeterminacy* of the Vesting Clauses relative to Congress's authority to shape government under the Necessary and Proper Clause. [This] attribute[s] . . . a specificity of purpose that the text may not support.").

<sup>76</sup> Cf. *Washington v. Glucksberg*, 521 U.S. 702, 721--725 (1997) (eschewing an approach that would "deduce[] [rights] from abstract concepts" and instead requiring "a 'careful description'" grounded in "concrete examples").

<sup>77</sup> See, e.g., *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). In dissent, Justice Black explained the point as follows:

The Court talks about a constitutional "right of privacy" as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the "privacy" of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities.

*Id.* at 508 (Black, J., dissenting).

<sup>78</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting).

<sup>79</sup> See *supra* notes 7--11 and accompanying text (canvassing some of the of affirmative theories offered by nondelegation theorists).

<sup>80</sup> See Stanley Elkins & Eric McKittrick, *The Age of Federalism: The Early American Republic, 1788--1800*, at 4--29 (1993).

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

after the Constitution's adoption. Records of Congress's proceedings in its first decade run to more than ten thousand pages, and a remarkable fraction consists of debates over constitutional meaning.<sup>82</sup>

What's more, there were immense incentives to gin up half-baked or even outright implausible constitutional objections. By 1791, Federalists and Republicans had split into discernable political parties with sharply divergent visions.<sup>83</sup> Each came to see the other as an existential threat to the country, with Republicans viewing Federalists as crypto-monarchists and Federalists seeing Republicans as Jacobins who might spark another bloody revolution.<sup>84</sup> With stakes that high, policymakers did not hesitate to press ambitious and novel constitutional arguments in service of their political goals. "The Constitution of this country," one Federalist observed, "is upon all occasions introduced as a stumbling-block in the discussions of this House, and instead of forming any safe rule of conduct, it proves a mere cobweb---a mere jargon of political maxims, and is the foundation of sophisms in almost every debate."<sup>85</sup>

So if the nondelegation doctrine really was a central precept of the constitutional order, originalists ought to be able to point to consistent, concrete, and specific evidence of its existence. The historical record of the Founding era is too rich and voluminous to require resort to any heroic inferences; there should be no need to draw inferences from contestable first principles and patterns in early legislation. And yet there is at best trifling evidence of a nondelegation doctrine even being *argued* for by aggressive legal innovators, let alone broadly accepted by the Founders as a group.<sup>86</sup> Rather, as demonstrated in Parts II and III, contemporary political theory and practice before the Founding both confirm that broad delegations of all kinds of legislative authority were not only constitutionally tolerable, but commonplace.

## B. Legislative Power Could Be Delegated

### 1. *The Theory of Legislative Delegations Before 1789*

Though the Constitution itself says nothing about the nondelegation doctrine, its vesting clauses parcel out the executive, legislative, and judicial powers to the three branches, each with distinct mechanisms of election or appointment.<sup>87</sup> The Founders divided power in this manner because both their own experience and the best political science of the era left them with serious concerns about the excessive consolidation of governmental authority.<sup>88</sup>

So far, this is common ground. The nondelegation doctrine's defenders, however, go further. They typically maintain, as Justice Gorsuch did in his *Gundy* dissent, that "the framers understood" the legislative power "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."<sup>89</sup> And they typically assert that the affirmative grant of this power to Congress necessarily means that the Constitution categorically prohibits its redelegation to other branches---though on their account, Congress may ask those branches "to fill up the details" so long as "Congress makes the policy decisions."<sup>90</sup>

Both claims are mistaken. To begin with, the Framers did *not* think that the legislative power had to involve the promulgation of "generally applicable rules of conduct governing future actions by private persons."<sup>91</sup> Indeed, the weirdly precise granularity of that definition would have left them scratching their heads. The standard understanding of legislative power was much simpler and far more pragmatic. As Baron de Montesquieu explained, the legislative power was "no more than the general will of the state."<sup>92</sup> This "general will" was most often explained by analogy to the human mind, as in Jean-Jacques Rousseau's classic extended metaphor:

Every free action ihas two causes which concur to produce it, one moral---the will which determines the act, the other physical---the strength which executes it. When I walk towards an object, it is necessary first that I should

<sup>82</sup> See David P. Currie, *The Constitution in Congress: The Federalist Period: 1789--1801*, at 296 (1997) ("Congress and the executive resolved a breathtaking variety of constitutional issues great and small, left us a legacy of penetrating and provocative constitutional arguments, and developed a sophisticated glossary of the meaning of a whole host of constitutional provisions."); see also Jonathan Gienapp, *The Second Creation* 8 (2018) ("In the years immediately following ratification, a great many debates---often those in which the initial controversy was . . . much narrower---rapidly mutated into contests over what the Constitution did or did not license.").

<sup>83</sup> Elkins & McKittrick, *supra* note 80, at 257--302, 691--754.

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

<sup>85</sup> 8 *Annals of Cong.* 1732 (1798) (statement of Rep. Otis).

<sup>86</sup> See *infra* Part III.

<sup>87</sup> U.S. Const. art. I, § 1; art. II, § 1; art. III, § 1.

<sup>88</sup> Jack Rakove, *Original Meanings: Politics and Ideas in the Making of the Constitution* 244--87 (1996).

<sup>89</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>90</sup> *Id.* at 2136. Gary Lawson is perhaps the most ardent adherent of this view. See Lawson, *supra* note 3, at 360--61.

<sup>91</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

<sup>92</sup> 1 M. de Secondat, Baron de Montesquieu, *The Spirit of Laws*, bk. XI, ch. VI, at 201 (London, printed for T. Evans & W. Davis 1777) ("The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will."). Montesquieu was a leading eighteenth-century political philosopher and influential authority on the Founders. See Hank Burchard, *Constitutionally Montesquieu*, *Wash. Post* (Nov. 10, 1989) (on file with the *Columbia Law Review*).

resolve to go that way and secondly that my feet should carry me. When a paralytic resolves to run and when a fit man resolves not to move, both stay where they are. The body politic has the same two motive powers---and we can make the same distinction between will and strength, the former is *legislative power* and the latter *executive power*.<sup>93</sup>

The most influential contemporary political theorists of the Framers' era simply wouldn't have agreed with Justice Gorsuch's narrow definition of legislative power as the power to make binding rules of general applicability for private persons. In the literature and political discussions of the Founding, legislative power was both broader and simpler: "that, which has a right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it."<sup>94</sup> And the authoritative exercise of that power was exercised through its possessor's "right. . . of *making* . . . the laws" to formulate that direction.<sup>95</sup>

But could that legislative power be delegated? Eighteenth-century legal discussions regularly evince the presumption that competent persons and institutions could delegate their authorities to agents, and that those agents would then exercise those authorities both on behalf and under the ultimate supervision of the original principal.<sup>96</sup> Where a limitation on delegation existed, it was noted with particularity and explained by some specific justifying consideration relevant to the circumstance.<sup>97</sup> The question becomes, then, whether legislative authority was such an exception to the general delegability of legal authorities.

Far from supporting such an exception, the legal and political theory of the era refutes it. Conventional wisdom held that "all lawful authority, legislative, and executive, originates from the people."<sup>98</sup> For the Founders, in other words, government's very existence meant that the "original legislative power" had already been delegated.<sup>99</sup> Founder, Justice, and Federalist James Wilson sketched the standard story:

All these powers and rights, indeed, cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation. One of those powers and rights is to make laws for the government of the

<sup>93</sup> Jean-Jacques Rousseau, *The Social Contract*, bk. III, ch. 1, at 101 (Maurice Cranston trans., Penguin 1968). Rousseau was, similarly, a foundational eighteenth-century political philosopher. Jean-Jacques Rousseau (1712--1778), Internet Encyclopedia of Philosophy, <https://iep.utm.edu/rousseau> [<https://perma.cc/T4BF-7F85>] (last visited Nov. 5, 2020).

<sup>94</sup> Locke, *Second Treatise*, supra note 66, ch. XII, § 143, at 164 (arguing that antecedent natural law requires this power to be exercised through standing laws rather than arbitrary decrees); see also, e.g., Thomas Hobbes, *Leviathan*, pt. II, ch. 20, at 158 (Oxford Univ. Press 1952) (1651) ("It belongeth therefore to the Sovereigne to bee Judge, and to præscribe the Rules of discerning Good and Evill: which Rules are Lawes; and therefore in him is the Legislative Power."); Thomas Rutherford, *Institutes of Natural Law*, bk. II, ch. IV, § X, at 280 (2d American ed., Baltimore, William Neal & Joseph Neal 1832) (1754) ("It belongs to the legislative power, considered as the common understanding, or joint sense of the body politic, to determine and direct what is right to be done . . .").

<sup>95</sup> 1 William Blackstone, *Commentaries* \*146 (describing "the supreme magistracy, or the right both of *making* and of *enforcing* the laws"); see also Jean Louis de Lolme, *The Constitution of England; Or, an Account of the English Government*, ch. IV, at 55 (Knud Haakonssen & David Lieberman eds., Liberty Fund 2007) (1784) ("[T]he Legislative power belongs to Parliament alone; that is to say, the power of establishing laws, and of abrogating, changing, or explaining them."); Emer de Vattel, *The Law of Nations, or, Principles of the Law of Nature, Applied to the Conduct and Affairs of Nations and Sovereigns*, bk. I, ch. III, § 34, at 95 (Knud Haakonssen, Béla Kapossy & Richard Whatmore eds., Liberty Fund 2008) (1797) ("[T]o make laws both in relation to the manner in which it desires to be governed, and to the conduct of the citizens:---this is called the *legislative power*"); The Federalist No. 33, at 159 (Alexander Hamilton) (Ian Shapiro ed., 2009) ("What is a power, but the ability or faculty of doing a thing? . . . What is a legislative power, but a power of making laws?"); Montesquieu, supra note 92, at bk. 11, ch. 6, at 198 ("By virtue of the [legislative power], the prince or magistrate enacts temporary or perpetual laws, and amends or abrogates those that have been already enacted."); cf. 2 Joseph Story, *Commentaries on the Constitution of the United States*, ch. XXIV, § 1237, at 137 (Melville M. Bigelow ed., Little, Brown, and Company, 5th ed., Boston, Little, Brown & Co., 5th ed. 1891) [hereinafter Story, *Commentaries on the Constitution*] ("What is a legislative power, but a power of making laws?").

<sup>96</sup> For just one example, see, e.g., 1 William Blackstone, *Commentaries* \*453 ("[T]he father . . . may also delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child, who is then *in loco parentis* . . .").

<sup>97</sup> See, e.g. Matthew Hale, *The Prerogatives of the King*, ch. 17, at 180 (D.E.C. Yale ed., Selden Soc'y 1976) ("Therefore we shall consider the king's power of judicature under these two notions, viz. (1) What points of judicature or decision he himself may personally execute. (2) In what manner he may transfer the exercise of jurisdiction."); Rutherford, supra note 94, bk. 1, ch. II, § IX, at 19 ("Some of our rights are alienable, others are unalienable. Those rights are alienable which the law does not forbid us to part with. Those only are unalienable which we cannot part with consistently with the law.").

<sup>98</sup> James Burgh, *Political Disquisitions*, bk. I, ch. II, at 3--4 (London, printed for E. & C. Dilly 1774) ("In governors, it may be compared to the reflected light of the moon; for it is only borrowed, delegated, and limited by the intention of the people, whose it is, and to whom governors are to consider themselves as responsible, while the people are answerable only to God . . .").

<sup>99</sup> See Rutherford, supra note 94, bk. II, ch. IV, § IV, at 286 ("There is, indeed, an original legislative power in every civil society; but some farther act is necessary, besides the mere union into such a society, before this power can be naturally vested in any one part of the society exclusive of the rest . . ."); see also, e.g., Obadiah Hulme, *An Historical Essay on the English Constitution*, ch. I, at 6 (London, printed for Edward & Charles Dilly 1771) ("For this reason, they never gave up their natural liberty, or delegated their power, of making laws, to any man, for a longer time than one year.").

nation. This power and right may be delegated for a certain period, on certain conditions, under certain limitations, and to a certain number of persons.<sup>100</sup>

From the outset, then, the Founders' account of government itself belies flattened modern claims that there was anything intrinsically nondelegable about any portion of the legislative power. The people already delegated it once.

Originalists must therefore be arguing for a non-redelegation principle: Once conveyed to a representative agent, the argument must go, the legislative power cannot then be passed further down the line. And some proponents have indeed made arguments along precisely these lines. Professors Gary Lawson and Guy Seidman, for example, have recently built on Professor Robert Natelson's research to claim that the eighteenth-century *private* law of fiduciary duties proves that constitutional governance authorities cannot be redelegated.<sup>101</sup> As Philip Hamburger explains the argument: "[T]he concept of delegation actually shows that Congress cannot subdelegate its lawmaking power. Under agency law . . . [t]he initial delegation . . . implies *potestas delegata non potest delegare*---that delegated power cannot be further delegated."<sup>102</sup>

It is hard to overstate the ahistoricity of this claim.<sup>103</sup> To begin with, the entire argument-by-analogy hinges on the proposition that *non potest delegare* was a well-known and uncontroversial proposition of eighteenth-century private law. But the sourcing even for the *private law* claim is thin. Natelson cites two eighteenth-century law treatises and three English cases from 1755, 1668, and 1613.<sup>104</sup> Lawson and Seidman cite a trio of American agency law treatises from the first half of the nineteenth century.<sup>105</sup> And Philip Hamburger cites an agency treatise from 1889 and two Supreme Court cases from 1831 and 1850.<sup>106</sup> It should go without saying that sweeping assertions about widely shared (let alone undisputed) understandings should not rest on such scanty source material.

More to the point, these authors cannot point to *any* evidence that the private law agency analogy should govern constitutional interpretation. In the tens of thousands of pages of searchable archival material from the Continental Congress, from the drafting and ratification of the Constitution, and from the records of the first ten years of Congress, we have not been able to find a single appearance of the phrase "*delegata potestas non potest delegari*" or any variant thereof.<sup>107</sup> The first mention of anything approximating the principle in the United States federal and state case reports was not until 1794.<sup>108</sup> It is not just that modern authors have *offered* "virtually no evidence" to suggest that the analogy had any purchase at the Founding.<sup>109</sup> So far as we can tell, there *is* no such evidence, certainly not with respect to the question of delegated governance authority.

To the contrary, seventeenth- and eighteenth-century thinkers reliably embraced not just the logic but the necessity of delegating governance authority. Certainly this was the case with executive authority, as with Locke's explanation that vesting the executive power in a single person means "he has in him the supreme execution, from whom all inferior magistrates derive all their several subordinate powers, or at least the greatest part of them."<sup>110</sup> It was equally true of judicial authority, as with Blackstone's observation that "our kings have delegated their whole judicial power to the judges of their several courts."<sup>111</sup>

<sup>100</sup> James Wilson, Lectures on Law, ch. V, at 557 (1791) [hereinafter Wilson, Lectures on Law], reprinted in 1 Collected Works of James Wilson 427, 557 (Kermit L. Hall & Mark David Hall eds., Liberty Fund 2011) [hereinafter Collected Works].

<sup>101</sup> See Lawson & Seidman, *supra* note 8, at 113--14.

<sup>102</sup> Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9, at 386.

<sup>103</sup> For a thorough-going dismantling of the claim in a broader context, see generally Richard Primus, *The Elephant Problem*, 17 *Geo. J.L. & Pub. Pol'y.* 373 (2019) [hereinafter Primus, *The Elephant Problem*] (discussing the lack of evidence that the Founders ever actually thought of the Constitution on a power-of-attorney model).

<sup>104</sup> See Robert G. Natelson, *Judicial Review of Special Interest Spending: The General Welfare Clause and the Fiduciary Law of the Founders*, 11 *Tex. Rev. L. & Pol.* 239, 260--61 (2006) (supporting this claim by citing three English cases; Matthew Bacon, *A New Abridgment of the Law* (John Exshaw ed., 5th ed. 1786); and Charles Viner, *A General Abridgment of Law and Equity* (2d ed. 1791)).

<sup>105</sup> See Lawson & Seidman, *supra* note 8, at 113--14. Lawson and Seidman cite: 1 Matthew Bacon, *A New Abridgement of the Law* (1730); 1 Samuel Livermore, *A Treatise on the Law of Principal and Agent and of Sales by Auction* (1818); 2 James Kent, *Commentaries on American Law* (1827); and Joseph Story, *Commentaries on the Law of Agency, as a Branch of Commercial and Maritime Jurisprudence* -- (1844).

<sup>106</sup> See Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9, at 386 (citing *Warner v. Martin*, 52 U.S. 315, 322 (1850); *Shankland v. Washington*, 30 U.S. 390, 395 (1831); Floyd R. Mechem, *A Treatise of the Law of Agency* (1889)).

<sup>107</sup> For the databases searched, see *supra* note 22.

<sup>108</sup> At least that we've been able to find. See *Hughes v. Giles*, 2 N.C. 26 (1794) (resolving the contested ownership of a horse following a double sale by a faithless bailee).

<sup>109</sup> See Primus, *The Elephant Problem*, *supra* note 103, at 373, 382 ("[T]here is no indication that opponents of extensive federal power used the power-of-attorney frame to make their arguments. . . . If the idea that the Constitution should be interpreted with the restrictive tools applicable to powers of attorney was mainstream in 1788, [then this] is hard to explain . . .").

<sup>110</sup> Locke, *Second Treatise*, *supra* note 66, ch. XIII, § 151, at 167.

<sup>111</sup> 1 William Blackstone, *Commentaries* \*267; see also, e.g., 3 William Blackstone, *Commentaries* \*56 ("For, as the barons of parliament were constituent members of that court; and the rest of its jurisdiction was dealt out to other tribunals, over

So if all three functional powers have already been delegated once by the people, and if executive and judicial powers could both be redelegated, then why would the legislative power be any different? The answer is that it wasn't. To the contrary: Absent express derogation from the principle, legislative authority was every bit as susceptible to redelegation as its executive and judicial siblings.<sup>112</sup> The Whig hero Algernon Sidney observed, for example, that while the King "can [not] have the Legislative power in himself," the legislative branch could choose to give him the "part in it" that "is necessarily to be performed by him, as the Law prescribes."<sup>113</sup> And when legislative power was exercised pursuant to such delegation, its boundaries were defined by the breadth or specificity of that grant: As philosopher David Hume explained, "every minister or magistrate . . . must exert the authority delegated to him after the manner, which is prescribed."<sup>114</sup>

Many Founders explicitly affirmed this understanding that legislative power could be redelegated just like any other. As James Wilson explained shortly after ratification,

Representation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of publick affairs. *This chain may consist of one link, or of more links than one; but it should always be sufficiently strong and discernible.*<sup>115</sup>

Other Americans likewise took for granted that such redelegations were legally valid. During the rising constitutional standoff of the 1760s, for example, the pamphleteer Aequus argued that "[t]he delegation" by Britain "of a legislative power to the colonies" should under the circumstances be considered "as exclusive of all parliamentary participation in the *proper subjects* of their legislation."<sup>116</sup> And of course the Continental Congress only possessed legislative power

---

which the great officers who accompanied these barons were respectively delegated to preside . . ."); Edward Coke, Part Twelve of the Reports (1660), reprinted in 1 *The Selected Writings of Sir Edward Coke* 418, 431 (Steve Sheppard ed., 2003) [hereinafter *Selected Writings of Coke*] (reporting the observation in *Floyd v. Barker* (1607) that "for this, that he himself cannot do it to all persons, he delegates his power to his Judges, who have the Custody and Guard of the King's oath").

<sup>112</sup> Indeed, the eighteenth-century understanding of legislative power refutes claims that nondelegation doctrine is simply a matter of identifying that which is legislative power and then prohibiting its delegation. The fact that legislative power was simply the power to issue authoritative instructions, see *supra* text accompanying notes 94--99, makes it a facially unworkable theory of government to claim that it was a categorically nondelegable authority.

<sup>113</sup> Algernon Sidney, *Discourses Concerning Government*, ch. III, § 46, at 459 (London 1698); see also David Hume, *Essay XIV: Of the Rise and Progress of the Arts and Sciences* (1787) [hereinafter *Hume, The Rise of Arts and Sciences*], reprinted in *Essays Moral, Political, and Literary* 111, 115--16 (Eugene F. Miller ed., 1987) (describing primitive governance regimes under which "the monarch, finding it impossible, in his own person, to execute every office of sovereignty, in every place, must delegate his authority to inferior magistrates"); cf. Samuel Pufendorf, *Two Books of the Elements of Universal Jurisprudence*, bk. I, def'n XIII, at 212 (Thomas Behme & Knud Haakonssen eds., William Abbott Oldfather trans. 1931, Liberty Fund 2009) (1672) [hereinafter *Pufendorf, Elements of Universal Jurisprudence*] ("[T]he supreme sovereignty promulgates the law, either with his own voice, or through the instrumentality of those who have been delegated by him."). Blackstone made a similar point about the Crown's delegated legislative authority, noting that "[a] proclamation for disarming papists is . . . binding, being only in execution of what the legislature has first ordained." 1 William Blackstone, *Commentaries* \*270--71. He expressly contrasted that kind of delegated authority from assertions of intrinsic legislative authority: "[A] proclamation for allowing arms to papists, or for disarming any protestant subjects, will not bind; because the first would be to assume a dispensing power, the latter a legislative one; to the vesting of either of which in any single person the laws of England are absolutely strangers." *Id.*

<sup>114</sup> Hume, *The Rise of Arts and Sciences*, *supra* note 113, at 125 (describing "civilized monarchy"). That's why he objected so strongly to Parliament's infamously open-ended grant of full powers to Henry VIII in 1539---not only because they "gave to the king's proclamation the same force as to a statute enacted by parliament," but also because they "framed this law, as if it were only declaratory, and were intended to explain the natural extent of royal authority." 3 David Hume, *The History of England, from the Invasion of Julius Caesar to the Revolution in 1688*, at 266--67 (Liberty Fund 1983) (1778).

<sup>115</sup> Wilson, *Lectures on Law*, *supra* note 100, ch. 11, at 721 (emphasis added). That's why he agreed that "[w]hen the Parliament transferred legislative authority to Henry VIII, the act transferring could not in the strict acceptance of the term be called unconstitutional." James Wilson, *Address to the Pennsylvania Convention* (Nov. 24, 1787) (notes of Thomas Lloyd), reprinted in 2 *Documentary History of the Ratification of the Constitution* 350, 361 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogan eds., digital ed. 2009) [hereinafter *Documentary History*]; see also 1 William Blackstone, *Commentaries* \*271 ("[The statute] enacted, that the king's proclamations should have the force of acts of parliament . . . which 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 [under] his successor, about five years after."); James Wilson, *Address to the Pennsylvania Convention* (Nov. 24, 1787) (notes of Alexander J. Dallas), reprinted in 2 *Documentary History*, *supra*, at 340, 348 ("So that when that body was so base and treacherous to the rights of the people as to transfer the legislative authority to Henry VIII, his exercising that authority by proclamations and edicts could not strictly speaking be termed unconstitutional . . .").

<sup>116</sup> Aequus, *From the Craftsman, Mass. Gazette & Bos. Newsl.*, Mar. 6, 1766, reprinted in 1 *American Political Writing During the Founding Era, 1760--1805*, at 62, 64 (Charles S. Hyneman & Donald S. Lutz eds., 1983) [hereinafter 1 *American Political Writing*] ("[H]ave not the *royal charters* been granted . . . delegating to them the before-mentioned qualified power of legislation?").

because the several states had delegated that power to it.<sup>117</sup> While it might not always be wise for the legislature to delegate its rulemaking authority, Benjamin Franklin observed, “certainly in particular cases it may.”<sup>118</sup> And so commentators criticizing particular delegations of avowedly legislative authority would follow the likes of the British politician Edmund Burke,<sup>119</sup> the French statesman Jacques Turgot,<sup>120</sup> and the American lawyer James Kent<sup>121</sup> in casting aspersions on the particular policy without ever suggesting that it was impermissible for a legislature to thereby “confer[] on the [executive branch’s] proclamations the force of law.”<sup>122</sup> And lest we pass too lightly by the existence vel non of a deeply entrenched norm against legislative delegations, we will be completely clear: All the legislative bills criticized on these policy grounds were enacted as law. So much for a longstanding Anglo-American understanding.

## 2. *The Practice of Legislative Delegations before 1789*

The theory we have canvassed so far was amply reflected in practice. Indeed, anyone who spends serious time in the line-level historical materials will be struck by the sheer ubiquity of delegation as a standard mode of governance.

Certainly British constitutionalism had a long-established practice of delegating legislative authority—or “secondary legislation,” as it is called nowadays.<sup>123</sup> Easily the broadest (and most notorious) such delegation was a 1539 statute in which Parliament authorized the King to “set forth proclamations under such penalties and pains as to him and them shall seem necessary, which shall be observed as though they were made by act of parliament.”<sup>124</sup> Even after the effective establishment of parliamentary supremacy in the years following 1688, however, such delegations of legislative power “continued[,] as Parliament came to appreciate both its convenience and its necessity amidst wars, disease outbreaks, and social changes.”<sup>125</sup> There were many “prominent instances of rulemaking power accorded to administrators by Parliament from the sixteenth century onwards, much of which occurred during the period before the American

<sup>117</sup> For more on state delegation as the source of the Continental Congress’s legislative power, see *infra* text accompanying notes 132–133.

<sup>118</sup> Benjamin Franklin, *A Dialogue Between X, Y, and Z*, *Pa. Gazette*, Dec. 18, 1755, available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Franklin/01-06-02-0131> [<https://perma.cc/PX5G-UP7J>] (last visited Oct. 9, 2020) (discussing the Pennsylvania militia bill). The dialogue reads, in part:

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

X. I believe not, generally; but certainly in particular Cases it may. Legislatures may, and frequently do give to Corporations, Power to make By Laws for their own Government. And in this Case, the Act of Parliament gives the Power of making Articles of War for the Government of the Army to the King alone, and there is no Doubt but the Parliament understand the Rights of Government.

*Id.* The law under discussion was enacted. See *id.* at n.8 (editor’s note).

<sup>119</sup> See Edmund Burke, *Speech on Mr. Fox’s East India Bill* (Dec. 1, 1783), in *4 Select Works of Edmund Burke* 93, 161 (Francis Canavan ed., 1999) [hereinafter *Select Works*] (“The whole subordinate British administration of revenue was then vested in a committee in Calcutta . . . [T]o this committee were delegated . . . [the functions] of the supreme administration of revenue . . . By the new scheme they are delegated to this committee, who are only to report their proceedings for approbation.”).

<sup>120</sup> A Letter from M. Turgot, late Comptroller-General of the Finances of France (Mar. 22, 1778), translated in Richard Price, *Observations on the Importance of the American Revolution, and the Means of Making It a Benefit to the World* 107, 116 (London, printed for T. Cadell 1785) (“They even delegate authority to executive bodies, and to Governors, to prohibit the exportation of certain commodities on certain occasions.”).

<sup>121</sup> James Kent, *A Country Federalist*, *Poughkeepsie Country J.*, Dec. 19, 1787, reprinted in *19 Documentary History*, *supra* note 115, at 430, 434 (“[U]nder Henry the 8th . . . the House was composed of a most abject set of slaves, who by a single act the most extraordinary that ever was recorded, conferred on the King’s proclamations the force of law.”).

<sup>122</sup> *Id.*

<sup>123</sup> Robert Baldwin, *Rules and Government* 59–60 (1995) (“By secondary legislation is meant ‘every exercise of a power to legislate conferred by or under an Act of Parliament’.” (quoting Joint Committee on Delegated Legislation, *Report*, 1971–1972, HL 184, HC 475 (UK))).

<sup>124</sup> *An Act That Proclamations Made by the King’s Highness with the Advice of His Honourable Council Shall Be Obeyed and Kept as Though They Were Made by Act of Parliament* 1539, 31 Hen. 8 c.8 (providing only the limit that “this shall not be prejudicial to any person’s inheritance, offices, liberties, goods, chattels or life,” other than as punishment for failure to comply). The phrase “Henry VIII Clause” is standard usage in British constitutional discourse to this day. See, e.g., *Henry VIII Clauses*, UK Parliament, <https://www.parliament.uk/site-information/glossary/henry-viii-clauses> [<https://perma.cc/7U9X-HSZF>] (last visited Oct. 8, 2020).

<sup>125</sup> Robert C. Sarvis, *Legislative Delegation and Two Conceptions of the Legislative Power*, 4 *Pierce L. Rev.* 317, 320 (2006); see also Cecil T. Carr, *Delegated Legislation: Three Lectures* 48–56 (1921) (describing successive delegations of power by Parliament). For more context on statutory reform in the seventeenth and eighteenth centuries, see David Lieberman, *The Province of Legislation Determined: Legal Theory in Eighteenth-Century Britain* 179–98 (1989) (describing successive reform programs).

revolution."<sup>126</sup> In one example of particular relevance to the Founders, municipal authorities thought it obvious that the colonial assemblies' legislative power necessarily rested on a delegation from some British source.<sup>127</sup>

Legislative delegations were a persistent feature of colonial and post-independence state governance in North America as well. Historians have explained that the Virginia legislature, for example, "delegated many special powers" to the governor and Council of State, including the authority "to direct recruiting, training, equipping, provisioning, and utilization of troops and seamen," to restrict "counterfeiting, and the engrossment of essential war commodities," to supervise "the commonwealth's lead mines, land office, and navy," and even "to maintain fair prices."<sup>128</sup> The Maryland Assembly once refused to approve a bill imposing specific rules on pilotage in Maryland harbors because it thought "the whole business relative to that subject ought to be put under the control of the executive, by an act of the general assembly, that would comprehend all other ports in [the] state."<sup>129</sup> (The Maryland Senate immediately agreed, and the offending statutory specifications were stricken.<sup>130</sup>) Maryland went so far as to delegate its legislative power of eminent domain to the *federal* commissioners responsible for establishing "the permanent seat of the government of the United States," where use of that power was "proper and necessary" for "the erection of public buildings, and for other public purposes."<sup>131</sup> And the whopper of all state delegations was their adoption of the Articles of Confederation, which "expressly delegated" an enormous range of legislative authorities from the states to the national government.<sup>132</sup> As Alexander Hamilton put it, "[i]f the [New York] constitution forbids the grant of legislative power to the union," then a wide range of authorities granted by the Articles of Confederation "are illegal and unconstitutional, and ought to be resumed."<sup>133</sup> But they weren't, because it didn't.

The Continental Congress, which set the most salient national precedents, delegated legislative authority by the bucketload.<sup>134</sup> Delegates experimented constantly with bureaucratic mechanisms for developing regulatory schemes on

<sup>126</sup> Craig, *Legitimacy of US Administrative Law*, supra note 51, at 19--27 (canvassing examples of extraordinarily broad delegations of rulemaking authority over commercial regulations, environmental law, welfare benefits, and excise).

<sup>127</sup> The only real question from the domestic British perspective was whether the colonial authorities' legislative power was grounded in an indirect delegation from Parliament or whether it "abide[d] in them solely . . . by virtue of a charter" from the Crown. John Adams, *Novanglus: Or, a History of the Dispute with America, from Its Origin, in 1754, to the Present Time (1774)*, reprinted in 4 *The Works of John Adams, Second President of the United States* 3, 111 (Charles C. Little & James Brown eds., 1851) (quoting a seventeenth-century Massachusetts governor's claim taking the latter position).

<sup>128</sup> Session of Virginia Council of State (Jan. 14, 1778) (editorial note), available at Nat'l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-01-02-0065> [<https://perma.cc/8XYP-RQ9D>] (last visited Oct. 9, 2020).

<sup>129</sup> Votes and Proceedings of the S. of the State of Maryland 75 (May 30, 1783) (online ed. 2009) (message by the House of Delegates).

<sup>130</sup> *Id.* at 76 (message by the Senate) (returning an amended bill, "having left out the parts relative to pilots and pilotage agreeably to your message").

<sup>131</sup> An Act to Condemn Land, if Necessary, for the Public Buildings of the United States, 204 Md. Laws Sess. 199, ch. 44 (1790) ("[T]he commissioners aforesaid . . . are authorised to order the [local] sheriff [to summon a jury to establish the value of land]; and thereupon the owners of the said land shall be entitled to receive such valuation; and after such inquest, the said land shall for ever belong to the United States.").

<sup>132</sup> Articles of Confederation of 1781, art. II ("Each State retains its Sovereignty, freedom and independence, and every Power, Jurisdiction and right, which is not by this confederation expressly delegated to the United States in Congress assembled.").

<sup>133</sup> Alexander Hamilton, *New York Assembly: Remarks on an Act Granting to Congress Certain Imposts and Duties* (Feb. 15, 1787), in 4 *The Papers of Alexander Hamilton* 71, 75--76 (Harold C. Syrett ed., digital ed. 2011) ("If, on the contrary, those authorities were properly granted, then it follows that the constitution does not forbid the grant of legislative power . . ."); see also Votes and Proceedings of the S. of the State of Maryland 84 (Mar. 11, 1786) (online ed. 2009) (message by the Senate) ("This State has already given certain powers to congress by a public act, respecting the regulation of the trade of the United States . . .").

<sup>134</sup> For more on the Continental Congress's experimentation with a bewildering series of committees, boards, and officers, see generally Calvin Jillson & Rick K. Wilson, *Congressional Dynamics: Structure, Coordination, and Choice in the First American Congress, 1774--1789* (1994); Jennings B. Sanders, *Evolution of Executive Departments of the Continental Congress, 1774--1789* (1935) (examining the evolution and operation of the executive departments of the Continental Congress); Jennings B. Sanders, *The Presidency of the Continental Congress, 1774--89: A Study in American Institutional History* (1930) (studying the development of the early congressional presidency and "the personalities intimately associated with it"); see also Josh Chafetz, *Congress's Constitution: Legislative Authority and the Separation of Powers* 94 (2017) (noting several early developments in the evolution of executive power under the Continental Congress). For some brief law review treatments, see, e.g., Curtis A. Bradley & Martin S. Flaherty, *Executive Power Essentialism and Foreign Affairs*, 102 *Mich. L. Rev.* 545, 585--91 (2004) (discussing the development of executive departments under the Continental Congress); Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 *Stan. L. Rev.* 443, 477--78, 532--45 (2018) (surveying the Continental Congress's use of the phrase "officer" for officials charged with implementing policy).

subjects that ranged from the national postal service,<sup>135</sup> to a proposal for the provision of medical services,<sup>136</sup> to the settlement of the national accounts.<sup>137</sup> Organizing the national territories prompted the creation of even more complex bureaucracies, with even more open-ended grants of legislative authority. The Illinois Commissioner, for example, was given authority to issue “decrees” on topics ranging from property rights and real estate regulation to the promotion of “Justice harmony and industry.”<sup>138</sup> The Northwest Ordinance followed a similar plan, creating a bureaucratic apparatus headed by a governor, who was authorized not only to adopt a body of civil and criminal laws to govern the district,<sup>139</sup> but also to “make proper divisions” of the territory, to “lay out the parts of the district in which the indian titles shall have been extinguished,” and to establish “such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same.”<sup>140</sup>

Some of these delegations may have been wise; others were not. And some were just mechanisms for passing the buck, as with the delegation of authority to make what would become the Treaty of Paris.<sup>141</sup> But whatever the motives behind any particular delegation, it went without saying that Congress could delegate enormous and open-ended rulemaking authority to its agents.<sup>142</sup> Indeed, the only contemporary legal challenges to delegations we have found were grounded in the Articles’ explicit and particularized exception to that general rule for “emit[ting] bills” of credit and “borrow[ing] money.”<sup>143</sup> Articles IX and X expressly prohibited delegating that authority to a committee that sat during

<sup>135</sup> See, e.g., 23 Journals of the Continental Congress, 1774--1789, at 670 (Gaillard Hunt ed., 1914) (recording an “Ordinance for Regulating the Post Office of the United States of America” (1782)) (instructing that the post “be established and maintained by . . . the Postmaster General . . . , to extend to and from . . . New Hampshire and . . . Georgia inclusive, and to and from such other parts of these United States, as from time to time, he shall judge necessary, or Congress shall direct.” (emphasis added) (citation omitted)).

<sup>136</sup> See, e.g., 21 Journals of the Continental Congress, 1774--1789, at 1094 (Gaillard Hunt ed., 1912) (recording proposed regulations of the Hospital Department and the Medical Department (1781)) (presenting a draft resolution creating a Medical Board “to digest rules and carry into execution, every thing relative to the Medical Department” with approval of either Commander in Chief or the head of “a seperate [sic] Department”).

<sup>137</sup> See, e.g., 32 Journals of the Continental Congress, 1774--1789, at 263--66 (Roscoe R. Hill ed., 1936) (recording an “Ordinance for settling the Accounts between the United States and Individual States” (1787)) (establishing a two-level bureaucracy responsible for compiling, evaluating, and “finally adjust[ing] on uniform and equitable principles” a comprehensive accounting of debts owed both to and by the national government (emphasis added)).

<sup>138</sup> 32 Journals of the Continental Congress, 1774--1789, at 266--69 (Roscoe R. Hill ed., 1936) (recording a “Report of Committee on Post St. Vincents and Illinois” (1787)). His first “duty” was to “divide the [existing] settlements into proper districts” and then “as soon as may be to summon the Inhabitants of each to meet” and then to elect “magistrates” who would act as both local judges and territorial legislators. *Id.* at 267. Once the basic governing structure was in place, the Commissioner was charged with making the appointments of additional executive officers “with the advice and Consent of the major part of the said Magistrates.” *Id.* at 268.

<sup>139</sup> The adoption of laws required approval by a majority of three territorial judges:

The governor, and judges or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

32 Journals of the Continental Congress, 1774--1789, at 336 (Roscoe R. Hill ed., 1936) (recording an “Ordinance for the government of the territory of the United States North West of the river Ohio” (1787)) [hereinafter 1787 Northwest Ordinance]. The sole apparent limit on the territorial government’s discretion--that it adopt “laws of the original States”--was interpreted to permit stitching together different laws from different states piecemeal, amending their “diction” as necessary along the way. See Arthur St. Clair, Address of the Governor to the Legislature (May 29, 1795) [hereinafter St. Clair, 1795 Address], in 2 *The Life and Public Services of Arthur St. Clair* 353, 357--62 (William Henry Smith ed., 1881) [hereinafter 2 *The St. Clair Papers*] (noting that the governor was outvoted on this issue in 1788 before reversing the earlier interpretation in 1795).

<sup>140</sup> 1787 Northwest Ordinance, *supra* note 139, at 336--37.

<sup>141</sup> See 23 Journals of the Continental Congress, 1774--1789, at 873 (Gaillard Hunt ed., 1914) (recording notes of debates (1782)) (“Congress on a trial found it impossible from the diversity of opinions & interests to define any other claims than those of independence & the alliance. A discretionary power therefore was to be delegated with regard to all other claims.”).

<sup>142</sup> As one example of how the several states shared this view of Congress’s ability to delegate legislative authority, consider the proposal from “a convention that met at Hartford consisting of the New England States and & N. York” that “the Commander in cheif [sic] of the Army of the united States be authorised & empowered to take *such Measures as he may deem proper & the public Service may render necessary*” in order to induce “a punctual Compliance with the Regulations which have been or may be made by Congress for Supplies.” Letter from John Witherspoon to William Livingston (Dec. 16, 1780), in 16 *Letters of Delegates to Congress, 1774--1789*, at 451, 451 (Paul H. Smith ed., 1976) (emphasis added) (criticizing the proposal on policy grounds).

<sup>143</sup> Articles of Confederation of 1781, art. IX, X. In 1783, facing a financial crisis in which “further drafts [on the public credit] were indispensable to prevent a stop to the public service,” Superintendent of Finance Robert Morris urgently

congressional recesses, and instead required exclusive determination of such questions by “the voice of nine States in the Congress of the United States assembled.”<sup>144</sup> Where a derogation from the presumptive delegability of legislative power was called for, it was specified.

It is not that broad delegations prompted no concerns. To the contrary, as Madison emphasized, it was “unquestionably an act of a high and important nature” to delegate even “a sort of legislative power.”<sup>145</sup> But we have found only two pre-ratification hints of nondelegation skepticism expressed in a *legal* register. In both cases, the objection failed.

The simpler instance involves Thomas Burke’s 1777 criticism of the proposal to delegate state fiscal authorities to the national government via the Articles of Confederation: “If the Legislature can delegate their power to tax to any person they may Delegate it to the Executive Magistrate, and may make him absolute, by giving him the power over the property of the Community. If they cannot delegate to him they cannot delegate to any other.”<sup>146</sup> Burke’s view didn’t prevail, of course; the Articles of Confederation were in fact adopted, along with the broad array of unequivocally legislative powers that it expressly delegated to the national government.

Consider also an earlier episode in the Pennsylvania Assembly. In 1764, the newly elected Pennsylvania Assembly devoted lengthy discussion to a set of “Petitions to His Majesty from the late Assembly . . . praying for a Change of Government . . .”<sup>147</sup> Those petitions had been written during the previous legislative session, and were transmitted to Richard Jackson, “counsel for the Province of Pennsylvania, in London” to be “presented, under certain Restrictions, to the Crown . . .”<sup>148</sup> The topic provoked much excitement, and “a considerable Debate ensued [sic], in which a great Contrariety of Opinions appear[ed] among the Members . . .”<sup>149</sup> The Speaker of the Assembly, Isaac Norris, had especially strong views:

---

requested that Congress delegate power over finances to a committee consisting of a member from each State. 25 Journals of the Continental Congress, 1774--1789, at 847--48 (Gaillard Hunt ed., 1922) (statement of Robert Morris) (noting that “our money affairs” were “3½ Million of livres short of the bills actually drawn”); see also Robert Morris to the President of Congress (Elias Boudinot) (Jan. 9, 1783), in 7 The Papers of Robert Morris 287, 287 (John Catanzariti, Elizabeth M. Nuxoll, Mary A. Gallagher, Kathleen H. Mullen, Nelson S. Dearmont & Clarence L. Ver Steeg eds., 1988) (referencing “some Circumstances of an important and confidential Nature relating to the Finances of the United States”).

Morris’s proposal was criticized on a variety of grounds, including by at least one unnamed person who “objected to [it] as improper, since Congress wd. thereby delegate an incommunicable power, perhaps, and would at any rate lend a sanction to a measure without even knowing what it was; not to mention the distrust which it manifested of their own prudence and fidelity.” 25 Journals of the Continental Congress, 1774--1789, at 848 (Gaillard Hunt ed., 1922) (recording notes of debates (1783)). So Congress instead appointed a three-person committee empowered only to consult with the Superintendent and report back. *Id.* The reference to an “incommunicable power” was clarified in a discussion of an analogous proposal later that year, which was again said to run afoul of the proposition That “Congrs. could not delegate to Comrs. a power of allowing claims for which the Confedon. reqd. nine States.” 25 Journals of the Continental Congress, 1774--1789, at 961 (Gaillard Hunt ed., 1922) (1783).

<sup>144</sup> Compare Articles of Confederation of 1781, art. IX, para. 5 (authorizing “a committee, to sit in the recess of Congress, to be denominated ‘A Committee of the States’, and to consist of one delegate from each State”), and *id.* art. X (“[P]rovided that no power be delegated to the said Committee, for the exercise of which, by the Articles of Confederation, the voice of nine States in the Congress of the United States assembled be requisite.”), with *id.* art. IX, para. 6 (providing that Congress “shall never . . . emit bills, nor borrow money . . . unless nine States assent to the same”).

<sup>145</sup> James Madison, The Bank Bill (Feb. 2, 1791), in 13 The Papers of James Madison 372, 378 (J.C.A. Stagg ed., digital ed. 2010).

<sup>146</sup> Thomas Burke’s Notes on the Articles of Confederation (Dec. 18, 1777), in 8 Letters of Delegates to Congress 1774--1789, at 433, 437 (Paul H. Smith, Gerard W. Gawalt, Rosemary Fry Plakas & Eugene R. Sheridan eds., 1981) (“The delegation . . . is as unconstitutional as if the Governor or Judges were to Substitute other persons to exercise their respective powers, or as if the assembly were to appoint substitutes to Enact Laws or empower the Delegates in Congress to enact Laws.”). Notably, Burke’s claim suggests that a special nondelegation principle might apply in relation to the power to lay taxes and manage the public fisc. This view had some staying power in some quarters: “[S]o strong were the prejudices against taxing dogs; that . . . even after it was adopted litigious [sic] persons were found, who disputed it constitutionality, Saying the ‘Legislature [sic] had no right to delegate to any body the power of imposing Taxes’ . . .” Letter from James Ronaldson to Thomas Jefferson (Mar. 20, 1809), in 1 The Papers of Thomas Jefferson 68, 68 (James P. McClure & J. Jefferson Looney eds., digital ed. 2008--2020). But even this was contested. See, e.g., Thomas Jefferson, Notes on Federalist Arguments in Congressional Debates (Aug. 3, 1798), in 30 The Papers of Thomas Jefferson, *supra*, at 471 (noting Robert Goodloe Harper’s view that “the constn leaves the levying taxes to the discretion Of Congress. therefore Congress may leave it to the discretion of the President”).

<sup>147</sup> Votes and Proceedings of the H.R. of the Province of Pennsylvania 5682 (Oct. 20, 1764), reprinted in 7 Pennsylvania Archives (Charles F. Hoban ed., 1935).

<sup>148</sup> *Id.* at 5678, 5682.

<sup>149</sup> *Id.* at 5682.

[A]s he was of Opinion the House had no Right to delegate their Powers to any Man, or any Set of Men whatever, to alter or change the Government, he was for putting an entire Prohibition on the Agent's presenting the said Petitions, without further and express Orders from the House for that Purpose.<sup>150</sup>

It's not clear whether this was a true nondelegation challenge in the modern sense, or whether it was really a version of the Lockean anti-alienation principle,<sup>151</sup> given Norris's focus on "alter[ing] . . . the Government."<sup>152</sup> Either way, Norris's argument was rejected. The Assembly formally considered his proposal to prohibit the agent from presenting the petitions, and it was defeated by a vote of 20--12.<sup>153</sup>

### 3. Hints of an Anti-Alienation Principle

Far from reflecting a pervasive understanding that legislative power could not be delegated, the Founding-era evidence indicates the opposite. That didn't necessarily mean, however, that everyone agreed legislatures were totally free from constraint in their disposition of rulemaking authority. A small handful of writers did argue for one specific limitation, albeit one different in kind from modern nondelegation doctrine. On their account, what was prohibited was legislatures' permanent alienation of legislative power without right of reversion or control.

The best-known exposition of this anti-alienation principle was probably Section 141 of John Locke's *Second Treatise on Government*:

[T]he 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 commonwealth, 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, nobody 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.<sup>154</sup>

The *Gundy* dissent is typical of the genre in misreading this passage as an endorsement of the modern nondelegation principle.<sup>155</sup> But, as the contrast in the very first sentence of Section 141 suggests, "transfer" and "delegat[ion]" mean different things. Locke consistently uses "transfer" in the ordinary seventeenth-century property sense of permanent alienation.<sup>156</sup> In contrast, he uses "delegation" in connection with powers which the delegating principal may supervise and at some point resume.<sup>157</sup> On the former point, Locke was consistent with Thomas Hobbes, who defines a man's

<sup>150</sup> *Id.*

<sup>151</sup> See *infra* section II.A.3.

<sup>152</sup> Votes and Proceedings of the H.R. of the Province of Pennsylvania 5682 (Oct. 20, 1764), reprinted in 7 Pennsylvania Archives, *supra* note 147.

<sup>153</sup> *Id.* at 5683 (noting that the question of "[w]hether Instructions shall be sent to our Agent, not to present the said Petitions to the Crown, until he receives further Orders for that Purpose from this House" was "carried in the Negative" by calling the previous question). How did Speaker Norris feel about this? Well, he didn't show up for work the next morning. *Id.* at 5684. It later turned out that he had resigned. *Id.* at 5685.

<sup>154</sup> Locke, *Second Treatise*, *supra* note 66, ch. 11, § 141, at 163 (emphasis added); see also *id.* § 142, at 164 ("The legislative neither must nor can transfer the power of making laws to any body else, or place it any where, but where the people have.").

<sup>155</sup> See, e.g., Alexander & Prakash, *supra* note 10, at 1297--99 (reproducing a block quote of Section 141 in the article's very first paragraph and interpreting it to "den[y] that the legislative power entailed the power to make third parties into legislators by delegating to them the right to make laws"). Even if the dissenters and their academic allies had the right reading of Locke, they'd still have to offer some theory on which one paragraph from a seventeenth-century English political treatise should trump the theory and practice of eighteenth-century America. See Primus, Locke, Gorsuch, and Gundy, *supra* note 66.

<sup>156</sup> E.g., John Locke, *The First Treatise: The False Principles and Foundation of Sir Robert Filmer* (1690), ch. IX, § 88, reprinted in *Two Treatises of Government*, *supra* note 66, at 57 ("It might reasonably be asked here, [why do] children [inherit] . . . the properties of their parent's upon their decease? [F]or it being personally the parents, when they die, without actually transferring their right to another, why does it not return again to the common stock of mankind?"); *id.* § 100, at 62 ("[Some might claim] that a man can alien his power over his child; and what may be transferred by compact, may be possessed by inheritance. I answer, a father cannot alien the power he has over his child: he may perhaps to some degrees forfeit it, but cannot transfer it . . ."). Locke's discussion of a monarch's voluntary subjugation to another sovereign is especially on point: "When a king makes himself the dependent of another, and subjects his kingdom," then he has "betrayed or forced his people, whose liberty he ought to have carefully preserved, into the power and dominion of a foreign nation." Locke, *Second Treatise*, *supra* note 66, ch. XIX, § 238, at 206. Such acts, Locke argued, were incapable of transferring any right to rule: "By this, as it were, alienation of his kingdom [the king] himself loses the power he had in it before, without transferring any the least right to those on whom he would have bestowed it." *Id.*

<sup>157</sup> See Locke, *Second Treatise*, *supra* note 66, ch. XIX, § 212, at 194 (noting that when those "who had[] [legislative authority] by the delegation of the society" exceed the boundaries of their power, "the people . . . come again to be out of

“Transferring” a right as “devest[ing] himsef of hindring another of the benefit of his own Right,” equivalent to “lay[ing] downe,” “Renouncing,” or “lay[ing] aside.”<sup>158</sup> And in both respects, Locke’s view was endorsed by the German jurist Samuel Pufendorf, who later observed that even if some authorities “cannot be *transferred* from us to another,” they can nonetheless “be *delegated* for others to exercise, in such wise, however, that they have all their authority [*autoritatem*] from those in whom the authority [*potestas*] roots and rests.”<sup>159</sup>

The deeper source of the *Gundy* dissent’s error, however, is its failure to appreciate the historical context in which Locke was writing. As the Founders well knew, Locke didn’t press this point because he was worried about a burgeoning bureaucracy.<sup>160</sup> He was answering a vastly more urgent call, in the context of a deadly serious debate about the very right to rule England. Section 141 was an assault on one of absolutism’s core tenets: the claim that the people had not merely *delegated* legislative authority to their sovereign, but had *alienated* it to him entirely. Here’s Jean Bodin, the seminal theorist of absolute sovereignty:

If such absolute power is given him simply and unconditionally, and not in virtue of some office or commission, nor in the form of a revocable grant, the recipient certainly is, and should be acknowledged to be, a sovereign. The people has renounced and alienated its sovereign power in order to invest him with it and put him in possession, and it thereby transfers to him all its powers, authority, and sovereign rights, just as does the man who gives to another possessory and proprietary rights over what he formerly owned.<sup>161</sup>

Nor was this view merely a Continental curiosity. The English legal scholar Francis Bacon had made the same claim about domestic English law, arguing that “it is in the power of a Parliament to extinguish or transfer their owne authority” entirely: “[I]f the Parliament should enact . . . that there should be no more Parliaments held, but that the King should have the authority of the Parlament [sic]; this act were good in Law.”<sup>162</sup>

*These* are the positions that Locke was rejecting in Section 141 of the Second Treatise. The stakes of the argument were nothing less than the legitimacy of popular self-determination: No more than the people could enslave themselves could Parliament do the same thing on their behalf.

That is certainly how others read Section 141. Take the eighteenth-century English jurist Thomas Rutherforth, for whom Locke serves as the culminating authority in a twenty-page discourse on the distinction between an official’s tenure of possession in a governance authority and the quantum of power that authority entails.<sup>163</sup> For Rutherforth, that distinction prompted the following inquiry:

---

subjection, and may constitute to themselves a new legislative”).

<sup>158</sup> Hobbes, *supra* note 94, pt. I, ch. 14, at 100–01 (“To *lay downe* a mans *Right* to any thing, is to *devest* himsef . . . of hindring another of the benefit of his own *Right* . . . *Right* is layd aside, either by simply *Renouncing* it; or by *Transferring* it to another.”).

<sup>159</sup> Pufendorf, *Elements of Universal Jurisprudence*, *supra* note 113, bk. I, def’n VII, § 2, at 88 (emphasis added).

<sup>160</sup> The Founders were intensely familiar with the history of the English Civil War, the Glorious Revolution, and the associated polemical debates between the likes of Locke and Robert Filmer. The players in those dramas were the Founding equivalent of our heroes and villains from World War II. See Mortenson, *Royal Prerogative*, *supra* note 14, at 1888–89, 1191–94.

<sup>161</sup> Jean Bodin, *Six Books of the Commonwealth*, bk. I, ch. VIII, at 67 (M.J. Tooley ed. & trans., Seven Treasures 2009) (1576). The *Gundy* dissent’s conscription of Locke as a fellow traveler in resisting legislative delegations is as muddled as Hamburger’s invocation of Edward Coke to the same end. See, e.g., Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9, at 43–50; see also Craig, *Four Central Errors*, *supra* note 51, at 17, 26 (“Hamburger repeatedly elides prerogative and administrative power[], . . . [but] the prerogative entails a ground of lawful authority in English law that exists independently of statute . . . . This is first year English constitutional law.”).

<sup>162</sup> Francis Bacon, *A Collection of Some Principal Rules and Maximes of the Common Lawes of England*, in *The Elements of the Common Lawes of England* 69 (London, printed by the Assignes of J. More Esq. 1636) (comprising Bacon’s chapter on “non impedit clausula derogatoria, quo minus ab eadem potestate res dissolvantur a quibus constituuntur”). Bacon contrasted this to the *impossibility* of Parliament restraining its future self: “[F]or as it is in the power of a man to kill a man, but it is not in his power to save him alive and to restraine him from breathing or feeling,” he explained, “so it is in the power of a Parliament to extinguish or transfer their owne authority, but not whilst the authority remains entire to restraine the functions and exercises of the same authority.” *Id.*; see also Hobbes, *supra* note 94, pt. II, ch. 17, at 131 (“[M]embers of society “conferre all their power and strength upon one Man, or upon one Assembly of men, . . . and therein to submit their Wills, every one to his Will, and their Judgements, to his Judgment.”); *id.*, pt. II, ch. 18, at 134 (“[T]here can happen no breach of Covenant on the part of the Sovereigne; and consequently none of his Subjects, by any pretence of forfeiture, can be freed from his Subjection.”); cf. Robert Filmer, *Patriarcha* (London 1680), reprinted in *Patriarcha and Other Writings* 1, 3 (Johann P. Sommerville ed., Cambridge Univ. Press 1991) (denouncing the “perilous conclusion . . . that ‘the people or multitude have a power to punish or deprive the prince if he transgress the laws of the kingdom,’” even though “this *vulgar* opinion hath of late obtained great reputation”).

<sup>163</sup> In general, Rutherforth argued that “things are held or possessed by three sorts of tenure . . . . A man may have full property in corporeal things; or he may have a claim of usufruct in them; or they may be his by a temporary tenure.” Rutherforth, *supra* note 94, bk. II, ch. IV, § XIV, at 317. The same holds true for governance authority: “[P]lenitude of property is [thus] so far from implying plenitude of power” that “the tenure by which [a ruler] holds this power, or so much of it as the constitution gives him, ought to be carefully distinguished from the power itself.” *Id.* at 317, 319.

It is questioned, indeed, whether any one can have full property in civil power; whether a kingdom can be patrimonial; or whether the right to govern a civil society can possibly be alienable, at the discretion of the possessor, as his right to any other estate, or to any other part of his patrimony is. Certainly, when the people have vested civil power in any particular man, or body of men, this grant of theirs does not imply that such power is alienable; that the man, or the body of men in whom it is so vested, have a right either to exercise it themselves, or to alienate it to anyone else, at their own discretion.<sup>164</sup>

Throughout his work, Rutherford follows Locke in using “alienation” and “transfer” to signify the permanent termination of a property right.<sup>165</sup> And it is on that question—whether the legislative authority is presumptively alienable by those in whom it has been vested—where he says that “Mr. Locke’s reasoning upon this head seems to be decisive.”<sup>166</sup>

But Rutherford doesn’t leave things there. To the contrary, he refines the question to suggest that Locke’s already narrow anti-alienation principle covers even less ground than readers might first assume:

But, then, though a king with legislative power, cannot, [merely] in virtue of such legislative power, *alienate* his kingdom, so that sovereignty in government, does not imply such sovereignty to be *alienable*, or plenitude of power does not imply plenitude of property in such power; yet there is still a farther question, whether the people who *delegated* the sovereign power, could not, likewise, confer a right upon the person . . . to whom they *delegated* such power, of making it over to others? [W]hether, as they gave the legislative power, they could not, likewise, give a right of *transferring* that power?<sup>167</sup>

The answer to this question Rutherford suggests, is actually yes. Somewhat tendentiously, he concludes by reframing Locke’s position in Section 141 as a default presumption, rebuttable by specific evidence that a particular legislative principal actually did intend to authorize alienation by its agent.<sup>168</sup>

Other late eighteenth-century writers, lawyers, and politicians repeatedly surfaced the same distinction between fee-simple alienation and right-of-reverter delegation.<sup>169</sup> As the Tory politician Bolingbroke wrote in reference to the people as a whole,

the collective Body of the People of Great Britain *delegate*, but do not give up, trust, *but do not alienate* their Right and their Power, and cannot be undone, by having Beggary, or Slavery brought upon Them, unless They co-operate to their own Undoing, and in one Word betray Themselves.<sup>170</sup>

Particularly relevant to modern nondelegation debates are comparable observations about transfer and delegation by political institutions, as with Burke’s reflection that a “king may abdicate for his own person, [but] he cannot abdicate for the monarchy. . . . [B]y a stronger reason, the house of commons cannot *renounce* its share of authority. The engagement and pact of society, which generally goes by the name of the constitution, forbids such invasion and such *surrender*.”<sup>171</sup> Pufendorf likewise emphasized that when it comes to “kings who have been constituted by the people’s will . . . cannot transfer the right to rule to anyone else, though they may employ the services of ministers in actively exercising it.”<sup>172</sup> The

<sup>164</sup> *Id.* at 318 (emphasis added); cf. *id.*, bk. I, ch. II, § IX, at 19 (“Some of our rights are alienable, others are unalienable. . . . Certainly where a man’s right to possess a thing . . . is absolute, or is not restrained or limited at all by the law; he may part with it . . . either by giving it up entirely, or by transferring it to some other person”).

<sup>165</sup> He used the same terminology for both private and public law. Compare *id.*, bk. I, ch. VI, § I, at 46–47 (discussing the “transfer” or “alienat[ion]” of private property rights) with *id.*, bk. II, ch. VIII, § XIV, at 462–63 (discussing the “transfer” or “alienation” of governance authority).

<sup>166</sup> *Id.*, bk. II, ch. IV, § XIV, at 319.

<sup>167</sup> *Id.* at 320 (emphasis added).

<sup>168</sup> *Id.* (“There are, certainly, many inconveniences, which would, probably, attend such an establishment as this; but none of them show it to be impossible.”). We don’t actually think this is the best reading of Locke. But Rutherford did.

<sup>169</sup> For a much later example of the point, see the editor’s note to the 1893 U.S. edition of Blackstone:

[T]he government is a mere agency established by the people for the exercise of those powers which reside in them. The powers of government are not, in strictness, *granted*, but *delegated*, powers. As all delegated powers are, they are trust powers, and may be revoked. It results that no portion of sovereignty resides in government. A man makes no grant of his estate when he constitutes an attorney to manage it.

<sup>1</sup> William Blackstone, *Commentaries on the Laws of England* 49 n.12 (George Sharswood ed., Philadelphia 1893) (1750) (commenting, in the editor’s footnote, on this more “simple and reasonable idea” in contrast to Blackstone’s supposition that the right of sovereignty “reside[s] in those hands which the exercise of the power of making laws is placed”).

<sup>170</sup> Henry St. John, Viscount Bolingbroke, *A Dissertation upon Parties*, letter XVII, 209 (2d ed. London 1735) (original emphasis added).

<sup>171</sup> Edmund Burke, *Reflections on the Revolution in France* (1790), reprinted in 2 *Select Works*, supra note 119, at 85, 107 (emphasis added).

<sup>172</sup> Samuel Pufendorf, *On the Law of Nature and Nations*, bk. I, ch. 1, § 19, reprinted in *The Political Writings of Samuel Pufendorf* 93, 106 (Craig L. Carr ed., Michael J. Seidler trans., Oxford Univ. Press 1994).

point thus amounted to a general proposition: “For [c]ertain kinds of authority[,] . . . even though we may not *transfer* them as such to someone else as his possession . . . , can have their enactment *delegated* to others . . . .”<sup>173</sup>

Scattered references to a Lockean anti-alienation view can also be found in the colonial, framing, and ratification records. Thomas Jefferson, for example, savaged legislative proposals to create a dictatorship during the revolutionary war by arguing 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.”<sup>174</sup> And the Founding-era politician James Otis just about plagiarized the whole of Section 141 in claiming that “[t]he legislature cannot transfer the power of making laws to any other hands” because “[t]heir whole power is not transferable.”<sup>175</sup> This perspective may have found its most succinct enunciation in a 1768 election sermon from Massachusetts preacher Daniel Schute:

A Community having determined that to commit the power of government to some few of their number is best, the right the some few can have to it, must arise from the choice of the whole; . . . . *This delegation is not indeed the giving away of the right the whole have to govern, but providing for the exercise of their power in the most effectual manner.*<sup>176</sup>

In sum, the categorical transfer of legislative power without provision for reversion or control might have threatened the principles of self-government. Mere delegations did not.

In practice, even those few Founding-era commentators who gestured at it could scarcely have imagined that the anti-alienation principle would ever do any limiting work in the real world. Congress would have to effectively abolish itself by enacting a law providing something like, “all legislative authority vested in the Congress is hereby transferred irrevocably and in perpetuity to the President, and no enactment subsequently made by this Congress shall have any force.”<sup>177</sup> The closest thing we have seen to a legal invocation of the anti-alienation principle in practice emerged in some nineteenth-century cases involving laws enacted by territorial legislatures pursuant to congressional delegation.<sup>178</sup> From time to time, the argument was floated that Congress, having delegated its legislative power, could not alter the laws thus made after the initial delegation was conveyed. The Supreme Court eventually rejected this argument in the late 1800s, explaining that

[s]uch a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the Territories and all the departments of the territorial governments.<sup>179</sup>

This is, of course, precisely the circumstance that applies with delegations to the executive branch. Even as Congress delegates wide authority to adopt prescriptive rules, it retains “full and complete legislative authority.”<sup>180</sup> Delegation of that authority pursuant to ongoing legislative supervision and control presents no constitutional difficulty.

<sup>173</sup> *Id.* (emphasis added).

<sup>174</sup> Thomas Jefferson, Notes on the State of Virginia 182--83 (2d ed. Philadelphia, printed for Mathew Carey 1794) (emphasis added); see also *id.* at 181 (“[I]t was proposed in the house of delegates to create a dictator, invested with every power legislative, executive and judiciary, civil and military, of life and of death, over our persons and over our properties . . .”).

<sup>175</sup> James Otis, The Rights of the British Colonies Asserted and Proved 37 (Boston, Edes & Gill 1764), reprinted in Collected Political Writings of James Otis 119, 147 (Richard Samuelson ed., 2015).

<sup>176</sup> Daniel Shute, An Election Sermon (1768), in 1 American Political Writing, *supra* note 116, at 110, 117 (emphasis added); cf. Federal Farmer, An Additional Number of Letters from the Federal Farmer to the Republican, Letter X (May 2, 1788) [hereinafter Federal Farmer, Letter X, May 2, 1788], reprinted in 20 Documentary History, *supra* note 115, at 1006, 1011 (warning, in the context of a debate over low legislative salaries restricting representation to the wealthy, of “the same policy, which uniformly and constantly exerts itself to transfer power from the many to the few”).

<sup>177</sup> Even if it tried to, the familiar rule that one Congress cannot bind a future Congress would prevent its action from taking hold. See, e.g., Charles L. Black, Jr., Amending the Constitution: A Letter to a Congressman, 82 Yale L.J. 189, 191 (1972) (calling it “a thing which, on the most familiar and fundamental principles, so obvious as rarely to be stated, no Congress for the time being can do”).

<sup>178</sup> For more on delegations of this sort, which were routine in the early republic, see *infra* section III.A.1.

<sup>179</sup> *Nat’l Bank v. County of Yankton*, 101 U.S. 129, 133 (1880) (stating this despite the fact that “there was not an express reservation of power in Congress to amend the acts of the territorial legislature”); see also *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 45 (1890) (“But it is too plain for argument that this charter, or enactment, was subject to revocation and repeal by Congress whenever it should see fit to exercise its power for that purpose. Like any other act of the territorial legislature, it was subject to this condition.”). In *Murphy v. Ramsey*, the Supreme Court expressed the point with particular clarity: “In the exercise of this sovereign dominion [over territories], [the people of the United States] are represented by the government of the United States, to whom all the powers of government over that subject have been delegated . . . .” 114 U.S. 15, 44 (1885). The Court explained, however, that “in ordaining government for the Territories . . . all the discretion which belongs to legislative power is vested in Congress; and that extends, beyond all controversy, to determining by law . . . the form of the local government in a particular Territory, and the qualification of those who shall administer it.” *Id.*

<sup>180</sup> *County of Yankton*, 101 U.S. at 133.

### C. Rulemaking Pursuant to Statutory Authorization Was an Exercise of Executive Power

Now the flip side of the coin. When an administrative agency issues a generally applicable rule that regulates private conduct, has it acted in an executive capacity? Under the standard constitutional grammar of the Founding, the answer is yes. That's because executive power had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.<sup>181</sup>

In this respect, executive authority served as the culminating element of an uncomplicated tripartite scheme in which each of the "three grand immutable principles in good government" was enmeshed with the others as interlocking pieces of "complete" or "perfect" governance.<sup>182</sup> The full three-part sequence notionally comprised successive exercises of what the Founders called "legislative, judicial, and executive power."<sup>183</sup> First you issued instructions. Then you adjudicated the application of those instructions. Then you executed those instructions. It was really that simple.

This stylized sequence didn't always play out in exactly that order; certainly not every act of law execution requires the prior entry of court judgment. Moreover, any given official might hold more than one of the powers simultaneously, in which case the same person could both will *and* execute some plan, instruction, or intention.<sup>184</sup> And there was some taxonomic disagreement, with many commentators suggesting (probably rightly) that judicial power was best understood as a subset of the executive.<sup>185</sup> It was common ground, however, that no government was "complete" unless it had each of these three "powers of Legislation, Judgment, and Execution" over every subject matter within its prescriptive jurisdiction.<sup>186</sup>

The upshot for nondelegation debates is straightforward. Without exception of which we are aware, late eighteenth-century Anglo-American lawyers, academics, and politicians understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.<sup>187</sup> Here's Rutherforth again:

It belongs to the legislative power, considered as the common understanding, or joint sense of the body politic, to determine and direct what is right to be done: and it belongs to the executive power, considered as the common or joint strength of the same body, to carry what is so determined and directed into execution.<sup>188</sup>

On this historical understanding, 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. By the Founders' lights, *Mistretta v. United States* was thus rightly decided: Even if "rulemaking power originates in the Legislative Branch," it "becomes an executive function" at the moment it is "delegated by the Legislature to the Executive Branch."<sup>189</sup>

The mistake 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. While Madison didn't have our modern vocabulary for framing problems, it's hard to miss the point in his observation to Jefferson that "the boundaries between the Executive, Legislative & Judiciary powers, though in general so strongly marked in themselves, consist in many instances of mere shades of difference."<sup>190</sup>

<sup>181</sup> See Mortenson, *Royal Prerogative*, supra note 14, at 1173; Mortenson, *Executive Power Clause*, supra note 14, at 1273.

<sup>182</sup> Mortenson, *Executive Power Clause*, supra note 14, at 1319--21 (quoting A Bostonian, *A View of the Federal Government, Its Defects, and a Proposed Remedy*, *Bos. Indep. Chron.* (Aug. 10, 1786), reprinted in 1 *Am. Museum* 294, 295 (1787)).

<sup>183</sup> Oliver Ellsworth, *Speech in the Connecticut Convention* (Jan. 4, 1788), reprinted in 15 *Documentary History*, supra note 115, at 243, 248.

<sup>184</sup> Rutherforth explained the point: "Though we here consider the legislative and executive bodies as distinguished from one another . . . yet it is not necessary that these bodies should be different from one another in fact." Rutherforth, supra note 94, bk. II, ch. IV, § VII, at 294--95. "Whatever prudential reasons there may be," he continued, "there does not appear to be any reason in the nature of the thing, against supposing that both these powers may possibly be vested in the same person or in the same body." *Id.* at 295. The Constitution actually presents a version of this, giving the President a share of both legislative power (in the form of the veto) and executive power (in the Executive Power Clause). U.S. Const. art. I, § 7; art. II, § 1.

<sup>185</sup> See, e.g., Rutherforth, supra note 94, bk. II, ch. III, § VII, at 275 ("[Some] consider the civil power as consisting of . . . [three] parts, legislative, judicial and executive. Whereas, in fact, the province of judicial power is plainly to direct and apply . . . the public force of the society; and in this view it can be nothing else but a branch of the executive power."); see also Mortenson, *Royal Prerogative*, supra note 14, at 1238; Mortenson, *Executive Power Clause*, supra note 14, at 1320 & n.268.

<sup>186</sup> See John De Witt II, *Am. Herald*, Oct. 29, 1787, reprinted in 4 *Documentary History*, supra note 115, at 156, 159.

<sup>187</sup> See Mortenson, *Royal Prerogative*, supra note 14, at 1221--22, 1231--32, 1235, 1237--38; Mortenson, *Executive Power Clause*, supra note 14, at 1334--40.

<sup>188</sup> Rutherforth, supra note 94, bk. II, ch. III, § X, at 280.

<sup>189</sup> See *Mistretta v. United States*, 488 U.S. 361, 386 n.14 (1989) (affirming the constitutionality of the U.S. Sentencing Commission against a nondelegation challenge).

<sup>190</sup> Letter from James Madison to Thomas Jefferson: New York (excerpts) (Oct. 24 & Nov. 1, 1787) [hereinafter 1787 Letter from Madison to Jefferson], reprinted in 13 *Documentary History*, supra note 115, at 442, 446; see also *The Federalist* No. 37, at 182 (James Madison) (Ian Shapiro ed., 2009) ("[N]o skill in the science of government has yet been able to

The game-like quality of this unstable exercise in classification was explicitly surfaced by John Jay in an early draft of Federalist 64: “Some object because the Treaties so made are to have the Force of Laws, and therefore that the makers of them will so far have legislative power[.] This objection is a mere play on the word legislative.”<sup>191</sup>

Jay’s response to these objections was neither unresponsive nor unfair. To the contrary, his reference to “mere play” reflected a deep truth: Any particular government action can be simultaneously legislative (in the sense of issuing new instructions or rules) and executive (in the sense of implementing instructions from a legislative principal). Choosing between the two classifications is just a matter of framing relationships---and of playing with words. On this point, Justice Stevens’s argument concurring in the judgment in *Bowsher v. Synar* is as compelling now as the day it was written: “[G]overnmental power cannot always be readily characterized with only one of those three labels. On the contrary, as our cases demonstrate, a particular function, like a chameleon, will often take on the aspect of the office to which it is assigned . . . .”<sup>192</sup>

The Founders’ recognition of this point is most visible in two contexts: passing statutes and adopting treaties. In each context, an agent’s exercise of lawful authority to participate in the promulgation of obligatory rules was repeatedly described as “executive” with respect to the legislative principal’s instructions. Those descriptions squarely refute originalist claims that government action must be neatly slotted under a single font of government authority. Depending on the relationships you focused on, a given act could properly be classified as both legislative and executive at the same time.

### 1. *The Legislative Act of Passing Statutes Could Accurately Be Described as an Exercise of Executive Power*

To understand this indeterminacy, start with the Continental Congress. Like the federal government that later emerged under the U.S. Constitution, the national government under the Articles of Confederation was commonly understood to possess all three powers of a complete government---albeit in notoriously ineffective form.<sup>193</sup> As one Federalist summarized, “the old Congress [was] a single body, without a head, possessing and exercising, as the spur of the occasion might suggest . . . legislative, judicial and executive powers, blended and confused in the undistinguishable mass of their impotence.”<sup>194</sup>

The Continental Congress had some legislative power in the traditional sense of the authority to promulgate instructions and authorizations with the force of law.<sup>195</sup> It had some judicial power in the traditional sense of authority to

---

discriminate and define, with sufficient certainty, its three great provinces the legislative, executive and judiciary . . . .”).

<sup>191</sup> John Jay, Draft of Federalist No. 64 (Mar. 5, 1788), reprinted in 16 Documentary History, supra note 115, at 309, 317 (“Whatever name therefore be given to the obligation of Treaties or whether the making them be called the Exercise or legislative or of any other kind of authority certain it is that the people have a Right to dispose of the power to make them as they think expedient . . . .”). Jay’s purpose was to deflect criticism of the President’s role in the legislative act of treaty-making. *Id.* (responding to this criticism). For more on the classification of treaties---including the persistence of this criticism about the President’s role in treaty-making---see infra section II.C.2.

<sup>192</sup> 478 U.S. 714, 749--51 (1986) (Stevens, J., concurring in the judgment) (“Under . . . the analysis adopted by the majority today, it would . . . appear that the function at issue is ‘executive’ if performed by the Comptroller General, but ‘legislative’ if performed by the Congress”). Stevens isn’t arguing that the allocation of these responsibilities should be beyond judicial review; his point is that the Vesting Clause categories alone are incapable of doing the work the majority was asking them to do.

<sup>193</sup> As James Wilson put it, the Continental Congress had “some legislative, but *little executive* and no effective judicial power.” James Wilson, Address to the Pennsylvania Convention (Dec. 4, 1787) [hereinafter Wilson, Dec. 4, 1787 Address to the Pa. Convention], reprinted in 2 Documentary History, supra note 115, at 465, 474 (emphasis added); see also Edmund Randolph, Address to the Virginia Convention (June 6, 1788), reprinted in 9 Documentary History, supra note 115, at 970, 986 (“In it, one body has the Legislative, Executive, and Judicial powers: But the want of efficient powers has prevented the dangers naturally consequent on the union of these.”); Notes of James Madison on the Convention (June 16, 1787) (statement of Rep. Randolph), reprinted in 1 The Records of the Federal Convention of 1787, at 249, 256 (Max Farrand ed., 1911) [hereinafter 1 Farrand’s Records of the Federal Convention] (“[I]f the Union of these powers heretofore in Congs. has been safe, it has been owing to the general impotency of that body.”); Notes of William Paterson on the Convention (June 16, 1787) (statement of Rep. Randolph), reprinted in 1 Farrand’s Records of the Federal Convention, supra, at 264, 273 (“Congress possess both Legislation and Execution.”).

<sup>194</sup> Solon, Jr., Providence U.S. Chron., Feb. 25, 1790 [hereinafter Solon, Jr., Feb. 25, 1790], reprinted in 26 Documentary History, supra note 115, at 737, 738. As was often the case with discussions of the tripartite scheme, some commentators described only two truly fundamental powers, with the judicial essentially a logical subset of the executive. See, e.g., Theophilus Parsons, Address to the Massachusetts Convention (Jan. 23, 1788) [hereinafter Parsons, Jan. 23, 1787 Address to the Mass. Convention], reprinted in 6 Documentary History, supra note 115, at 1313, 1325 (“Under the confederation the whole power, executive and legislative, is vested in one body”); *Americanus V*, N.Y. Daily Advertiser, Dec. 12, 1787, reprinted in 19 Documentary History, supra note 115, at 397, 401 (“In . . . the present Congress, . . . the whole of the legislative and executive powers centre in a single body.”).

<sup>195</sup> See, e.g. Articles of Confederation of 1781, art. IX, paras. 1, 4 (empowering Congress to “have the sole and exclusive right and power” of “establishing rules for deciding in all cases, what captures on land or water shall be legal” and “regulating the trade and managing all affairs with the Indians, not members of any of the States”).

promulgate definitive resolutions of specific individual disputes, either in its own right<sup>196</sup> or by creating special bodies for the purpose.<sup>197</sup> And it had some executive power in the traditional sense of authority to execute legislative instructions by, as James Madison put it, “operat[ing] immediately on . . . persons [and] properties.”<sup>198</sup> (By the time of the convention, congressional delegates were executing the body’s legislation variously “by themselves,” through “committees” both ad hoc and formalized, through individual agents,<sup>199</sup> and through the creation and supervision of institutionalized “boards” of governance.<sup>200</sup>)

So far, so standard. Yet some Founders---not most, but some---confidently classified Congress in quite different terms: as a fundamentally executive body. And as a conceptual matter, they weren’t wrong to do so. Indeed, these alternative descriptions exemplify how the standard conceptual vocabulary could be deployed with perfect consistency to support entirely different classifications, in precisely the sense of intellectual “play” that John Jay described.<sup>201</sup>

<sup>196</sup> See, e.g. Articles of Confederation of 1781, art. IX, para. 2 (empowering Congress to be “the last resort on appeal in all disputes and differences . . . between two or more States concerning boundary, jurisdiction or any other causes whatever”); see also Deirdre Mask & Paul MacMahon, *The Revolutionary War Prize Cases and the Origins of Diversity Jurisdiction*, 63 *Buff. L. Rev.* 477, 489--94 (2015) (describing the resolution of prize appeals by congressional Committee of Appeals); William F. Swindler, *Seedtime of an American Judiciary: From Independence to the Constitution*, 17 *Wm. & Mary L. Rev.* 503, 514--17 (1976) (describing congressional adjudication of territorial disputes among states).

<sup>197</sup> See, e.g. Articles of Confederation of 1781, art. IX, para. 1 (empowering Congress to “have the sole and exclusive right and power of . . . appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures”); see also Mask & MacMahon, *supra* note 196, 494--97 (describing the creation of the Court of Appeal in Cases of Capture).

<sup>198</sup> Notes of James Madison on the Convention (June 28, 1787) (statement of Rep. Madison), reprinted in 1 Farrand’s *Records of the Federal Convention*, *supra* note 193, at 444, 447 (noting that the power “to operate immediately on . . . persons [and] properties” was already “the case in some degree as the articles of confederation stand; the same will be the case in (a far greater degree) under the plan proposed to be substituted” (footnote omitted)); cf. Notes of Robert Yates on the Convention (June 28, 1787) (statement of Rep. Madison), reprinted in 1 Farrand’s *Records of the Federal Convention*, *supra* note 193, at 453, 455 (“[T]he present powers of congress . . . may and do, in some cases, affect property, and in case of war, the lives of the citizens”); see also Notes of James Madison on the Convention (June 25, 1787) (statement of Rep. Madison), reprinted in 1 Farrand’s *Records of the Federal Convention*, *supra* note 193, at 397, 404 (“[T]he States . . . are the instruments upon which the Union must frequently depend for the support & execution of their powers.” (emphasis added)).

<sup>199</sup> Congress had enforcement agents of various kinds through much of its existence. A key issue during the impost debates of 1781 and 1783 was thus whether a comparable mechanism should be created for the direct collection of revenue. While the point was contested, Madison certainly thought so:

A requisition of Congress on the States for money is as much a law to them as their revenue Acts[,] when passed[,] are laws to their respective Citizens. If, for want of the faculty or means of enforcing a requisition, the law of Congress proves inefficient, does it not follow that in order to fulfil the views of the federal constitution, such a change [should] be made as will render it efficient?

25 *Journals of the Continental Congress, 1774--1789*, at 875 (Gaillard Hunt ed., 1922) (statement of Rep. Madison (1783)). For some other perspectives on the question, compare *id.* at 870 (statement of Rep. Wolcott (1783)) (noting that he “did not like” the proposal for revenue “to be collected by Congress”), with *id.* (statement of Rep. Wilson (1783)) (arguing that he “considered this mode of collection as essential” in agreement with Madison) and *id.* (statement of Rep. Hamilton (1783)) (noting that he was “strenuously of the same opinion” as Wilson). For a succinct summary of those debates in larger constitutional context, see generally Lance Banning, *James Madison and the Nationalists, 1789--1783*, 40 *Wm. & Mary Q.* 227 (1983).

<sup>200</sup> Solon, Jr., Feb. 25, 1790, *supra* note 194, at 738. The steadily increasing bureaucratization of Congress’s executive function reflected a broadly shared sense that “so Long as that respectable body persist in the attempt to execute as well as to deliberate on their business it never will be done.” Robert Morris to Silas Deane (Dec. 20, 1776), in 5 *Letters of Delegates to Congress, 1774--1789*, at 620, 626 (Paul H. Smith ed., 1976).

<sup>201</sup> See *supra* note 191 and accompanying text. Some of these dissenting claims were more pragmatic than grounded in any conceptual reframing. At least one commentator argued, for example, that the Congress’s judicial and executive capabilities were so ineffective that in fact its only true power was legislative. The Triumphs of Reason, Being a Dialogue on the New Constitution, Poughkeepsie Country J. (Mar. 11, 1788), reprinted in 20 *Documentary History*, *supra* note 115, at 853, 858 (“[T]hey had no judicial nor executive, no way to inforce their discretionary requisitions, either for money or for men, on the disobedient members, but by carrying arms against them and enkindling civil war.”). The ineffectiveness of congressional execution has led some scholars to assume mistakenly that contemporaneous descriptions of the Continental Congress’s executive power have to be read as references to its foreign affairs competences. See, e.g., Jack Rakove, *The Beginnings of National Politics* 383 (1979) [hereinafter Rakove, *Beginnings*] (“The idea that Congress was essentially an executive body persisted because its principal functions, war and diplomacy, were traditionally associated with the crown . . . .”); Michael McConnell, *The President Who Would Not Be King* (forthcoming 2020) (manuscript at 156) (on file with the *Columbia Law Review*) (“The ‘Executive rights’ of the Confederation Congress went far beyond law execution---indeed, the Congress did not *have* the power of law execution. (Law execution was performed by the states.)”); Martin Flaherty, *The Most Dangerous Branch*, 105 *Yale L.J.* 1725, 1772 (1996) (“[T]hey also gave Congress the

Take the recurring claim by a handful of commenters that Congress should be understood as “merely an executive body.”<sup>202</sup> How could that be, when the Confederation Congress undeniably had the powers of both “Execution” and “Legislation”?<sup>203</sup> Recall that the fundamental problem in any effort to draw stable “boundaries between the Executive, Legislative [and] Judiciary powers”<sup>204</sup> is the first step: deciding how to frame each actor’s functional role in the sequence of action that moves from decision to execution. From this perspective, the Continental Congress straddled exactly the taxonomic “boundar[y]” that Madison was describing. Focus on Congress’s authority to issue binding instructions alone, and the legislature is obviously exercising the legislative power, with its own officers (and potentially the several States) acting as executive agents.

But that is not the only way to think about the relevant institutional relationships. Instead of treating Congress as an uncaused cause, the separation of powers analysis can be framed around the anterior relationship between legislative delegates and their electoral constituencies. That alternative frame was fairly intuitive in a system of national government where states were viewed as the real principals in interest and where both the individual delegates and Congress as a whole were what John Adams described as “no more than attorneys, agents and trustees for the people.”<sup>205</sup> And in that sense, Congress and its delegates were acting in an executive capacity in carrying out the people’s will. As Republicus explained, “[C]ivil government . . . originates with the people . . . They form the compact, they prescribe the rules and they also enact them or delegate others to do it for them; who are . . . *their servants* and accountable to them and to them only [for] how they execute those trusts.”<sup>206</sup> In this sense, the Democratic Federalist was actually quite right to argue that “Congress . . . are merely an executive body.”<sup>207</sup>

To modern eyes, these are deeply counterintuitive descriptions. But the framing would have felt natural to the Founders, who were awash in centuries of debates about the nature of political representation, the criteria of legislative legitimacy, and the locus of sovereignty.<sup>208</sup> The idea was deeply embedded in British discourse, where A Craftsman, for example, observed that “the *House of Commons* is, properly speaking, no more than a *Court of Delegates*, appointed and commission’d by the whole diffused Body of the People of *Great-Britain* to speak in their sense, and act in their Name . . . .”<sup>209</sup> And A Freeman’s discussion of the ratification process exemplified this view of legislative service as a “merely . . . ministerial” charge “to be executed” without reference to the individual’s potentially diverging policy views:

---

power to make war and appoint and commission all military officers serving the nation---authority usually thought to be executive in nature”); Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 *Yale L.J.* 231, 275--77 (2001) (“Given that . . . diverse observers acknowledged that Congress enjoyed the executive power and that its Department of Foreign Affairs was executive in nature, there can be little doubt that Congress possessed the executive power over foreign affairs.”).

<sup>202</sup> See, e.g., *A Democratic Federalist*, *Pa. Herald*, Oct. 17, 1787, [hereinafter *A Democratic Federalist*, Oct. 17, 1787], reprinted in 13 *Documentary History*, supra note 115, at 386, 387; see also, e.g., *Federal Farmer*, Letter X, May 2, 1788, supra note 176, at 1008 (“[T]he present congress is principally an executive body.”); Letter from Thomas Burke to the North Carolina Assembly (Oct 25, 1779), in 14 *Letters of Delegates to Congress, 1774--1789*, at 108, 109 (Paul H. Smith ed., 1987) (“[T]he Nature of Congress which is a deliberating Executive assembly . . . .”). This framing of congressional power retained enough rhetorical resonance that at least one contemporary pamphlet was at pains to “refute” it during the ratification debates by adopting the internal frame rather than the external one. See *A Friend to Order*, *Balt. Md. Gazette*, Oct. 30, 1787, reprinted in 11 *Documentary History*, supra note 115, at 26, 26 (listing the Continental Congress’s legislative authorities to refute the “belie[f] that Congress are merely an *Executive body*.”).

<sup>203</sup> Notes of William Paterson on the Convention (June 16, 1787) (statement of Rep. Randolph), reprinted in 1 *Farrand’s Records of the Federal Convention*, supra note 193, at 270, 273.

<sup>204</sup> 1787 Letter from Madison to Jefferson, supra note 190, at 446; see also *The Federalist* No. 37, at 182 (James Madison) (Ian Shapiro ed., 2009).

<sup>205</sup> John Adams, “A Dissertation on the Canon and Feudal Law,” No. 3, *Bos. Gazette*, Sept. 30 1765, available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Adams/06-01-02-0052-0006> [<https://perma.cc/R749-H8KH>] (last visited Oct. 9, 2020) (“[T]he people have a right to revoke the authority, that they themselves have deputed, and to constitute abler and better agents, attorneys and trustees.”).

<sup>206</sup> Republicus, *Ky. Gazette*, Feb. 16, 1788, reprinted in 8 *Documentary History*, supra note 115, at 375, 377.

<sup>207</sup> *A Democratic Federalist*, Oct. 17, 1787, supra note 202, at 386, 387.

<sup>208</sup> If you’re going to read one thing on the background here, please make it Don Herzog’s *Happy Slaves*. See generally Don Herzog, *Happy Slaves: A Critique of Consent Theory* (1989) (critiquing the origins and development of the now-prevailing political theory that indispensable governmental legitimacy stems from the consent of the governed as free individuals).

<sup>209</sup> Caleb D’Anvers, No. 56, 2 *The Craftsman* 72, 72 (1727); see also, e.g., James Wilson, *Considerations on the Nature and Extent of the Legislative Authority of the British Parliament* (1774), reprinted in *Collected Works*, supra note 100, at 3, 9 (“The representatives are reminded whose creatures they are; and to whom they are accountable for the use of that power . . . .”).

[T]he people themselves are the *sole* and *final* deciders. Before *them* the proposed Federal Government is to be tried--by *them* it is to be approved or condemned, and *their* sentence is to be executed by their delegated servants in the Convention, who should act merely in an official or ministerial character.<sup>210</sup>

This framing was both reflected in and reinforced by a social practice “as old as . . . Parliament itself” of electoral constituencies issuing detailed voting instructions to their legislative delegates.<sup>211</sup> The same pattern quickly emerged in the Continental Congress, where all thirteen state legislatures issued such instructions to their delegates by the packetload.<sup>212</sup> Indeed, contemporaries observed that the “right of any State to instruct its delegates in Congress” was “founded in the same principle of freedom” as the “undoubted right” of the “constituents of every District . . . to instruct their representatives in both houses” of state government.<sup>213</sup> While the obligatory character of such instructions had long been contested, the key point for our purpose was never in serious dispute: Elected officials serving in the legislature could both accurately and meaningfully be described as the executive agents of an underlying electoral principal.<sup>214</sup>

While this characterization of legislative service most often appeared as a rhetorical flourish celebrating legislative accountability, the taxonomic question took center stage during the thoroughly substantive dispute about whether the young national government could and should bolster its tottering finances by imposing its own system of taxation. The Virginia congressman Arthur Lee led opponents of centralized taxation in claiming that a national impost would be “subversive of the fundamental principles of liberty.”<sup>215</sup> In essence, Lee’s reasoning relied on the widespread view that

<sup>210</sup> Freeman, Md. J., Feb. 19, 1788, reprinted in 12 *Documentary History*, supra note 115, at 578, 579.

<sup>211</sup> Paul Kelly describes the background thus:

The practice of instructing . . . had a history as old as that of Parliament itself. Originally M.P.s were no more than attorneys for their constituents, and accordingly came up to Parliament with instructions. But ideas of representation had changed, and by the end of the fifteenth century the medieval delegate of a locality was already being transformed into a representative of all the interests of the nation.

Paul Kelly, *Constituents’ Instructions to Members of Parliament in the Eighteenth Century*, in *Party and Management in Parliament, 1660--1784*, at 169, 170 (Clyve Jones ed., 1984) (footnote omitted); see also id. at 179 (noting also that colonial assemblies in North America “had begun with seventeenth-century assumptions, but then had reverted back to medieval forms of attorneyship in representation”).

For more on the theoretical relationship between suffrage, representation, and instructions, see generally Willi Paul Adams, *The First American Constitutions 228--53* (Rita Kimber & Robert Kimber trans., Rowman & Littlefield Publishers 2001) (1973); Marc W. Kruman, *Between Authority and Liberty: State Constitution Making in Revolutionary America 61--108* (1997); Gordon S. Wood, *The Creation of the American Republic 1776--1787*, at 163--96 (1998 ed. 1969). For terrific accounts of how the eighteenth-century American theory and practice of representational government varied from region to region, see generally Richard R. Beeman, *The Varieties of Political Experience in Eighteenth-Century America* (2004); David Hackett Fischer, *Albion's Seed: Four British Folkways in America 783--844* (1989). For more on the relationships between state legislatures and their constituencies, see generally Alison G. Olson, *Eighteenth Century Colonial Legislatures and Their Constituents*, 79 *J. Am. Hist.* 543 (1992); Bernard Bailyn, *Ideological Origins of the American Revolution 161--174* (Enlarged ed. 1992).

<sup>212</sup> See, e.g., 32 *Journals of the Continental Congress, 1774--1789*, at 237 (Roscoe R. Hill ed., 1936) (reproducing the text of instructions from the North Carolina legislature to their delegates to the Continental Congress (1787)); id. at 72--74 (New York (1787)); 28 *Journals of the Continental Congress, 1774--1789*, at 387 (John C. Fitzpatrick ed., 1933) (Massachusetts (1785)); 26 *Journals of the Continental Congress, 1774--1789*, at 332 (Gaillard Hunt ed., 1928) (South Carolina (1784)); 25 *Journals of the Continental Congress, 1774--1789*, at 591 (Gaillard Hunt ed., 1922) (Pennsylvania (1783)); id. at 968--69 (New Jersey and Delaware in 1783); 24 *Journals of the Continental Congress, 1774--1789*, at 139 (Gaillard Hunt ed., 1922) (Connecticut (1783)); 21 *Journals of the Continental Congress, 1774--1789*, at 937 (Gaillard Hunt ed., 1912) (Georgia (1781)); 17 *Journals of the Continental Congress, 1774--1789*, at 802 (Gaillard Hunt ed., 1910) (Maryland (1780)); 14 *Journals of the Continental Congress, 1774--1789*, at 617 (Worthington Chauncey Ford ed., 1909) (Virginia (1779)); 3 *Journals of the Continental Congress, 1774--1789*, at 298 (Worthington Chauncey Ford ed., 1905) (New Hampshire (1775)); id. at 274 (Rhode Island (1775)).

<sup>213</sup> Philodemus, *Conciliatory Hints, Attempting, by a Fair State of Matters, to Remove Party Prejudice* (1784), in 1 *American Political Writing*, supra note 116, at 606, 620 (calling this right “undoubted . . . (however speciously it may have been lately denied)”; see also id. at 607--08 (noting that inhabitants “had an unquestionable right to instruct their respective Delegates on . . . [any] subject” and that “no member of either house would have thought himself at liberty to disregard the instruction of a majority of his constituents”).

<sup>214</sup> See, e.g., James Madison, *Notes on Debates* (Jan. 28, 1783), in 6 *Papers of James Madison*, supra note 145, at 141, 147 (“[A]ltho’ the delegates who compose Congress more immediately represented, [and] were amenable to, the States from which they respectively come, yet, in another view, they owed a fidelity to the collective interests of the whole.”); Wilson, *Lectures on Law*, supra note 100, ch. 5, at 558 (“[A parliamentary act] is a contract, to which there are three parties; those, who constitute one of the three parties, not acting even in publick characters. A peer represents no one; he votes for himself; and when he is absent, he may transfer his right of voting to another.”).

<sup>215</sup> 25 *Journals of the Continental Congress, 1774--1789*, at 871 (Gaillard Hunt ed., 1922) (statement of Rep. Lee (1783)). For more on the dispute, see Banning, supra note 199, 241--52; Rakove, *Beginnings*, supra note 201, 325--29, 337--42. Also worth reading is Wesley Campbell’s insightful discussion of this dispute’s implications for modern commandeering doctrine. See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 *Yale L.J.* 1104, 1171--81 (2013).

liberty could not tolerate “placing the purse in the same hands with the sword”<sup>216</sup>—a standard trope for distinguishing between “the power of executing” and “the power of enacting.”<sup>217</sup>

Eventually, James Madison pushed back. He argued that Lee was conflating his frames by claiming, along with “sundry members[,] that Congress was merely an Executive body.”<sup>218</sup> That characterization, he conceded, may have captured something significant about the national government’s relationship to the states.<sup>219</sup> But the external question of where Congress’s authority came from had no bearing on the internal question of whether Congress as an institution could exercise the legislative power of issuing binding instructions.<sup>220</sup> For Madison, the answer was obvious:

[B]y the Articles of Confederation, Congs. had clearly & expressly the right to fix the quantum of revenue necessary for the public exigencies, & to require the same from the States . . . [T]he requisitions thus made were a law to the States, as much as the Acts of the latter for complying with them were a law to their individual members . . . .<sup>221</sup>

How could it be, he asked, that “these powers were reconcilable with the idea that Congress was a body merely Executive?”<sup>222</sup>

In response to Madison’s sally, two opponents of centralized revenue collection accused him of abandoning basic principles of democratic accountability. The intensity of their response may seem overwrought until you recall the central role played by social contract theory during debates about the legitimacy of the American rebellion. That’s why Lee averred that “the doctrine maintained by [Madison] was pregnant with dangerous consequences to the liberties of the confederated States.”<sup>223</sup> His colleague John Mercer went a step further, vowing that “if he conceived the foederal compact to be such as it had been represented he would immediately withdraw from Congress & do every thing in his power to destroy its existence.”<sup>224</sup> At this point, even Madison’s ally Alexander Hamilton seemed to concede that Congress was fundamentally executive on the traditional “instructions” frame, although he argued that institutional realities should mitigate Lee’s and Mercer’s anxieties.<sup>225</sup> The day’s session closed shortly thereafter, with the taxation proposals still unresolved.<sup>226</sup>

The point of this excursion into preconstitutional discourse about the nature of Congress’ power isn’t to figure out whose classification was best-suited to the substance of their debate. The point is that, conceptually speaking, both sides were right. When taken as an authoritative source of legally binding instructions, the Continental Congress was indeed acting in a legislative capacity. And 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.

## 2. *The Legislative Act of Treaty-making Could Accurately Be Described as an Exercise of Executive Power*

Treaties may work even better than legislation as an analogy for agency rulemaking. That’s because treaty-making typically involved not one but two government entities, with the second acting as an executive agent implementing instructions issued by the first.<sup>227</sup> The upshot of the analysis, though, was the same: When officials participated in the production of a legislative instrument, it was often perfectly accurate to describe their action as an exercise of executive power.

<sup>216</sup> 25 Journals of the Continental Congress, 1774--1789, at 871 (Gaillard Hunt ed., 1922) (statement of Rep. Lee (1783)); see also, e.g., *id.* at 897 (statement of Rep. Mercer (1783)) (arguing that “the liberties of [England] had been preserved by a separation of the purse from the sword” and that “he never [would] assent in [Congress] or elsewhere to the scheme of the Impost”).

<sup>217</sup> For some famous examples, see, e.g., James Madison, “Helvidius” Number 1 (Aug. 24, 1793), available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-15-02-0056> [<https://perma.cc/K7YY-EXY9>] (last visited Oct. 9, 2020) (“[A] great principle in free government . . . separates the sword from the purse, or the power of executing from the power of enacting laws.”); The Federalist No. 78, at 392 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“The Executive . . . holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse.”).

<sup>218</sup> 25 Journals of the Continental Congress, 1774--1789, at 907 (Gaillard Hunt ed., 1922) (statement of Rep. Madison (1783)).

<sup>219</sup> See *id.*

<sup>220</sup> See *id.*

<sup>221</sup> *Id.* at 908; see also *id.* at 907 (“[H]e did not conceive . . . that the opinion was sound that the power of Congress in cases of revenue was in no respect Legislative, but merely Executive.”). For Madison, this was a consistent theme. See, e.g., *id.* at 875 (“A requisition of Congress on the States for money is as much a law to them as their revenue Acts when passed are laws to their respective Citizens.”).

<sup>222</sup> *Id.* at 908.

<sup>223</sup> *Id.* at 909--10 (statement of Rep. Lee (1783)) (“[H]e had rather see Congress a rope of sand than a rod of Iron.”).

<sup>224</sup> *Id.* at 910 (statement of Rep. Mercer (1783)).

<sup>225</sup> *Id.* at 910 (statement of Rep. Hamilton (1783)) (going on to “point[] out the difference between the nature of the constitution of the British Executive [and] that of the U.S. in answer to Mr. Lee’s reasoning from the case of Ship money”).

<sup>226</sup> *Id.* at 911--12.

<sup>227</sup> See *infra* text accompanying notes 244--255.

Start with a descriptive point. Just like statutes, treaties were classified as legislative instruments---a fact that prompted some of the fiercest separation-of-powers attacks on the Constitution during all of ratification. The Antifederalist George Mason and the Federalist James Wilson didn't agree on much, but they both disliked the Treaty Clause for excluding the House from (and privileging the Senate in) a fundamentally legislative act.<sup>228</sup> As Wilson put it, this threatened "a perfect despotism" by consolidating "the powers of legislation, and Executive and judicial powers" in the Senate: "To make treaties legislative, to appoint officers Executive for the Executive has only the nomination---To try impeachments judicial."<sup>229</sup> This objection prompted the frequent demand to amend the Constitution so as to require the House to approve treaties, which would otherwise be an insufficiently controlled act of legislative authority.<sup>230</sup>

The logic behind classifying treaty-making as a legislative act was straightforward. Treaty-making created binding obligations and conferred legal powers pursuant to authoritatively formulated sovereign intent. That meant it was an exercise of one type of legislative power. On the international plane, for example, treaties were plainly "legislative,"<sup>231</sup> a "branch of legislative power,"<sup>232</sup> and part of "the law of nations."<sup>233</sup> But even from a domestic perspective, treaties were

---

<sup>228</sup> The legislative character of treaties was a particular hobby horse for Mason, and his widely republished *Objections to the Constitution* in many ways set the mold for this criticism. See George Mason, *Objections*, Mass. Centinel, Nov. 21, 1787, reprinted in 14 *Documentary History*, supra note 115, at 149, 151; see also George Mason: *Objections to the Constitution* (Oct. 7, 1787), in 8 *Documentary History*, supra note 115, at 40, 41--42 (introducing Mason's objections in the editor's note by describing its wide circulation in 1787, with just one version getting "reprinted in twenty-one newspapers from New Hampshire to South Carolina" and prompting a swift Federalist response). For others making the point, see, e.g., Richard Henry Lee, Letter to Edmund Randolph, Va. Gazette, Oct. 16, 1787, reprinted in 14 *Documentary History*, supra note 115, at 364, 367 (decrying the proposed Constitution because "the president and senate have all the executive and two thirds of the legislative power. In some weighty instances (as making all kinds of treaties which are to be the laws of the land) they have the whole legislative and executive powers"); Brutus, Va. Indep. Chron., May 14, 1788 [hereinafter Brutus, May 14, 1788], reprinted in 9 *Documentary History*, supra note 115, at 798, 801--02 ("[B]y the new plan of government, a treaty made by the president and senate shall be 'the supreme law of the land' . . . . That seems to be saying . . . that a part shall be greater than the whole--Or that though three branches must make the law, two may destroy it."); Cato VI, N.Y.J., Dec. 13, 1787, reprinted in 19 *Documentary History*, supra note 115, at 416, 419--20 (criticizing the proposed Constitution for granting the "important" power of making treaties, as "[c]omplete acts of legislation" which "affect your person and property, and even the domain of the nation," to "the senate and executive alone . . . without the aid or interference of the house of representatives").

<sup>229</sup> Notes of James McHenry on the Convention (Sept. 6, 1787) (statement of Rep. Wilson), reprinted in 2 *The Records of the Federal Convention of 1787*, at 529, 530 (Max Farrand ed., 1911) [hereinafter 2 *Farrand's Records of the Federal Convention*] (emphasis added). Wilson returned constantly to this point. See, e.g., Wilson, Dec. 4, 1787 Address to the Pa. Convention, supra note 193, at 491; Notes of James Madison on the Convention (Sept. 6, 1787) (statement of Rep. Wilson), reprinted in 2 *Farrand's Records of the Federal Convention*, supra, at 521, 522; Notes of James Madison on the Convention (June 1, 1787) (statement of Rep. Wilson), reprinted in 1 *Farrand's Records of the Federal Convention*, supra note 193, at 64, 66; cf. Notes of William Pierce on the Convention (June 1, 1788) (statement of Rep. Wilson), reprinted in 1 *Farrand's Records of the Federal Convention*, supra note 193, at 73, 73--74.

<sup>230</sup> See, e.g., Letter from George Mason to John Lamb (June 9, 1788), reprinted in 9 *Documentary History*, supra note 115, at 818, 822--23 (enclosing proposed amendments to the draft Constitution, including supermajority requirements in both houses of Congress to ratify some kinds of treaties); Notes of James Madison on the Convention (Sept. 7, 1787) (statement of Rep. Wilson), reprinted in 2 *Farrand's Records of the Federal Convention*, supra note 229, at 535, 538; *The Society of Western Gentlemen Revise the Constitution*, Va. Indep. Chron., May 7, 1788, reprinted in 9 *Documentary History*, supra note 115, at 769, 771.

<sup>231</sup> See Richard Morris, *Notes on the Constitution* (Jan.--July 1788), reprinted in 23 *Documentary History*, supra note 115, at 2531, 2534 (noting, in shorthand, that "the B[ri]t[ish] constitution was his Guide in [evaluating the draft Constitution]. and we All Know they are by No Means totally Sep[ara]te & Dist[inc]t. The King Ex[ecuti]ve Branch *Legislative He makes treatys*. The force of Laws. Jud[iciar]y Apptd. by him and Removeable by him" (emphasis added)).

<sup>232</sup> William Findley, Address to the Pennsylvania Convention (Dec. 3, 1787) [hereinafter Findley, Dec. 3, 1787 Address to the Pa. Convention], reprinted in 2 *Documentary History*, supra note 115, at 457, 459 ("Notwithstanding the legislative power in Article I, section 1, the power of treaties is given to the President and Senate. This is [a] branch of legislative power.").

<sup>233</sup> 1 William Blackstone, *Commentaries* \*257 (describing how, as part of "the law of nations," treaties are "binding upon the whole community" that made them).

typically described as legislative.<sup>234</sup> Both Blackstone<sup>235</sup> and the Continental Congress<sup>236</sup> agreed, and the proposition was central to Federalist defenses of the Supremacy Clause, including those offered by James Wilson,<sup>237</sup> James Madison,<sup>238</sup> George Nicholas,<sup>239</sup> and Cassius.<sup>240</sup>

Some contemporary commentators gestured at a more complex view under which some treaties had immediate domestic operation, but other treaties---perhaps those that violated individual rights,<sup>241</sup> conflicted with established domestic law,<sup>242</sup> or alienated sovereign territory<sup>243</sup>---might require legislative reception. But no one disputed that treaties served a legislative function as to the international actors they empowered and restrained. Certainly we have seen no suggestion in the founding records that treaty instruments were themselves “executive” or “judicial” in nature.

That brings us to a point that has confused some modern readers who misunderstand the grammar of governance at the Founding. Despite the consensus view that treaties were legislative, once in a while careful readers of the Founding

<sup>234</sup> This fact may seriously unsettle the historiography of modern foreign relations law, where it is conventional wisdom that eighteenth-century Anglo-American law gave treaties no domestic effect unless the legislature “received” them. See, e.g., 14 Sir William Holdsworth, *A History of English Law* 66 (A.L. Goodhart & H.G. Hanbury eds., 1964). For some important but tentative dissents, see Martin S. Flaherty, *History Right?: Historical Scholarship, Original Understanding, and Treaties as the “Supreme Law of the Land”*, 99 *Colum. L. Rev.* 2095, 2112 n.81, 2126--51 (1999) (concluding “that the domestic effect of treaties in British law in the eighteenth century remains understudied; that contrary to the assumptions made by American legal academics, the story is not neat at all; and that there is . . . evidence . . . to suggest that British practice was evolving from self-execution to non-self-execution”); Vasani Kesavan, *The Three Tiers of Federal Law*, 100 *Nw. U. L. Rev.* 1479, 1516--25 & n.199 (2006) (relying on secondary sources to conclude that “[t]he relevant British treaty-making practice seems to be one of partial non-self-execution”).

<sup>235</sup> 4 William Blackstone, *Commentaries* \*67 (“[T]he law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.”). Blackstone suggested that this principle extended to both civil and criminal prohibitions. See, e.g., 1 William Blackstone, *Commentaries* \*252--53 (noting that “hostility upon any nation in league with the king” remained criminal despite the repeal of the relevant statute, apparently because “it remains a very great offence against the law of nations, and punishable by our laws”).

<sup>236</sup> 32 *Journals of the Continental Congress, 1774--1789*, at 176, 178 (Roscoe R. Hill ed., 1936) (recording a letter from the continental congress to the states (1787)) (“When . . . a treaty is constitutionally made ratified and published by us, it immediately becomes binding on the whole nation and superadded to the laws of the land, without the intervention of State Legislatures.”).

<sup>237</sup> See James Wilson, *Address to the Pennsylvania Convention* (Dec. 3, 1787) [hereinafter Wilson, Dec. 3, 1787 *Address to the Pa. Convention*], reprinted in 2 *Documentary History*, supra note 115, at 457, 460 (“Treaties *in all countries* have the force of laws. 1st. Blackstone.” (emphasis added)).

<sup>238</sup> See James Madison, *Address to the Virginia Convention* (June 18, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1371, 1382 (“Are not treaties the law of the land in England? I will refer you to a book which is in every man’s hand---Blackstone’s *Commentaries*. It will inform you that treaties made by the King are to be the supreme law of the land.”).

<sup>239</sup> See George Nicholas, *Address to the Virginia Convention* (June 19, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1387, 1388--89 (quoting Blackstone to make the same point as Madison).

<sup>240</sup> Cassius I: To Richard Henry Lee, Esquire, Va. *Indep. Chron.*, Apr. 2, 1788, reprinted in 9 *Documentary History*, supra note 115, at 641, 644 (explaining at length that treaties were inherently “the supreme laws of the land” from the moment “when made”---not just in Britain and the colonies, but “in other countries” as well).

<sup>241</sup> See Peyton Randolph, *Address to the Virginia Convention* (June 18, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1371, 1385 (“The lives and properties of European subjects are not affected by treaties; which are binding on the aggregate community in its political social capacity.”); see also Patrick Henry, *Address to the Virginia Convention* (June 18, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1371, 1382 (arguing that “[t]o say that [treaties] are municipal, is to me a doctrine totally novel,” such that the draft Constitution’s treaty power “extended farther than it did in any country in the world”). Henry spent quite a while arguing that this claim was supported by a famous diplomatic dispute between England and Russia---a case that he appears unfortunately to have misunderstood. See *id.* at 1384--85.

<sup>242</sup> See Francis Corbin, *Address to the Virginia Convention* (June 19, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1387, 1392 (arguing that “the difference between a commercial treaty and other treaties” is that a “commercial treaty must be submitted to the consideration of Parliament”).

<sup>243</sup> See Brutus, May 14, 1788, supra note 228, at 798, 801 (“Do you think, Cassius, that the King by treaty can alienate the British dominions? Every man acquainted with the subject will, I believe answer NO. That in such case an act of parliament must give validity to the treaty.”); George Mason, *Address to the Virginia Convention* (June 19, 1788), reprinted in 10 *Documentary History*, supra note 115, at 1387, 1390 (“Will any Gentleman undertake to say, that the King, by his prerogative, can dismember the British empire?---Could the King give Portsmouth to France?---He could not do this without an express act of Parliament . . .”).

records will stumble across a comment describing the act of making treaties as an exercise of *executive* power.<sup>244</sup> After our earlier discussion of the “executive” quality of legislative service, the question this prompts should feel familiar: How could a legislative instrument be created by someone serving in a “merely” executive capacity? The answer should now feel familiar too: When a diplomat negotiates, drafts, and concludes a treaty, he is merely executing the instructions and authority that were earlier conveyed by his authorizing principal.<sup>245</sup> It is this frame that explains the Founders’ occasional description of the treaty power as the execution of a legislated intention.

As those speaking in this register emphasized, the act of treaty-making is executed---certainly in the first instance, and often conclusively---by a group of plenipotentiary representatives who negotiate, specify, and conclude the agreement. Indeed, the Continental Congress was constantly delegating either “full” or “partial” powers to diplomatic agents, along with instructions ranging from scant<sup>246</sup> to spectacularly comprehensive.<sup>247</sup> And so these plenipotentiaries were executive agents who were both empowered and restricted by binding directions from the legislative principal. As John Jay described,

I know that it is with Congress to give Instructions, and that it is my Business faithfully to execute and obey them--- If in their Opinion the Instruction in Question requires no Alteration I will cheerfully [sic] and punctually adhere to it, for upon this, as upon every other Occasion, I shall think it my Duty to observe their Orders, whatever may be the Light in which the Policy of them may appear to me.<sup>248</sup>

Rutherford explained why: “[T]he external executive power, in its own nature, is no more an independent power of

<sup>244</sup> The best known instance is an indeterminate fragment buried in The Dissent of the Minority of the Pennsylvania Convention. See The Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to their Constituents, Pa. Packet, Dec. 18, 1787, reprinted in 2 Documentary History, supra note 115, at 618, 634 (“And the senate has, moreover, various and great executive powers, viz.: in concurrence with the president general, they form treaties with foreign nations, that may control and abrogate the constitutions and laws of the several states.”). This description---with its emphasis on the Senate’s “form[ing]” them---is entirely consistent with the explanation that follows in main text. But the story is even more equivocal than that. First, the passage itself pivots from describing treaty formation as “executive” to emphasizing that the separation of powers problem emerges from its legislative effect. Second, at least one prominent signer of the Dissent repeatedly rejected this framing, not only during the Pennsylvania debates but in published writings after they ended. See William Findley, Hampden, Pittsburgh Gazette, Feb. 16, 1788, reprinted in 2 Documentary History, supra note 115, at 663, 666. Nor have we found any subsequent citation to this portion of the Pennsylvania Dissent, either to praise it or to refute it.

Turning to the record of debates only further complicates matters. Space does not permit a full explanation, but it suffices to note that in a series of three speeches by James Wilson and one by Thomas McKean, the pair of leading Federalists purported to exhaustively enumerate and rebut every criticism of the Constitution that had been made. Yet in all forty-nine pages of comprehensive, detailed rebuttal, neither Wilson nor McKean once described their opponents as arguing that treaties were conceptually executive. And they covered an enormous amount of ground: Wilson’s notes tracked thirty-five distinct Antifederalist objections in preparation for the first speech, twenty-two objections for the second speech, and nine objections for the third speech. See Wilson, Dec. 4, 1787 Address to the Pa. Convention, supra note 193, at 467--69, 485--86 n.2 (outlining Wilson’s first speech); James Wilson, Address to the Pennsylvania Convention (Dec. 11, 1787) (notes of Thomas Lloyd, morning session), reprinted in 2 Documentary History, supra note 115, at 550, 551--52, 571 n.2 (outlining Wilson’s second speech); James Wilson, Address to the Pennsylvania Convention (Dec. 11, 1787) (notes of Thomas Lloyd, afternoon session), reprinted in 2 Documentary History, supra note 115, at 571, 571--72 (outlining Wilson’s third speech and referencing at least 240 Antifederalist objections separately tracked by Wilson in the preceding days); see also Thomas McKean, Address to the Pennsylvania Convention (Dec. 10, 1787) (notes of Thomas Lloyd), 2 Documentary History, supra note 115, at 532, 533--35.

<sup>245</sup> As Baron de Montesquieu and Thomas Rutherford’s idiosyncratic division of executive power into foreign and domestic variants suggests, the institutional relationships involved in treaty-making have a distinctive tendency to surface this characteristic of representative government generally. See Mortenson, Royal Prerogative, supra note 14, at 1250--60 (explaining that Montesquieu and Rutherford are consistent with the standard treatment of executive power as not just subordinate to, but actually impotent without, instructions from the legislative power).

<sup>246</sup> See, e.g., 22 Journals of the Continental Congress, 1774--1789, at 67 (Gaillard Hunt ed., 1914) (1782) (informing the envoy to France that “[y]ou are . . . authorised [and] directed . . . to enter into such engagements with . . . with any particular state . . . or with any man . . . for the purpose of binding these United States to discharge the said loan with the interest”).

<sup>247</sup> See, e.g., 4 Journals of the Continental Congress, 1774--1789, at 215--20 (Worthington Chauncey Ford ed., 1906) (1776) (vesting delegation with “full powers” to treat with Canadians on topics up to and including union, pursuant to four pages of detailed “Instructions &c”); 8 Journals of the Continental Congress, 1774--1789, at 518--23 (Worthington Chauncey Ford ed., 1906) (1777) (reciting detailed charges for various European envoys); 28 Journals of the Continental Congress, 1774--1789, at 116 (John C. Fitzpatrick ed., 1933) (1785) (reciting detailed “[i]nstructions . . . to their Minister Plenipotentiary in Europe, for . . . speedily forming Treaties of Amity” with various nations).

<sup>248</sup> 29 Journals of the Continental Congress, 1774--1789, at 629 (John C. Fitzpatrick ed., 1933) (recording a report of John Jay from the Office of Foreign Affairs (1785)); see also 31 Journals of the Continental Congress, 1774--1789, at 484 (recording a speech of John Jay (1786)) (“I shall always remember that I am to be governed by the instructions, and that it is my duty faithfully to execute the orders of Congress.”); id. at 480 (“Whether Mr. Gardoqui would be content with such an Article, I cannot determine, my instructions restraining me from even sounding him respecting it.”).

acting without being controlled by the legislative than the internal executive power is.”<sup>249</sup>

The draft Constitution carried forward this expectation of legislative control, as with the emphasis in Federalist 64 that “the president *must*, in forming [treaties], act by the advice and consent of the Senate,”<sup>250</sup> or with Federalist 66’s assertion that it would be impeachable “misbehavior” for the President to “pervert[] the instructions” or otherwise “contraven[e] the views” of the Senate in treaty-making.<sup>251</sup> During the Massachusetts ratification debates, the Federalist Theophilus Parsons made a similar point,<sup>252</sup> arguing that the Senate would act “in their executive capacity” in two ways: “in *making* treaties and *conducting* the national negotiations [sic].”<sup>253</sup> Given that the Senate must conduct negotiations, the question for Parsons was whether it would do so as an independent decisionmaker entitled to make its own call on foreign policy.<sup>254</sup> And his answer was clear: absolutely not. Any legislative instruction enacted pursuant to the standard presentments process would bind the execution of American foreign policy.<sup>255</sup>

Which brings us back to the essential indeterminacy of characterizing government power. That indeterminacy is why the Federalist John Jay<sup>256</sup> agreed with the Antifederalist Brutus<sup>257</sup> that tail-chasing on the classification of treaties wasn’t very useful. That indeterminacy is why Hamilton thought that the classification of treaty-making involved “an arbitrary disposition” without much strict meaning.<sup>258</sup> And that indeterminacy is why the most prominent Federalist and the most prominent Antifederalist at the Pennsylvania ratification convention agreed that even though “the power of treaties . . . is [a] branch of legislative power,”<sup>259</sup> it was nonetheless true that the executive agent “makes treaties ministerially.”<sup>260</sup>

<sup>249</sup> Rutherforth, *supra* note 94, bk. II, ch. III, § VII, at 277.

<sup>250</sup> The Federalist No. 64, at 474 (John Jay) (Ian Shapiro ed., 2009) (emphasis added).

<sup>251</sup> The Federalist No. 66, at 492 (Alexander Hamilton) (Ian Shapiro ed., 2009). Hamilton, writing as Publius, made this argument in response to criticism that the Senate’s role in the impeachment process was ethically inconsistent with its role in the treaty process. *Id.* at 491 (“The convention might with propriety have meditated the punishment of the executive, for a deviation from the instructions of the senate . . .”).

<sup>252</sup> His intervention is all the more notable, since his ghost-written Essex Result has given aid and comfort to residuum theorists for years. Mortenson, *Royal Prerogative*, *supra* note 14, at 1250–51, n.347. As explained in previous work, the Essex Result (like the authors on which it drew) was plainly referring to nothing more than the execution of legislated instructions in different subject matter realms. *Id.* By the time Parsons spoke during ratification, it had been quite a while since he wrote for the town of Essex in 1778. *Id.* But as the discussion above demonstrates, he stood by his earlier application of Montesquieu and Rutherforth, including the logical implications of the executive power’s essential nature as an empty vessel. *Id.*

<sup>253</sup> Parsons, Jan. 23, 1787 Address to the Mass. Convention, *supra* note 194, at 1326 (emphasis added).

<sup>254</sup> See *id.*

<sup>255</sup> See *id.* In his view, “the representatives might tack any foreign matter to a money-bill, and compel the senate to concur.” *Id.* at 1327 (defending the Senate’s power to amend appropriations bills). Parson’s concern about coerced approval makes sense only if the enactment would then have binding legal force independent of the budget process. Cf. Luther Martin, *Genuine Information VI*, *Balt. Md. Gazette*, Jan. 15, 1788, reprinted in 15 *Documentary History*, *supra* note 115, at 373, 374 (making a similar point about the malleability of appropriations bills).

<sup>256</sup> The Federalist No. 64, at 328 (John Jay) (Ian Shapiro ed., 2009) (responding to the antifederalist criticism that “treaties . . . should be made only by men invested with legislative authority”). Jay observed that “whatever name be given to the power of making treaties,” it “surely does not follow that because they have given the power of making laws to the legislature, that therefore they should likewise give them the power to do every other act of sovereignty by which the citizens are to be bound and affected.” *Id.*

<sup>257</sup> Brutus’s disinterest in the framing game is particularly striking, since it came during an otherwise relentless and hyper-detailed attack on the Senate’s mixture of powers. Brutus XVI, *N.Y.J.*, Apr. 10, 1788, reprinted in 17 *Documentary History*, *supra* note 115, at 64, 68 (“[W]hether the forming of treaties, in which they are joined with the president, appertains to the legislative or the executive part of the government, or to neither, is not material.”).

<sup>258</sup> The Federalist No. 75, at 378–79 (Alexander Hamilton) (Ian Shapiro ed., 2009) (“[I]f we attend carefully to its operation, [the treaty power] will be found to partake more of the legislative than of the executive character, though it does not seem strictly to fall within the definition of either of them.”); see also *id.* at 378 (“Though several writers on the subject of government place that power in the class of executive authorities, yet this is evidently an arbitrary disposition . . .”). Hamilton is evidently referring to Montesquieu and Rutherforth. See Mortenson, *Royal Prerogative*, *supra* note 14, at 1250–60. Note where Hamilton lands, in two respects. Forced to choose among the categories, Hamilton says that if the power to make treaties is any one thing, it’s legislative. But Hamilton also made clear that once you start playing the “arbitrary” framing game, it’s entirely valid to describe the act of making treaties as executive in the technical sense as well.

<sup>259</sup> Findley, Dec. 3, 1787 Address to the Pa. Convention, *supra* note 232, at 459 (“Notwithstanding the legislative power in Article I, section 1, the power of treaties is given to the President and Senate.”); see also Notes of James McHenry on the Convention (Sept. 6, 1787) (statement of Rep. Wilson), reprinted in 2 *Farrand’s Records of the Federal Convention*, *supra* note 229, at 529, 530 (“To make treaties [is] legislative . . .”).

<sup>260</sup> Findley, Dec. 3, 1787 Address to the Pa. Convention, *supra* note 232, at 460 (arguing the same, with “laws” substituted for “treaties” as an obvious transcription error given the reference in the next sentence to impeachment for *treatymaking*); see also Wilson, Dec. 3, 1787 Address to the Pa. Convention, *supra* note 237, at 460 (“The President and Council in [the

There was no contradiction between these two perspectives; the same person could say both things and be right both times.<sup>261</sup> *Treaties* represented an act of legislative power, but *treatymaking* was executed “ministerially.”

\* \* \*

As an originalist matter, the Supreme Court has thus erred in denying “that agencies exercise ‘legislative power’ and ‘judicial power.’”<sup>262</sup> The Founders would have said that agencies absolutely wield legislative power to the extent they declare binding rules that Congress could have enacted as legislation.<sup>263</sup> At the same time, the Founders would have said--indeed, they did say--that such rulemaking also constitutes an exercise of the executive power to the extent it is authorized by statute.<sup>264</sup> It isn’t one or the other; it’s both. And on the dominant understanding at the Founding, there was no separation of powers problem either way.

### III. AFTER 1789

But what about political practice in the early republic? Did the Founders’ experience wrestling with delegation in the wild reveal that a nontextual limitation lurked in the interstices of the vesting clauses? The answer is no. A comprehensive survey of legislative practice in the First Congress, as well as a review of the legislative debates over delegation in the following decade, shows that the Founders’ practice reflected the political and legal theory on which they drew: Regulatory delegations were limited only by the will and judgment of the legislature.

This Part does not traffic in hypotheticals. We do not claim that it is impossible to conceive of a delegation that might have triggered resistance from a majority of the Founders, or that such resistance could not possibly have been expressed in a constitutional register. There were a variety of ideas in circulation from which aggressively inventive lawyers could have cobbled together nondelegation-style arguments: the abhorrence of tyranny, fears of concentrated authority, and a concern for the separation of powers. And it doesn’t take a radical legal realist to recognize that sufficiently virulent policy objections to a sufficiently awful proposal can sometimes find a legal vessel through which to express themselves.

But that’s not what happened. In actual practice, Congress after Congress delegated vast powers without even a whiff of constitutional protest.<sup>265</sup> Over the course of the 1790s, some intrepid souls began to raise nondelegation objections to legislation that they already opposed on independent grounds.<sup>266</sup> But they were not drawing on a well-established principle with a known pedigree that commanded broad assent. Still less could they point to a shared conceptual apparatus for distinguishing permissible from impermissible delegations. To the contrary, their arguments were scorned as opportunistic efforts to constitutionalize policy disputes--and they were rejected every time. The nondelegation doctrine simply was not an accepted feature of the constitutional fabric at the time of ratification. Its adoption long after the Founding was an act of constitutional creativity.

#### A. Delegations by the First Congress

When the First Congress thought particularized guidance important, it didn’t hesitate to specify statutory requirements in elaborate detail--as often happened, for example, with customs duties. But when Congress valued flexibility and discretion, it delegated expansive legislative authority without even spotting a constitutional issue, much less grappling with some solemn “obligation to decide” whether it was thereby “unconstitutionally divest[ing] itself of its legislative responsibilities.”<sup>267</sup>

---

Pennsylvania] Constitution *makes* the treaty ministerially” (emphasis added)).

To be crystal clear: a ministerial act was one performed subject to the direction of an authorizing principal. E.g. Locke, Second Treatise, *supra* note 66, ch. XIII, § 153, at 168 (“[T]he federative power . . . and the executive [are] both ministerial and subordinate to the legislative . . .”). That’s why an Antifederalist delegate tried to use this latter framing to partisan advantage: “If it is *ministerial*, the Senate are not here a legislature. Supreme laws cannot be made ministerially, but legislatively.” John Smilie, Address to the Pennsylvania Convention (Dec. 3, 1787), reprinted in 2 Documentary History, *supra* note 115, at 457, 460.

<sup>261</sup> The 1788 North Carolina ratifying convention may offer the best example of this flickering executive-legislative duality. Space here doesn’t suffice to trace the back-and-forth in any detail, but the delegates spent July 25 to July 28 shifting between these two equivalently accurate frames before James Iredell observed--with what surely must have been exasperation--that “[t]he power of making treaties is very important, and must be vested *somewhere* . . .” Hillsborough Convention (July 28, 1788), in 4 The Debates in the Several Conventions on the Adoption of the Federal Constitution 106, 128 (2d ed., Jonathan Elliot ed., 1836) (statement of Rep. Iredell) (emphasis added). The sense of the discussion seemed to settle on Federalist William Davie’s invocation of the standard formula: While treaties were indeed conceptually legislative, the power of making them had “in all countries and governments, been placed in the executive departments.” *Id.* at 119 (statement of Rep. Davie). And the convention finally moved on.

<sup>262</sup> *City of Arlington v. Fed. Comm’n Comm’n*, 569 U.S. 290, 304 n.4 (2013).

<sup>263</sup> See *supra* section II.B.; see also note 21 and accompanying text.

<sup>264</sup> See *supra* section II.C.

<sup>265</sup> See *infra* section II.A.

<sup>267</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting); see also *infra* notes 397--423 and accompanying text.

Indeed, a modern reader could be forgiven for wondering whether the First Congress went out of its way to violate each of the criteria that the *Gundy* dissent claims are deeply embedded in American constitutional tradition. Delegations in the First Congress authorized both interference with and outright deprivation of private rights. They vastly exceeded Justice Gorsuch's vision of ministerial fact-finding within the boundaries of crisply defined legal categories. They consolidated prescriptive and enforcement authority within sometimes-sprawling bureaucratic apparatuses. They delegated virtually unguided discretion on major policy questions touching on the most pressing governmental business of the age.<sup>268</sup> And the First Congress did so without betraying a hint of concern that doing so might violate the Constitution. Taken as a whole, Congress's comfort with delegations of all stripes cannot be squared with the *Gundy* dissent's claim that "[t]he framers understood . . . that it would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals."<sup>269</sup>

The point isn't merely that the statutes were enacted. It's that there are extensive records, mainly from the House of Representatives and running to nearly 2,000 pages, of the contentious constitutional disputes sparked by legislation in the First Congress.<sup>270</sup> The Founders were obsessed with their new charter and fought over it endlessly.<sup>271</sup> Some of those debates explored fundamental questions about Congress's authority and the separation of powers, as in the ferocious battles over the First Bank of the United States and the removal power.<sup>272</sup> Other constitutional debates were picayune, bordering on the bizarre. But they were ubiquitous.

Yet not one of the laws we discuss below prompted even a hint of worry that something like the nondelegation doctrine might preclude congressional action---even though, as Professor David Currie has said, the First Congress appeared "sincerely concerned not to do anything it was unauthorized to do."<sup>273</sup> It is this lack of evidence of even a half-hearted argument---knowing what we know about the constitutionalization of politics, about the uncertainty of the boundaries of even well-accepted legal theories, and above all else the tetchy pedanticism of many in the Founding generation---that speaks with such deafening force.

Before turning to the record, a word of clarification. While many of the delegations that we discuss empowered federal officials to craft rules of conduct for private persons---the key concern of the *Gundy* dissent and most originalist defenders of the nondelegation doctrine---a few did not.<sup>274</sup> Our discussion ranges more broadly because the Founders' definition of legislative power was much broader than Justice Gorsuch's.<sup>275</sup> If a nondelegation doctrine had existed at the Founding, it would have been plausibly implicated by any law that empowered federal officials to issue authoritative instructions, regardless of whether those instructions applied to private persons. Indeed, the first nondelegation objections that eventually did appear were directed at laws that did *not* allow for prescriptive rulemaking.<sup>276</sup>

### 1. *The Police Power in Federal Lands*

Begin with the fact that the First Congress delegated the entirety of its police power over federal lands to federal officers and judges. One of Congress's first acts was to "continue" the Northwest Ordinance, which authorized the territorial governor and judges to:

[A]dopt and publish in the district, such laws of the original States, criminal and civil, *as may be necessary, and best suited* to the circumstances of the district . . . ; which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the [territorial] legislature shall have authority to alter them as they shall think fit.<sup>277</sup>

<sup>268</sup> See Mashaw, *Recovering American Administrative Law*, supra note 12, at 1256, 1338--40 ("Some of these [Federalist-era] delegations were so broad that one might wonder whether a twenty-first century court would be able to find any standards guiding the exercise of administrative authority."). In the late 1960s, Kenneth Culp Davis offered a breezy overview of six delegations in the First Congress. See Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. Chi. L. Rev. 713, 719--20 (1969). But Davis overlooked the most significant delegations and significantly understated the quality of the evidence from the First Congress. See *id.*

<sup>269</sup> *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

<sup>270</sup> See, e.g., 1 *Annals of Cong.* 480--585 (1789) (Joseph Gales ed., 1834) (debating the removal power).

<sup>271</sup> See Currie, supra note 82, at 116 (describing how "[c]onstitutional questions cropped up in the House and Senate every time somebody sneezed" in the First Congress).

<sup>272</sup> See *infra* sections III.B.--C.

<sup>273</sup> Currie, supra note 82, at 120.

<sup>274</sup> See *infra* sections III.B.--C.

<sup>275</sup> See supra notes 70--77 and accompanying text.

<sup>276</sup> See *infra* section III.C.

<sup>277</sup> Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50--51 (1789) (emphasis added) (reprinting the full text of the Northwest Ordinance in the margin). For more on the Northwest Ordinance and comparable territorial delegations under the Continental Congress, see supra notes 139--140 and accompanying text.

As inherited by the First Congress, the delegation thus conveyed standardless discretion to craft the entire body of laws for the territories---including criminal laws, which modern-day originalists tell us raise especially acute nondelegation concerns.<sup>278</sup>

The First Congress did make some technical changes to “adapt the [ordinance] to the present Constitution.”<sup>279</sup> But did it impose newly determinate standards on a delegation that, for adherents of the modern nondelegation doctrine, must have been anathema to the new Constitution? Not remotely. Only three statutory adaptations were made. First, the new statute gave the President appointment and removal authority over territorial officers previously appointed by the Continental Congress.<sup>280</sup> Second, the statute required the governor to communicate with the President instead of with Congress.<sup>281</sup> Third, the statute authorized the territorial secretary to perform the governor’s duties in the event that the latter left office.<sup>282</sup> That’s it. So far as the First Congress was concerned, the Northwest Ordinance’s unbounded delegation of open-ended police powers presented no other constitutional problems.

These powers were not just granted; they were exercised. In 1795, Governor Arthur St. Clair and two territorial judges met in Cincinnati and “organized as a Legislature” to adopt a new suite of laws for the territory, selected from among the myriad laws on books in other states.<sup>283</sup> Published in what became known as Maxwell’s Code (named for the printer), the laws were described as having been “Adopted and Made by the Governour and Judges, in their Legislative Capacity”<sup>284</sup>--nothing apparently precluding the exercise of legislative functions by executive and judicial actors. (In letters, Governor St. Clair referred repeatedly to his and the judges’ role “[a]s legislators.”<sup>285</sup>) The laws they adopted ranged broadly, from the regulation of taverns to the probate of wills, and from liability for trespassing animals to the suppression of gambling.<sup>286</sup> If a man could be publicly whipped for violating a law that Congress never enacted, as the Code provided for petty larceny,<sup>287</sup> it’s hard to see what’s left of the objection that the Founders would never have tolerated delegations of authority to make important rules governing private rights.

Nor was this broad delegation of lawmaking power an oversight or one-off. Whenever early Congresses created new territories, they routinely empowered governors, judges, and territorial legislatures to pass “Rules and Regulations respecting the Territory,” subject to congressional oversight. They did so for the Southwest Territory (whose government “shall be similar to that which is now exercised in [the Northwest Territory]”),<sup>288</sup> the Mississippi Territory (“a government in all respects similar to that now exercised in [the Northwest Territory]”),<sup>289</sup> and the Indiana Territory (“a government in all respects similar to that provided” in the original law reauthorizing the Northwest Territory).<sup>290</sup> And in 1792, Congress specifically authorized “the governor and judges” of the Northwest Territory “to repeal their laws by them made, whensoever the same may be found to be improper.”<sup>291</sup> No one at the time protested the suggestion that nonlegislative actors “made” laws.

It won’t do for originalists to insist, without support in the Founding-era materials, that territories “do not exercise . . . the legislative or executive power of the United States”<sup>292</sup> and that the nondelegation doctrine therefore has no application to territorial delegations. Apart from a desire to deny the importance of sweeping Founding-era delegations, however, what justifies the claim? Congress’s Article IV authority to “make all needful Rules and Regulations respecting

<sup>278</sup> See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2144--45 (2019) (Gorsuch, J., dissenting).

<sup>279</sup> Act of Aug. 7, 1789, 1 Stat. at 51.

<sup>280</sup> *Id.* § 1, 1 Stat. at 53.

<sup>281</sup> *Id.* § 2, 1 Stat. at 53.

<sup>282</sup> *Id.*

<sup>283</sup> See St. Clair, 1795 Address, *supra* note 139, at 353--362.

<sup>284</sup> *Laws of the Territory of the United States Northwest of the Ohio, Adopted and Made by the Governour and Judges, in Their Legislative Capacity* (Cincinnati, printed by W. Maxwell 1796) [hereinafter Maxwell’s Code].

<sup>285</sup> See, e.g., Letter from Governor St. Clair to Judges Parsons and Varnum (Aug. 7, 1788), in 2 *The St. Clair Papers*, *supra* note 139, at 72, 77; see also Letter from Arthur St. Clair to George Washington (Aug. 1789), available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Washington/05-03-02-0339> [<https://perma.cc/8GPR-FA7E>] (last visited Oct. 9, 2020) (submitting “Copies of the Laws that have been adopted and published by him and the Judges, who are constituted temporary Legislators until the Inhabitants reach to a certain Number”).

<sup>286</sup> Maxwell’s Code, *supra* note 284, at 148 (“A Law concerning the Probate of Wills, written or nuncupative.”); *id.* at 157 (“A Law concerning trespassing Animals.”); *id.* at 206 (“A Law to Suppress Gambling.”).

<sup>287</sup> *Id.* at 41 (“A Law for the trial and punishment of Larceny.”).

<sup>288</sup> Act of May 26, 1790, ch. 14, § 1, 1 Stat. 123, 123 (incorporating by reference the Act of Apr. 2, 1790, ch. 6, 1 Stat. 106, 108, which provided that North Carolina law would govern “until the same shall be repealed, or otherwise altered by the legislative authority of the said territory”).

<sup>289</sup> Act of Apr. 7, 1798, ch. 28, § 3, 1 Stat. 549, 550.

<sup>290</sup> Act of May 7, 1800, ch. 41, § 2, 2 Stat. 58, 59.

<sup>291</sup> Act of May 8, 1792, ch. 42, § 2, 1 Stat. 285, 286.

<sup>292</sup> Wurman, *Nondelegation*, *supra* note 16 (manuscript at 49).

the Territory” is also legislative---just like the powers enumerated in Article I.<sup>293</sup> And the Article IV territorial authority is assigned to Congress alone---again, just like the powers enumerated in Article I.<sup>294</sup> If originalists are right that Congress can’t delegate its Article I authority to “regulate Commerce,” it should follow that Congress also can’t delegate its Article IV power to make “needful Rules and Regulations respecting the Territory.” And yet, without apparent objection, the re-adopted Northwest Ordinance delegated that power in its entirety to territorial officials.

Had the Founders collectively believed (or even if they had reasoned their way to the view) that the nondelegation doctrine had less purchase when it came to territorial legislation, surely someone, somewhere, would have said as much. To our knowledge, however, no one ever did. Nor will it do to look to Supreme Court case law that came a century or more after the Founding to insist that Congress faced fewer restrictions on its authority to legislate when it comes to the territories.<sup>295</sup> The Supreme Court’s conclusion didn’t spring from a careful review of Founding-era evidence, but from case law developed in the late nineteenth century.<sup>296</sup> It’s anachronistic to project those later views onto the Founders.

What’s more, the practice of delegating broad authority to local legislatures finds further support in those laws that were adopted pursuant to Congress’s power to “exercise *exclusive* Legislation [in the capital district] in all Cases whatsoever.”<sup>297</sup> If any provision of the Constitution were to prohibit delegations of legislative authority, it would be one vesting “exclusive” power in Congress. Yet the very First Congress delegated to three commissioners, “under the direction of the President,” the power to define the “proper metes and bounds” of the capital district, with little more guidance than that it had to be put somewhere along a nearly 100-mile stretch of the Potomac.<sup>298</sup> At that point, “the district so defined, limited and located, shall be deemed the district accepted by this act, for the permanent seat of the government of the United States.”<sup>299</sup> The commissioners were also authorized to buy “such quantity of land” east of the Potomac “as the President shall deem proper for the use of the United States” and to “provide suitable buildings” to accommodate Congress, the president, and other public offices.<sup>300</sup> To pay for all “necessary” expenses of moving the government to the newly established district, the law established an indefinite and open-ended appropriation.<sup>301</sup> “From the constitutional viewpoint,” as Currie writes, “the most noteworthy feature of the legislation was the breadth of its delegation of authority.”<sup>302</sup>

But Congress didn’t stop there. In 1802, it delegated *plenary* authority to the district’s mayor and council over subjects ranging from commerce to the arts, health policy to private property, nuisance law to the laying and collecting of taxes,<sup>303</sup>

<sup>293</sup> See U.S. Const. art. IV, § 3, cl. 2 (“The *Congress* shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .” (emphasis added)).

<sup>294</sup> See *id.* at § 3.

<sup>295</sup> See, e.g., *Dorr v. United States*, 195 U.S. 138, 142--43, 149 (1904) (holding that Congress was not constitutionally compelled to set up a system of laws protecting the right to a trial by jury in the territories); see also *Cincinnati Soap Co. v. United States*, 301 U.S. 308, 323 (1937) (“In dealing with the territories, . . . Congress in legislating is not subject to the same restrictions which are imposed in respect of laws for the United States considered as a political body of States in union.”).

<sup>296</sup> Cf. Sarah H. Cleveland, *Powers Inherent in Sovereignty: Indians, Aliens, Territories, and the Nineteenth Century Origins of Plenary Power Over Foreign Affairs*, 81 *Tex. L. Rev.* 1, 163--250 (2002) (charting the emergence of claims of plenary authority over the territories).

<sup>297</sup> U.S. Const. art I, § 8, cl. 17 (emphasis added).

<sup>298</sup> See Act of July 16, 1790, ch. 28, §§ 1--2, 1 Stat. 130, 130. The statute said that the new district should be located “on the river Potomac, at some place between the mouths of the Eastern Branch and Connogochegue.” *Id.* § 1, 1 Stat. at 130. The Potomac’s Eastern Branch is what’s now called the Anacostia River, and Connogochegue Creek splits near what’s now Williamsport, Maryland. See Map from Connogochegue Creek to Anacostia River, GoogleMaps, <https://www.google.com/maps/@39.2520119,-77.2665511,10.92z> (on file with the *Columbia Law Review*) (last visited Oct. 10, 2020). An earlier version of the proposal was met with an objection from Representative Tucker: “I have no want of confidence in the judgment and discretion of the President, or those whom he may employ; but I never can agree that they shall exercise their judgment or discretion in a business to which the two branches of the Legislature alone are competent.” 1 *Annals of Cong.* 879 (1789) (Joseph Gales ed., 1834) (statement of Rep. Tucker). Tucker appears to have been making a constitutionally inflected policy argument, not insisting on a constitutional impediment to the delegation. In any event, Congress passed the law over his objections. See *id.* at 880.

<sup>299</sup> Act of July 16, 1790 § 2, 1 Stat. at 130; see also Act of Mar. 3, 1791, ch. 17, 1 Stat. 214, 214 (providing “that it shall be lawful for the President to make any part of” a defined geographical area “a part of the said district”).

<sup>300</sup> Act of July 16, 1790 § 3, 1 Stat. at 130.

<sup>301</sup> See Act of May 3, 1802, ch. 53, § 7, 2 Stat. 195, 197 (granting power to “pass all ordinances necessary to give effect and operation to all the powers vested in the corporation of the city of Washington”).

<sup>302</sup> Currie, *supra* note 82, at 109.

<sup>303</sup> See Act of May 3, 1802 § 7, 2 Stat. at 197. For the initial organization of the district, see Act of Mar. 3, 1801, ch. 24, 2 Stat. 115, 115--16; Act of Feb. 27, 1801, ch. 15, 2 Stat. 103, 103--08.

and bolstered all that with what amounted to a municipal Necessary and Proper Clause.<sup>304</sup> St. George Tucker, a staunch Jeffersonian, was bitterly opposed. The next year, he observed that “[i]f the maxim be sound, that a delegated authority cannot be transferred to another to exercise, the project here spoken of will probably never take effect.”<sup>305</sup> As events showed, of course, the maxim wasn’t sound. “In point of fact,” Justice Story later wrote, “the three cities within [the capital district] possess and exercise a delegated power of legislation under their charters, granted by Congress, to the full extent of their municipal wants, *without any constitutional scruple, or surmise, or doubt.*”<sup>306</sup> Specification and detail indeed.

## 2. Commercial Regulations

To foster industrial innovation and cultivate the young nation’s economy, the Constitution gave Congress the power to “secur[e] for limited Times to . . . Inventors the exclusive Right to their . . . Discoveries.”<sup>307</sup> The First Congress promptly delegated this crucial power over the commercial life of the United States---in its entirety---to the executive branch. In its very first patent law, Congress gave the Secretary of State, the Secretary of War, and the Attorney General (“or any two of them”) the power to grant patents to new inventions.<sup>308</sup> The only policy guidance---if it can be called that---was that they must “deem the invention or discovery sufficiently useful and important” to warrant protection for up to fourteen years.<sup>309</sup> Congress left the three cabinet officials at liberty to decide for themselves what counted as “sufficiently useful and important” to warrant the issuance of a legally enforceable monopoly, and for how long.<sup>310</sup>

The executive branch was thus empowered to prescribe, recognize, and adjust the private rights of both inventors and putative infringers. Federal officers were given precisely the kind of “blank check to write a code of conduct governing private conduct” that originalists decry.<sup>311</sup> Nor was writing that code a trivial matter of filling in details. As Thomas Jefferson reflected some years after serving on the first patent board: “I know well the difficulty of drawing a line between the things which are worth to the public the embarrassment of an exclusive patent, and those which are not,” and “saw with what slow progress a system of general rules could be matured.”<sup>312</sup> Nonetheless, Jefferson said that several rules had in fact been “established by that board.”<sup>313</sup> A patent wouldn’t issue, for example, for a change in the application of an earlier invention (“a Chain-pump for raising water might be used for raising wheat”), or a change of material (“making a ploughshare of cast rather than of wrought iron”), or a mere change in form (“a round hat instead of a three square”).<sup>314</sup> None of these rules were in the statute. They were, instead, the creations of a patent board that crafted general rules in response to a broad congressional delegation.

<sup>304</sup> See Act of May 3, 1802 § 7, 2 Stat. at 197. In debates over the 1801 legislation, Representative Nathaniel Macon said, without much conviction, that he “doubted whether the Legislature of the Union could at all delegate powers to this local government.” 10 Annals of Cong. 1000 (1801) (statement of Rep. Macon). Congress apparently disagreed.

<sup>305</sup> 1 St. George Tucker, *Blackstone’s Commentaries: With Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia* app. at 277--78 (Philadelphia, William Young Birch & Abraham Small 1803) (describing the plan as “in contemplation to establish a subordinate legislature, with a governor to preside over the district”). This is the earliest argument resembling the “*potestas delegata non potest delegare*” principle that we have found in a governance context, notwithstanding some originalists’ insistence that it served as a central organizing principle of eighteenth-century Anglo-American constitutional law. See, e.g., Hamburger, *Is Administrative Law Unlawful?*, supra note 9, at 386; Lawson & Seidman, supra note 8, at 114--17; see also supra notes 107--109 and accompanying text. And it was *rejected*.

<sup>306</sup> 2 Joseph Story, *Commentaries on the Constitution*, supra note 95, § 1223, at 130--31 (1833) (emphasis added) (noting Tucker’s concern before brushing it aside as both wrong and idiosyncratic).

<sup>307</sup> U.S. Const. art. I, § 8, cl. 8.

<sup>308</sup> Patent Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110.

<sup>309</sup> *Id.*

<sup>310</sup> *Id.*; see also Herbert Hovenkamp, *The Emergence of Classical American Patent Law*, 58 *Ariz. L. Rev.* 263, 268 (2016) (“The statute provided almost nothing in the way of substantive or procedural review standards.”); Edward C. Walterscheid, *Patents and the Jeffersonian Mythology*, 29 *J. Marshall L. Rev.* 269, 280 (1995) (“The patent board was thus left almost entirely to its own devices in implementing the Act.”).

<sup>311</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting).

<sup>312</sup> Letter from Thomas Jefferson to Isaac McPherson (Aug. 13, 1813), available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> [<https://perma.cc/NNA4-S248>] (last visited Nov. 5, 2020)..

<sup>313</sup> *Id.*

<sup>314</sup> *Id.* Among other things, the first patent board also had to devise “the appropriate means of establishing priority of invention between conflicting claimants because the Act of 1790 did not provide any guidance.” Walterscheid, supra note 310, at 284. Though the board could have opted for a first-to-file approach, it declined to do so. *Id.*

### 3. *Commerce and Other Interactions with Native Americans*

“Nothing,” writes Gordon Wood, “preoccupied the Federalist administration more than having to deal with th[e] native peoples” of the trans-Appalachian West.<sup>315</sup> Committed to the orderly settlement of the territories, and fearful of provoking an Indian war, members of Congress generally shared George Washington’s view that:

[t]o suffer a wide extended Country to be overrun with Land jobbers---Speculators, and Monopolizers or even with scatter’d settlers is . . . inconsistent with that wisdom & policy which our true interest dictates, or that an enlightened People ought to adopt; and besides, is pregnant of disputes, both with the Savages, and among ourselves, the evils of which are easier, to be conceived than described . . . .<sup>316</sup>

At the same time, legislators recognized that properly regulated trade (“without fraud, without extortion”<sup>317</sup>) could serve as an instrument to foster good relations with the Indian tribes. Washington had long argued for a bureaucratic response to this problem of regulatory calibration: “[N]o person should be suffered to Trade with the Indians without first obtaining a license, and giving security to conform to such rules and regulations as shall be prescribed; as was the case before the War.”<sup>318</sup>

The First Congress adopted an aggressive version of Washington’s 1783 proposal, banning not only “trade” but any kind of “intercourse with the Indian tribes, without a license” granted by the superintendent of the territorial department.<sup>319</sup> In this, it mimicked the pre-constitutional regime, which required a license not only to “trade with” but simply to “reside among . . . any Indian nation within the territory of the United States.”<sup>320</sup>

Regulations issued by the executive branch would “govern[]” any person receiving such a license “in all things touching the said trade and intercourse.”<sup>321</sup> Yet the law said nothing---not one word---about the content of these rules, regulations, or waivers, much less anything approximating what Justice Gorsuch called “‘sufficiently definite and precise’ standards ‘to enable Congress, the courts, and the public to ascertain’ whether Congress’s guidance has been followed.”<sup>322</sup> Instead, the law instructed the President to build a framework from scratch, in his complete discretion: Licensees would be “governed . . . by *such rules and regulations as the President shall prescribe*.”<sup>323</sup> The statute even authorized the President to waive the licensing requirement entirely for Indian tribes “surrounded in their settlements by the citizens of the United States,” with no requirement other than that he “deem it proper.”<sup>324</sup>

President Washington had no compunction about exercising these newly granted powers over private conduct. In 1790, he issued rules creating “two departments” for regulating the Indian trade, the southern department of which explicitly contained areas “within the limits of the U. States.”<sup>325</sup> Among other things, the rules said that only U.S. citizens could be licensed; that the departmental superintendents may “assign the limits within which each trader shall trade”; and that only goods “necessary for the comfort & convenience of the Indians”---not “Distilled Spirits”---could be sold directly in Indian towns and villages.<sup>326</sup>

<sup>315</sup> Gordon S. Wood, *Empire of Liberty* 123, 114--23 (2009). For more on the political centrality of this question in American politics, see generally Reginald Horsman, *The Frontier in the Formative Years* (1975); Richard White, *The Middle Ground: Indians, Empires, and Republics in the Great Lakes Region* (1991).

<sup>316</sup> Letter from George Washington to James Duane (Sept. 7, 1783), available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Washington/99-01-02-11798> [<https://perma.cc/3VJV-WVCZ>] (last visited Oct. 10, 2020).

<sup>317</sup> Matthew L.M. Fletcher, *The Original Understanding of the Political Status of Indian Tribes*, 82 *St. John’s L. Rev.* 153, 171 (2008) (quoting Washington’s 1793 address to Congress).

<sup>318</sup> Letter from George Washington to James Duane, *supra* note 316.

<sup>319</sup> Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137. In the same law, Congress declared invalid any sales of Indian land that were not made pursuant to treaty. *Id.* § 1, 1 Stat. at 138. As Matthew Fletcher has explained, Congress thus guaranteed (or tried to, anyhow) that every parcel of land purchased from the Indians “had to pass through the federal government’s hands.” Fletcher, *supra* note 317, at 155.

<sup>320</sup> 30 *Journals of the Continental Congress, 1774--1789*, at 425, 426--27 (John C. Fitzpatrick ed., 1934) (recording “An Ordinance for the Regulation of Indian Affairs” (1786)) (creating a bureaucracy headed by “superintendants” vested with authorities ranging from administering residence permits to managing stores and gifts).

<sup>321</sup> Act of July 22, 1790 § 1, 1 Stat. at 137.

<sup>322</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Yakus v. United States*, 321 U.S. 414, 464 (1944)).

<sup>323</sup> Act of July 22, 1790 § 1, 1 Stat. at 137 (emphasis added); see also Act of Mar. 1, 1793, ch. 19, § 1, 1 Stat. 329, 329 (amending the law but retaining the delegation).

<sup>324</sup> Act of July 22, 1790 § 1, 1 Stat. at 137.

<sup>325</sup> Letter from George Washington to Henry Knox, (Aug. 13, 1790), available at Nat’l Archives: Founders Online, <https://founders.archives.gov/documents/Washington/05-06-02-0119> [<https://perma.cc/B6XT-UND2>] (last visited Oct. 10, 2020) (reprinting Timothy Pickering’s copy of regulations issued pursuant to the delegation).

<sup>326</sup> *Id.*

The President's regulations thus specified *who* could trade *what* and *where*, including within the borders of the United States.<sup>327</sup> These were rules that Congress chose not to fashion itself---indeed, it declined even to hint at what their content ought to be. Yet there is no evidence in the historical record that anyone at any point raised anything resembling a nondelegation objection to the arrangement.

Philip Hamburger dismisses the licensing regime for Indian trade for the curious reason that "persons, such as Indian traders, were not entirely subject to domestic law."<sup>328</sup> But it's a tautology that a nation's laws do not apply to someone not subject to those laws. As to the citizens and aliens to whom the law *did* apply---the law said that "*no person* shall be permitted to carry on any trade or intercourse with the Indian tribes, without a license"<sup>329</sup>---the President was authorized to create binding rules for private conduct. Hamburger seems to have in mind an exception to the nondelegation doctrine for "cross-border or offshore problems."<sup>330</sup> But many Indian tribes were located within the established borders of the United States, and trade with them was banned too.<sup>331</sup> To our knowledge, no one in the Founding era ever suggested that legislative power could be delegated more freely in the borderlands. It's a post hoc rationale offered by modern-day originalists to explain away contrary evidence, not a historically grounded distinction.

#### 4. *Social Welfare and Entitlement Benefits*

In the late eighteenth century, the most politically salient benefits programs targeted members of the army. For those currently in service, Congress authorized the president to identify any of his soldiers who were "wounded or disabled while in the line of his duty in public service," and put them 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."<sup>332</sup> Apart from placing upper limits on the size of awards, however, Congress offered no guidance of any kind. Nothing about how to decide eligibility; nothing about how the amount should be calculated; nothing about how it should be paid out; nothing about how its availability should be assessed; nothing about how to work out competing claims to a limited source of funds.<sup>333</sup> The delegation was especially noteworthy given that it was typically legislative assemblies---not the executive branch---that took responsibility for deciding who should be placed on the pension lists.<sup>334</sup>

For veterans wounded in the Revolutionary War, the First Congress created an even more elaborate structure of delegated authority, grounded in a pension scheme originally created by the Continental Congress.<sup>335</sup> Shortly after the outbreak of hostilities, the pre-constitutional legislature had promised pensions of half-pay for life to soldiers who lost a limb or were "otherwise so disabled as to prevent their serving in the army or navy, or getting their livelihood."<sup>336</sup> Those with lesser injuries were offered pensions "as shall be judged adequate" by those to whom this authority was delegated.<sup>337</sup> The cash-strapped Continental Congress, however, couldn't finance or oversee those pensions itself, and exhorted the states to do so.<sup>338</sup> Though the rules governing pensions were adjusted several times prior to ratification,<sup>339</sup> the assignment of control to the states---and more specifically to their legislatures---remained in place. "Consequently," as one commentator has noted wryly, "the continental pension provision was just as effective as the individual states chose to make it, and in many instances they performed the administrative duties assigned to them very imperfectly."<sup>340</sup>

<sup>327</sup> See Act of July 22, 1790 § 1, 1 Stat. at 137; see also Act of Mar. 1, 1793, ch. 19, § 1, 1 Stat. 329, 329.

<sup>328</sup> Hamburger, *Is Administrative Law Unlawful?*, supra note 9, at 105.

<sup>329</sup> Act of July 22, 1790 § 1, 1 Stat. at 137 (emphasis added).

<sup>330</sup> See Hamburger, *Is Administrative Law Unlawful?*, supra note 9, at 105. Gary Lawson dismisses the delegation on similar grounds: that "the 'executive Power' [may] ha[ve] a sufficiently broad sweep in the area of foreign affairs . . . to permit Congress to give the President more discretion in this context than in others." Lawson, supra note 3, at 401--02. As one of us has explained elsewhere, however, the Founders did not in fact believe that the "executive Power" had an intrinsically "broad sweep in the area of foreign affairs." Mortenson, *Royal Prerogative*, supra note 14, at 1173--74; Mortenson, *Executive Power Clause*, supra note 14, at 1367.

<sup>331</sup> Take the Iroquois in New York, for example. See Alan Taylor, *The Divided Ground* 118 (2006) (reporting that about 6,000 Iroquois lived in New York in 1784).

<sup>332</sup> Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121.

<sup>333</sup> *Id.*

<sup>334</sup> See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 *La. L. Rev.* 625, 637 (1985) ("[A]t the time of the establishment of the Constitution, the 'legislative model' of claims determination was a firmly established part of the American political tradition at both the state and national levels.").

<sup>335</sup> See 5 *Journals of the Continental Congress, 1774--1789*, at 702--04 (Worthington Chauncey Ford ed., 1906) (recording the pension scheme as of August 1776) [hereinafter *August 1776 Pension Scheme*].

<sup>336</sup> *Id.*; see also 12 *Journals of the Continental Congress, 1774--1789*, at 953--54 (Worthington Chauncey Ford ed., 1908) (recording the 1778 extensions of the August 1776 pension benefits).

<sup>337</sup> *August 1776 Pension Scheme*, supra note 335, at 703.

<sup>338</sup> *Id.* at 704 (recommending that "the several states . . . cause payment to be made . . . on account of the United States").

<sup>339</sup> See William H. Glasson, *Federal Military Pensions in the United States* 21--23 (David Kinley ed., 1918).

<sup>340</sup> *Id.* at 21.

The First Congress assumed responsibility for payments in arrears and, at the same time, vested responsibility for administering the pension regime in the President.<sup>341</sup> In so doing, Congress specified only that pensions “shall be continued and paid by the United States . . . under such regulations as the President of the United States may direct.”<sup>342</sup> No guidance was offered as to how the president might discharge his responsibilities, what principles might animate his “regulations,” what restrictions might compromise the “continuation” of existing principles, or what policy priorities came foremost in the implementation of the scheme.

The First Congress did retain the authority to add claimants to the pension lists.<sup>343</sup> But it was so besieged with petitions from wounded soldiers that the Second Congress enlisted the courts to resolve contested claims.<sup>344</sup> Judicial decisions about these claims were subject to review by the Secretary of War, who was empowered “in any case, where the said Secretary shall have cause to suspect imposition or mistake,” to omit a claimant from the pension lists.<sup>345</sup> The federal courts immediately objected on the ground that the scheme was unconstitutional—but not because it delegated policymaking discretion to judges or to the Secretary of War.<sup>346</sup> The only problem they saw was the putative unconstitutionality of allowing an executive officer to second-guess a judicial decision.<sup>347</sup> The Supreme Court avoided resolving the question in *Hayburn’s Case*,<sup>348</sup> after which Congress amended the law to limit the courts’ involvement to taking evidence, which they apparently believed was compatible with the judicial role.<sup>349</sup> It’s telling that at no point in this tangled history did anyone raise a nondelegation objection to vesting such uncabined discretionary authority in the executive branch.

##### 5. Finance and Budget

The parlous state of national finances had for years been one of the young nation’s most pressing problems. The First Congress recognized that both “justice and the support of public credit” required payment of the foreign debt, now in arrears, that the United States had accumulated during the war.<sup>350</sup> They enabled that payment by delegating enormous discretionary authority to the executive branch.<sup>351</sup>

For starters, Congress empowered the President to borrow up to \$12 million to pay off the foreign debt, with the choice of prioritization among lenders left entirely up to him.<sup>352</sup> Perhaps even more significant, the President was further authorized “to cause to be made such other contracts respecting the said debt as shall be found for the interest of the [United] States.”<sup>353</sup> In other words, the President was delegated the authority to restructure the country’s foreign debt on terms that he thought best, with parties he thought best, under conditions he thought best. Apart from setting a fifteen-year cap on the length of repayment of any restructured loan, Congress offered no standards to guide the exercise of the president’s discretion: which debts to pay first, whether the president should prefer repayment to restructuring, or what sorts of terms were acceptable.<sup>354</sup>

Comparable delegations pervaded other early financial measures, including a program aimed to use revenue newly raised from duties on imports and tonnage to purchase the United States’ domestic debt back from the public.<sup>355</sup> To that end, Congress directed:

That the purchases to be made of the said debt, shall be made under the direction of the President of the Senate, the Chief Justice, the Secretary of State, the Secretary of the Treasury, and the Attorney General for the time being; and who, or any three of whom, with the approbation of the President of the United States, shall cause the said purchases to be made in such manner, and *under such regulations as shall appear to them best calculated to fulfill the*

<sup>341</sup> Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95.

<sup>342</sup> *Id.* The First Congress renewed the delegation two more times before the end of the term. See Act of July 16, 1790, ch. 27, 1 Stat. 129, 129--30; Act of Mar. 3, 1791, ch. 24, 1 Stat. 218, 218.

<sup>343</sup> See Glasson, *supra* note 339, at 54 (“Congress for a long time reserved to itself direct control over the final allowance of claims.”).

<sup>344</sup> Charles E. Schamel, Mary Rephlo, Rodney Ross, David Kepley, Robert W. Coren & James Gregory Bradsher, *Guide to the Records of the United States House of Representatives at the National Archives, 1789--1989: Bicentennial Edition*, 6.16--17, 6.20, at 77--78 (Donnald K. Anderson ed., 1995).

<sup>345</sup> Act of Mar. 23, 1792, ch. 11, § 4, 1 Stat. 243, 244.

<sup>346</sup> Currie, *supra* note 82, at 155.

<sup>347</sup> *Id.* at 156.

<sup>348</sup> See 2 U.S. (2 Dall.) 409, 409 (1792) (avoiding the question on grounds that a judicial decision subject to executive or legislative revision would be an improper advisory opinion).

<sup>349</sup> See Act of Feb. 28, 1793, ch. 17, §§ 1--2, 1 Stat. 324, 324--25.

<sup>350</sup> Act of Aug. 4, 1790, ch. 34, 1 Stat. 138, 138.

<sup>351</sup> *Id.* § 2, 1 Stat. at 139.

<sup>352</sup> *Id.*

<sup>353</sup> *Id.*

<sup>354</sup> See *id.*

<sup>355</sup> See Act of Aug. 12, 1790, ch. 47, § 1, 1 Stat. 186, 186.

*intent of this act: Provided, That the same be made openly, and with due regard to the equal benefit of the several states . . .*<sup>356</sup>

In other words, the entire responsibility for the First Congress's plan to reduce the public debt was vested in a five-member commission that was given no meaningful guidance on what debt to retire first, how to allocate payments among the several states, or anything else.

These provisions did not simply delegate authority. They did so with the power of the purse, perhaps the subject most tightly bound up with legislative power. Nor did they relate to some trivial bookkeeping concern or otherwise fit within some exception for "authoriz[ing] another branch to 'fill up the details.'"<sup>357</sup> With an eye to repairing the tottering finances of the new Republic, they instead instructed the executive branch to set national fiscal policy as it saw best.<sup>358</sup>

#### 6. Tax Assessment and Enforcement

In several contexts, Congress authorized line-level executive officers to invade people's property without a warrant and with little or no direction as to the circumstances under which those invasions would be justified. The exercise of policymaking discretion was thus passed to dispersed officers and their superiors within the nascent bureaucracy.

In the maritime context, for example, port-of-entry collectors were authorized to put inspectors on arriving ships "to examine the cargo or contents" and "to perform such other duties according to law, as they shall be directed by the said collector . . . to perform for the better securing the collection of the duties . . ."<sup>359</sup> Another law authorized collectors to seize evidence and open packages when they were "suspicious of fraud"<sup>360</sup> and to search ships when they had "cause to suspect a concealment."<sup>361</sup> Other provisions gave the officers of revenue cutters "power and authority to go on board of every ship or vessel which shall arrive within the United States, or within four leagues of the coast thereof, . . . and to search and examine the same and every part thereof."<sup>362</sup> In none of these statutes did Congress lay down any meaningful guidance about the circumstances in which ships ought to be searched or the type of evidence that ought to make collectors think that fraud or smuggling was afoot, leaving that determination to its agents.<sup>363</sup>

Congress delegated comparably broad discretion when it instructed federal tax supervisors to appoint officers to inspect local distilleries.<sup>364</sup> The inspection officers, whom the president was to pay "as he shall deem reasonable and proper," had broad authority:

[I]t shall be lawful for the officers of inspection of each survey at all times in the daytime, upon request, to enter into all and every the houses, store-houses, ware-houses, buildings, and places . . . and by tasting, gauging or otherwise, to take an account of the quantity, kinds and proofs of the said spirits therein contained; and also to take samples thereof, paying for the same the usual price.<sup>365</sup>

Once again, Congress said nothing about the circumstances under which inspection officers ought to exercise their discretion to taste or sample the wares. That rankled the law's opponents.<sup>366</sup> "The law," one argued, "will let loose a swarm of harpies, who, under the denomination of revenue officers, will range through the country, prying into every man's house and affairs, and like a Macedonian phalanx bear down all before them."<sup>367</sup>

Despite this opposition, Congress delegated vast policymaking authority to the executive branch to regulate private conduct. The delegation's breadth would be blindingly apparent if Congress had, for example, empowered the Secretary of the Treasury to craft formal rules governing the circumstances under which private property could be searched and seized. Functionally, however, Congress's delegation of open-ended authority to thousands of collectors and inspectors

<sup>356</sup> *Id.* (emphasis altered).

<sup>357</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

<sup>358</sup> Act of Aug. 4, 1790 § 2, 1 Stat. at 139. For more on the lack of specificity in early appropriations bills---and how their "very brief and not very specific" terms functioned in practice as systematic delegations---see Chafetz, *supra* note 134, at 58--59.

<sup>359</sup> Act of Aug. 4, 1790, ch. 35, § 30, 1 Stat. 145, 164; see also Act of July 31, 1789, ch. 5, § 15, 1 Stat. 29, 40 (repealed 1790).

<sup>360</sup> Act of July 31, 1789 § 22, 1 Stat. at 42.

<sup>361</sup> *Id.* § 24, 1 Stat. at 43.

<sup>362</sup> Act of Aug. 4, 1790 § 64, 1 Stat. at 175. The same statute delegated authority to the President to purchase as many revenue cutters as he thought "necessary to be employed for the protection of the revenue," up to a maximum of ten. *Id.* § 62, 1 Stat. at 175.

<sup>363</sup> See *id.* Searches and seizures weren't the only discretionary responsibilities vested in line officers. Congress, for example, specified that tea importers had to secure permits certifying either that they had paid duties upon the teas or that they had had paid a bond "to the satisfaction of the [customs] inspector." Act of Mar. 3, 1791, ch. 26, § 1, 1 Stat. 219, 219--20.

<sup>364</sup> Act of Mar. 3, 1791, ch. 15, §§ 16, 18, 1 Stat. 199, 203.

<sup>365</sup> *Id.* §§ 29, 58, 1 Stat. at 206, 213.

<sup>366</sup> See 2 *Annals of Cong.* 1844 (1791).

<sup>367</sup> *Id.* (statement of Rep. Parker).

was a decentralized delegation of exactly the same power.<sup>368</sup> Recognizing as much, Congress devised means to rationalize these individual choices. By statute, the Secretary of the Treasury could “mitigate or remit” any penalties or forfeitures associated with import duties or liquor taxes, “if in his opinion” (or “if it shall appear to him”) the penalty or forfeiture did not arise from willful negligence or fraud.<sup>369</sup> In what should by now be a familiar pattern, Congress offered no guidance on what factors should inform the Secretary’s exercise of that judgment. As Professor Kevin Arlyck has recently explored, Secretary Alexander Hamilton and his successors freely exercised their “broad” and “unreviewable” discretion under the law to grant remittance “in over ninety percent of cases presented to them.”<sup>370</sup>

### 7. Citizenship

For a nation filled with recent arrivals, few issues were more central to its political identity than the question of citizenship. So it is remarkable that the First Congress exercised its constitutional authority to “establish an uniform rule of naturalization” with an expansive delegation.<sup>371</sup> 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.”<sup>372</sup> The provision was apparently added at the suggestion of Representative James Jackson of Georgia:

I conceive, sir, that an amendment of this kind would be reasonable and proper; all the difficulty will be to determine how a proper certificate of good behavior should be obtained; *I think it might be done by vesting the power in the grand jury or district courts to determine ou[t] the character of the man, as they should find it.*<sup>373</sup>

Delegating to the courts marked a shift from the colonial era practice in which state legislatures were primarily responsible for naturalizing aliens.<sup>374</sup> Congress, however, didn’t lay out what factors ought to matter in deciding whether an alien was of “good character.”<sup>375</sup> That was left up to the courts.<sup>376</sup> Not once during the recorded (and extensive) debates over the first naturalization law did any member of Congress so much as intimate that this vague delegation of naturalization authority might be unconstitutional.

### 8. Powers Arguably Within Another Branch’s Constitutional “Space”

For the most part, we have not included in our discussion laws that contain delegations that plausibly sit in what Justice Gorsuch calls an “overlap[]” between “Congress’s legislative authority” and “authority the Constitution separately vests in another branch.”<sup>377</sup> But two laws in that category, both of which delegated wide discretionary authority without meaningful legislative guidance, bear mentioning.

In an “Act for Regulating the Military Establishment of the United States,” Congress authorized the mustering and organization of soldiers for the purpose of “protecting the inhabitants of the frontiers of the United States.”<sup>378</sup> Among other things, the law gave the President the power “to call into service from time to time such part of the militia of the states respectively, *as he may judge necessary for th[at] purpose.*”<sup>379</sup> In other words, Congress authorized President Washington to call up any state militias he so pleased, at any time he so pleased, in any numbers he so pleased, to wherever on the frontier he so pleased, with no more guidance than the vague instruction to guard frontiersman from Indians.

The First Judiciary Act conveyed even more sweeping rulemaking discretion, vesting authority in “all the . . . courts of the United States” to “make and establish all necessary rules for the orderly conducting [of] business in the said courts,

<sup>368</sup> See Michael Lipsky, *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services* 13 (2d ed. 2010) (“[W]hen taken in concert, [street-level bureaucrats’] individual actions add up to agency behavior.”).

<sup>369</sup> Act of Mar. 3, 1791 § 43, 1 Stat. at 209 (concerning the tax on spirits); Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123 (concerning import duties).

<sup>370</sup> Kevin Arlyck, *The Founders’ Forfeiture*, 119 *Colum. L. Rev.* 1449, 1452 (2019).

<sup>371</sup> U.S. Const. art I, § 8, cl. 4; Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103, 103--104 (repealed 1795).

<sup>372</sup> Act of Mar. 26, 1790 § 1, 1 Stat. at 103.

<sup>373</sup> 1 *Annals of Cong.* 1114 (1790) (Joseph Gales ed., 1834) (statement of Rep. Jackson) (emphasis added).

<sup>374</sup> See *id.* at 1120 (statement of Rep. Huntington).

<sup>375</sup> One representative objected to the proposal on the ground that it would “add an inquisition . . . . Indeed, sir, I fear, if we go on as is proposed now, in the infancy of our Republic, we shall, in time, require a test of faith and politics, of every person who shall come into these States.” *Id.* at 1114--15 (statement of Rep. Page).

<sup>376</sup> See Richard W. Flournoy, Jr., *Naturalization and Expatriation*, 31 *Yale L.J.* 702, 707 (1922) (reading the naturalization statute to require courts to “ascertain, through examination of witnesses acquainted with the applicant, whether he was a fit person to receive the privilege of American citizenship”).

<sup>377</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2137 (Gorsuch, J., dissenting).

<sup>378</sup> Act of Apr. 30, 1790, ch. 10, § 16, 1 Stat. 119, 121 (repealed 1795).

<sup>379</sup> *Id.* (emphasis added). The First Congress used nearly identical language in an earlier law that aimed to “recognize and adapt to the Constitution of the United States the establishment of the Troops raised under” the Confederation Congress. Act of Sept. 29, 1789, ch. 25, 1 Stat. 95, 95 (repealed 1790).

provided such rules are not repugnant to the laws of the United States.”<sup>380</sup> Yet again, Congress said nothing about the content of those rules.

Gary Lawson has dismissed the significance of this delegation on the ground that the courts may have inherent authority under Article III of the Constitution to adopt procedural rules.<sup>381</sup> But that’s by no means an obvious inference---it’s at least as plausible that Congress’s greater power to create the lower federal courts should include the lesser power to define the rules and procedures by which those courts would proceed.<sup>382</sup> At any rate, it’s telling that Congress felt the need to explicitly delegate the power to make rules, yet felt no obligation to be specific about what those rules should be.

\* \* \*

In less than two years, the First Congress adopted law after law delegating policymaking discretion without offering meaningful guidance on how that discretion was to be exercised. These laws touched on some of the most sensitive and contentious questions in the early Republic: territorial administration, the patent system, Indian affairs, foreign and domestic debt, naturalization, customs duties, military service, and the federal courts. They conveyed authority over private rights and interests that went far beyond filling up details, finding facts, or organizing public structures. None of these delegations, taken alone, can prove a negative. But their sheer accumulated weight makes it difficult---indeed, impossible---to credit modern claims that the Founders were committed to the nondelegation doctrine, let alone fundamentally so. We are unaware of *any* evidence that *any* member of the First Congress objected to *any* of the laws we have discussed on the ground that Congress had unconstitutionally surrendered its legislative power. The silence is deafening.

## B. The Post Roads Debate

Even if delegation raised no constitutional concerns, early Congresses did sometimes debate the wisdom of vesting broad authority in the executive branch. And objections to excessive delegations---however provisional, defeasible, and supervised those delegations were---sometimes drew on contemporary political theory’s standard policy prescription that the powers of government should not be excessively consolidated. Indeed, something like that concern may have animated James Madison’s failed effort to amend the Constitution to provide that the executive “shall never exercise . . . the power vested in the Legislative.”<sup>383</sup> Given the still-pervasive tendency for political disagreements to express themselves in constitutional terms, it should come as no surprise that some policy objections eventually began to be framed---tentatively at first---as constitutional violations.<sup>384</sup> Indeed, as David Currie has noted, it is during the Second Congress that “increasingly one has the sense that many [legislators] were tailoring their [constitutional] arguments to their conclusions.”<sup>385</sup>

The first semi-serious nondelegation objection in the early Republic came during the Second Congress’ debate over the nation’s post roads.<sup>386</sup> Modern originalists have looked to the post-roads debate as evidence---indeed, their best evidence---for the principle that the nondelegation doctrine existed at the Founding.<sup>387</sup> But to call the post-roads debate a thin reed would be a vast overstatement. It is no reed at all.

In December 1791, the House of Representatives opened debate on a bill to establish the United States postal system.<sup>388</sup> At the time, the question of which towns would be connected to the postal network had enormous commercial, political,

<sup>380</sup> Judiciary Act of 1789, ch. 20, § 17, 1 Stat. 73, 83.

<sup>381</sup> See Lawson, *supra* note 3, at 396--99 (“The statute would only be relevant to the nondelegation doctrine if it was so obvious that courts have no independent power to set procedural rules that the Judiciary Act must be understood as reflecting a view about Congress’s ability to delegate legislative powers.”).

<sup>382</sup> See U.S. Const. art. III, § 1, cl. 1.

<sup>383</sup> 1 Annals of Cong. 436 (1789) (Joseph Gales, ed., 1834) (statement of Rep. Madison). In a later debate, Madison proposed: “The powers delegated by this Constitution . . . shall be exercised as therein appropriated, so that the Legislative shall not exercise the powers vested in the Executive or Judicial; nor the Executive the power vested in the Legislative or Judicial; nor the Judicial the powers vested in the Legislative or Executive.” *Id.* at 760. Representative Samuel Livermore thought the clause “subversive of the Constitution” and “hoped it might be disagreed to.” *Id.* at 760--61 (statement of Rep. Livermore). Though the House adopted the language, the Senate did not. *Id.* at 761.

<sup>384</sup> For a recent account tracing this dynamic in the early Republic, see generally Gienapp, *supra* note 82.

<sup>385</sup> Currie, *supra* note 82, at 171.

<sup>386</sup> 3 Annals of Cong. 239--241 (1791). Two months earlier, Representative Livermore had objected to creating a Committee of Contested Elections on the ground that the House, and not just a part of it, “should be the judges of contested elections of their own members . . . . Such a transfer of power . . . would be as unconstitutional as to delegate a Legislative authority.” *Id.* at 144--45 (statement of Rep. Sedgwick). Over his lone protest, a committee was immediately appointed. *Id.*

<sup>387</sup> See, e.g., Joseph Postell, *Bureaucracy in America: The Administrative State’s Challenge to Constitutional Government* 75 (2017); Wurman, *Nondelegation*, *supra* note 16 (manuscript at 14--20).

<sup>388</sup> Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, 232. Two earlier laws had provided for “the temporary establishment of the Post-Office,” but they were due to lapse. See Act of Sept. 22, 1789, ch. 16, § 2, 1 Stat. 70, 70; Act of Mar. 3, 1791, ch. 23, § 1, 1 Stat. 218, 218.

and social significance.<sup>389</sup> Members of Congress, especially those with business interests of their own, were keenly interested in assuring that the roads ran along their preferred routes. As was natural for a bill that attracted considerable political interest, it specified in painstaking detail the fifty-three towns through which the post roads would run.<sup>390</sup>

Representative Theodore Sedgwick of Massachusetts, however, was dissatisfied with that level of specification: “The members of the House could not be supposed to possess every information that might be requisite on this subject, and their opinions were liable to be biased by local interests.”<sup>391</sup> He offered a flexible alternative: Instead of Congress laying out the roads, the mail should be carried “by such route as the President of the United States shall, from time to time, cause to be established.”<sup>392</sup>

A lengthy debate ensued, and Sedgwick’s proposal was eventually defeated.<sup>393</sup> There was no single theme to the diverse and uncoordinated opposition. Among the six 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.<sup>394</sup> Far from limiting partiality, Sedgwick’s proposed delegation would afford the president “a dangerous power of establishing offices and roads in those places only where his interest would be promoted, and removing others of long standing, in order to harass those he might suppose inimical to his ambitious views.”<sup>395</sup> Two of the objectors expressed reservations about giving the president broad authority over a postal system that might either become a financial drain (if the roads were extended haphazardly) or a substantial source of revenue (as was the case in England).<sup>396</sup>

Among the opponents, at most three members of the House—and probably only two<sup>397</sup>—raised a constitutional objection to delegating Congress’s Article I authority “[t]o establish Post Offices and post Roads.”<sup>398</sup> Representative John Page “look[ed] upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency.”<sup>399</sup> Representative James Madison agreed, maintaining “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.”<sup>400</sup> Some modern commentators have cited Madison’s and Page’s arguments, together with the defeat of Sedgwick’s motion, as decisive

<sup>389</sup> In his 1791 address to Congress, George Washington made the stakes plain:

The importance of the Post Office and Post Roads, on a plan sufficiently liberal and comprehensive, as they respect the expedition, safety, and facility of communication, is increased by their instrumentality in diffusing a knowledge of the laws and proceedings of the Government; which, while it contributes to the security of the people, serves also to guard them against the effects of misrepresentation and misconception.

3 Annals of Cong. 15 (1791) (statement of President Washington); see also Lawson, *supra* note 3, at 403 (“Postal routes were the eighteenth-century equivalent of water projects.”).

<sup>390</sup> Act of Feb. 20, 1792, § 1, 1 Stat. at 233 (“[F]rom Springfield, by Northampton, Brattleborough, and Charlestown, by Windsor in Vermont, to Hanover, and from Hartford, by Middletown, to New London . . .”).

<sup>391</sup> 3 Annals of Cong. 229 (1791) (statement of Rep. Sedgwick).

<sup>392</sup> *Id.*

<sup>393</sup> *Id.* at 241.

<sup>394</sup> *Id.* at 235 (statement of Rep. Vining) (“[T]he members [of the House] were as fully competent to judge of the matter as any one man could be . . .”); *id.* at 233 (statement of Rep. White) (“No individual could possess an equal share of information with th[e] House on the subject of the geography of the United States.”); *id.* at 231 (statement of Rep. Hartley) (“If it were left to the President or Postmaster General, neither is acquainted with all the roads contemplated; they must depend in great measure on the information of others.”).

<sup>395</sup> *Id.* at 235 (statement of Rep. Vining).

<sup>396</sup> See *id.* at 229–230 (statement of Rep. Livermore); *id.* at 231–32 (statement of Rep. Hartley).

<sup>397</sup> The objections of the third member, Representative Livermore, seem best understood as a criticism of the policy rather than as a hard constitutional objection. See *id.* at 229–30 (statement of Rep. Livermore) (observing in passing that Congress “could [not] *with propriety* delegate that power, which they were themselves appointed to exercise” (emphasis added)). The same goes for Representatives Hartley and White. See *id.* at 231 (recording Rep. Hartley’s complaint that “[t]he Constitution *seems* to have intended that we should exercise all the powers respecting the establishing post roads *we are capable of . . .*” (emphasis added)); *id.* at 233 (recording Rep. White calling the delegation an “advance[] towards monarchy”). The Second Congress’s post roads debate was anticipated by brief skirmishes over a similar amendment in the First Congress. See 2 Annals of Cong. 1677 (1790) (statements of Reps. Bloodworth, White, Steele, Livermore, Hartley, and Gerry) (recording the claim that the amendment “is unconstitutional, as that expressly reserves the power of establishing Post Offices and post roads to the Legislature”); *id.* (statement of Reps. Partridge and Sedgwick) (responding that “the bill does proposes no more . . . than is provided for in the other Executive Departments”).

<sup>398</sup> U.S. Const. art. I, § 8, cl. 7.

<sup>399</sup> 3 Annals of Cong. 233–34 (1791) (statement of Rep. Page).

<sup>400</sup> *Id.* at 238–39 (1791) (statement of Rep. Madison) (conceding the difficulty of “determin[ing] with precision the exact boundaries of the Legislative and Executive powers,” but suggesting that delegating the power to establish post roads “will lead to blending those powers so as to leave no line of separation whatever”).

evidence of a Founding-era nondelegation commitment that was both broadly shared and fundamental.<sup>401</sup> Close attention to the debate, however, reveals that the opposite was true.

Certainly Sedgwick and his supporters were “astonished” at the constitutional objections, which seemed to them obvious makeweights.<sup>402</sup> Channeling the standard view that the scope of delegation was a question left to ordinary politics, Representative Benjamin Bourne responded 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.”<sup>403</sup> For his part, Sedgwick snarked that Congress was “also empowered to coin money, and if no part of their power be delegable, he did not know but they might be obliged to turn coiners, and work in the Mint themselves. Nay, they must even act the part of executioners, in punishing piracies committed on the high seas.”<sup>404</sup>

For at least three reasons, it’s clear that Madison’s and Page’s arguments did not reflect a majority view among those present and voting, much less a constitutional consensus. First, the statute that Congress actually adopted *did* confer wide discretionary authority to site post roads, even though Sedgwick’s particular amendment was defeated.<sup>405</sup> At the time Madison made his objection, the bill that Sedgwick was seeking to amend already gave the Postmaster General authority “to establish such other roads as post roads, as to him may seem necessary.”<sup>406</sup> Sedgwick pointed out the anomaly:

As to the constitutionality of this delegation, it was admitted by the committee themselves who brought in the bill; for if the power was altogether indelegable, no part of it could be delegated; and if a part of it could, he saw no reason why the whole could not. The second section [with the delegation to the Postmaster General] was as unconstitutional as the first . . . .<sup>407</sup>

Evidently caught short by Sedgwick’s point, Representative Samuel Livermore lamely suggested that the latter clause could “be amended when we come to it.”<sup>408</sup>

Yet there never was any amendment---or rather, not one that addressed the nondelegation objection. The final version of the law gave the Postmaster General unfettered discretion to “designate[]” additional roads that “shall . . . be deemed and considered as post roads” by entering into contracts to “extend[] the line of posts.”<sup>409</sup> Far from demonstrating the force of Madison’s constitutional objection, the statute as enacted expressly conferred the open-ended authority that Madison had claimed was unconstitutional during debate.<sup>410</sup>

Second, the law that Congress adopted conveyed a similar power to site post *offices*.<sup>411</sup> That is irreconcilable with the logic of the nondelegation argument: If the constitutional objection was that only Congress could “establish Post Offices and post Roads,” that objection applied with equal force to *offices* as to *roads*.<sup>412</sup> As Representative Egbert Benson pointed out, “it is said that the Legislature alone is competent to establish post offices and post roads; notwithstanding this, there is not a single post office designated by the bill.”<sup>413</sup> Still, no one objected to allowing the Postmaster General to create post offices. Instead, the bill left those decisions to the executive branch, conferring authority on the Postmaster General “to appoint . . . deputy postmasters, at all places where such shall be found necessary,” and directing “[t]hat every deputy

<sup>401</sup> See Postell, *supra* note 387, at 75; Gordon, *supra* note 11, at 746 (arguing that the post roads debate “undoubtedly weigh[s] in favor of the proposition[] that Congress could *not* delegate legislative power”); Ilan Wurman, *As-Applied Nondelegation*, 96 *Tex. L. Rev.* 975, 992--93 (2018) [hereinafter Wurman, *As-Applied Nondelegation*] (arguing “Congress’s deliberation appears to have liquidated the question whether the power to establish post roads can be delegated”).

<sup>402</sup> See 3 *Annals of Cong.* 235 (1791) (statement of Rep. Barnwell); *id.* at 239 (statement of Rep. Sedgwick). Ilan Wurman is therefore mistaken when he reads the House debates as indicating that speakers were “nearly” unanimous about the unconstitutionality of the delegation. See Wurman, *As-Applied Nondelegation*, *supra* note 401, at 992.

<sup>403</sup> 3 *Annals of Cong.* 232 (1791) (statement of Rep. Bourne) (emphasis added).

<sup>404</sup> *Id.* at 230--31 (statement of Rep. Sedgwick).

<sup>405</sup> See Act of Feb. 20, 1792, ch. 7, §§ 2, 3, 1 *Stat.* 232, 233--34.

<sup>406</sup> 3 *Annals of Cong.* 230 (1791) (statement of Rep. Sedgwick) (internal quotation marks omitted) (quoting the bill).

<sup>407</sup> *Id.*

<sup>408</sup> *Id.* at 237 (statement of Rep. Livermore) (accusing Sedgwick of taking “an uncandid advantage of the liberality of the committee in leaving the appointment of the deputy postmasters and branching offices to the Postmaster General”).

<sup>409</sup> Act of Feb. 20, 1792 § 2, 1 *Stat.* at 233 (granting authority “to 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”); see also 3 *Annals of Cong.* 237 (1791) (describing the amendment’s adoption).

<sup>410</sup> Allowing for eight-year contracts for post roads was arguably even more expansive than the original version of the bill, which terminated after two years. Act of Feb. 20, 1792 § 30, 1 *Stat.* at 239; see also Currie, *supra* note 82, at 149 n.131 (noting the change but dismissing it because “[i]t is not clear why it mattered”).

<sup>411</sup> Act of Feb. 20, 1792 § 3, 1 *Stat.* at 234.

<sup>412</sup> See U.S. Const. art. I, § 8, cl. 7.

<sup>413</sup> 3 *Annals of Cong.* 236 (1791) (statement of Rep. Benson).

postmaster shall keep an office.”<sup>414</sup> Benson’s observation went without a recorded response,<sup>415</sup> and when Congress passed the law, the delegated authority to designate post offices remained with the Postmaster General.<sup>416</sup>

Third, the nondelegation objections were inconsistent with the terms of the excise tax on distilled spirits---the Whiskey Tax---that had been enacted the previous year.<sup>417</sup> Though Congress initially established fourteen tax districts, they were “subject to alterations by the President of the United States, 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.”<sup>418</sup> As two critics of Madison’s constitutional claim observed, the constitutionality of that delegation provided a clear precedent for one governing post roads.<sup>419</sup> Madison tried to wave off the point by saying that the excise tax “cannot be considered as a parallel case; no similar exigency exists to justify a similar delegation.”<sup>420</sup> Sedgwick was baffled by the distinction:

[A] supposed necessity could not justify the infraction of a Constitution which the members were under every obligation of duty, and their oaths, solemnly pledged, to support. Gentlemen should be very cautious how, on slight grounds, they assent to principles, which, if they were true, would evince that the Government had scattered through the whole country, officers who are daily seizing on the property of the citizens, by the assumption of unconstitutional powers.<sup>421</sup>

In short, it couldn’t be further from the truth that Madison’s poor constitutional arguments reflected “an affirmation of the nondelegation principle by both Federalists and Republicans.”<sup>422</sup> To the contrary, they were condemned for their lack of support in constitutional text and legislative practice. And again, Congress as a whole decisively rejected them when it passed a law authorizing the Postmaster General to establish post offices as he saw fit, to extend the post roads as he saw fit, and to “basically . . . do whatever was necessary to deliver the mail.”<sup>423</sup>

A controversial, self-interested, and losing argument grounded in a specific grant of congressional power (“To establish Post Offices and post Roads”<sup>424</sup>) cannot even arguably serve as the basis for a modern nondelegation doctrine grounded in Article I, Section 1. Even if it could, the particular formulation of the nondelegation doctrine pressed in the post roads debate would call into question not only those laws empowering the executive branch to adopt rules regulating private conduct, but also those that “ma[d]e the application of [a given] rule depend on executive fact-finding”---a category that the *Gundy* dissent<sup>425</sup> and many originalists<sup>426</sup> aver has always been permissible. Madison’s nondelegation argument, were it accepted, would constitute a far more radical version of the nondelegation doctrine than the one contemplated by most originalists today.

At most, the post roads debate shows that several members of the House of Representatives in 1791 could mobilize constitutional rhetoric about the dangers of delegating too much power in service of their political aims. As Sedgwick observed, “[t]he powers of the Constitution, he was sorry to say, were made in debate to extend or contract, as seemed, for the time being, to suit the convenience of the arguments of gentlemen.”<sup>427</sup> Nothing about the debate suggests that the

<sup>414</sup> Act of Feb. 20, 1792 §§ 3, 7, 1 Stat. at 234.

<sup>415</sup> Madison offered what might at first glance be taken as a rebuttal of Benson’s concerns: “[T]he President is invested with the power of filling those offices; but does it follow that we are to delegate to him the power to create them?” 3 Annals of Cong. 238 (1791) (statement of Rep. Madison). Madison was not referring to physical post offices, however, but instead to the statutory offices of deputy postmasters. And he was responding to a different claim that the House might “infring[e] on the powers of the Executive” if it effectively told the President where his deputy postmasters must go. Not so, argued Madison: Congress had previously thought it appropriate not only to create executive offices but even to specify the officers who would fill them. *Id.* If that was so, why would congressional specificity be more objectionable “in respect to the post office and post roads, more than in all other cases?” *Id.* At any rate, if Madison did mean to object to delegating to the Postmaster General the authority to establish post offices, he lost that argument when the enacted law did just that. See Act of Feb. 20, 1792 §§ 3, 7, 1 Stat. at 234.

<sup>416</sup> Act of Feb. 20, 1792 §§ 3, 7, 1 Stat. at 234 (granting the Postmaster General authority to appoint deputy postmasters and directing “[t]hat every deputy postmaster shall keep an office”).

<sup>417</sup> Act of Mar. 3, 1791, ch. 15, § 1, 1 Stat. 199, 199; see also *supra* section III.A.6.

<sup>418</sup> *Id.* § 4, 1 Stat. at 200.

<sup>419</sup> 3 Annals of Cong. 232 (1791) (statement of Rep. Bourne) (“[T]he House, . . . empowered the president to mark out the districts and surveys; and if they had a right to delegate such power to the Executive, the further delegation of the power of marking out the roads for the conveyance of the mail, could hardly be thought dangerous.”); *id.* at 240 (statement of Rep. Sedgwick) (making the same point).

<sup>420</sup> *Id.* at 238 (statement of Rep. Madison).

<sup>421</sup> *Id.* at 239 (statement of Rep. Sedgwick).

<sup>422</sup> Postell, *supra* note 387, at 75.

<sup>423</sup> Currie, *supra* note 82, at 149.

<sup>424</sup> U.S. Const. art. I, § 8, cl. 7.

<sup>425</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

<sup>426</sup> See, e.g., Hamburger, *Is Administrative Law Unlawful?*, *supra* note 9, at 4.

<sup>427</sup> 3 Annals of Cong. 239--41 (1791) (statement of Rep. Sedgwick).

Founders agreed that such limits existed, much less that there was any consensus---even a rough one---about what those limits were. The constitutional opportunism of a few politicians does not a doctrine make.

### C. The Pattern in Later Congresses

While space here permits only a sketch, the pattern established in the First Congress continued through the 1790s. When it seemed appropriate to do so, Congress delegated wide authority to the executive branch, typically without pausing to consider any questions of constitutional character. We offer three key examples.

First, in 1794, a Congress fearful of British hostilities passed a law authorizing President Washington to lay an embargo “on all ships and vessels in the ports of the United States” whenever, “in his opinion, the public safety shall so require” and Congress was out of session.<sup>428</sup> As with prior statutes, the authorization to impose an embargo and specify any “such regulations as the circumstances of the case may require” was completely open-ended: It didn’t specify the target, the trigger circumstances, any substantive limitations, any procedural safeguards, or even a particular purpose.<sup>429</sup> It’s an especially clear example of a delegation affording the President the power to issue binding rules for private persons.

The embargo act’s conferral of plenary authority over outbound voyages was in fact a carefully considered policy choice. As the bill’s supporters argued, the delays of lawmaking and the difficulty of keeping a secret in “a body as numerous as the Legislature” meant that deciding whether and how to impose an embargo was “better performed” by the President than by the legislature.<sup>430</sup> Otherwise, they pointed out, “every ship” would leave port at the first hint that an embargo was under discussion.<sup>431</sup> Apparently persuaded, Congress gave the President the unilateral and essentially unfettered authority to keep every ship in the nation at dock at whim: “On great occasions, confidence must be reposed in the Executive.”<sup>432</sup> No constitutional objection was recorded to the delegation.<sup>433</sup>

Second, Congress in 1796 debated the bill that became the nation’s first quarantine law.<sup>434</sup> The first paragraph of the initial draft delegated wide power to the president to craft rules that infringed on private liberty:

[T]he President of the United States be, and is hereby, authorized to direct at what place or station in the vicinity of the respective ports of entry within the United States, and for what duration and particular periods of time, vessels arriving from foreign ports and places may be directed to perform quarantine.<sup>435</sup>

Debate over the constitutionality of this provision grew heated. Did it regulate foreign commerce and thus come within Congress’s enumerated powers? Its defenders thought so: Quarantine was “of the nature of a commercial regulation, to which, by the Constitution, Congress alone were competent.”<sup>436</sup> States might otherwise exploit their quarantine laws to undercut the federal government’s power to regulate trade with foreign nations.<sup>437</sup> The provision’s opponents, however, insisted that a quarantine law was an internal health regulation of the sort that the Constitution reserved to the states.<sup>438</sup> They feared that an expansive reading of the commerce clause “would swallow up all the authority of the State Governments.”<sup>439</sup>

Yet again, at no point during the tense debate did any member object that the law impermissibly delegated too much power to the president.<sup>440</sup> This silence can’t be dismissed on the ground that the nondelegation doctrine applies with less

<sup>428</sup> Act of June 4, 1794, ch. 41, 1 Stat. 372, 372 (“An Act to authorize the President of the United States to lay, regulate and revoke Embargoes.”).

<sup>429</sup> See *id.*

<sup>430</sup> 4 Annals of Cong. 503 (1794) (statement of Rep. Sedgwick).

<sup>431</sup> *Id.*

<sup>432</sup> *Id.*

<sup>433</sup> See *id.* at 731--35 (debating and passing the bill).

<sup>434</sup> See Act of May 27, 1796, ch. 31, 1 Stat. 474, 474 (repealed 1799).

<sup>435</sup> 5 Annals of Cong. 1349 (1796).

<sup>436</sup> *Id.* at 1350 (statement of Rep. Bourne).

<sup>437</sup> See *id.* at 1357--58.

<sup>438</sup> See *id.* at 1353 (statement of Rep. Gallatin) (“[T]he regulation of quarantine had nothing to do with commerce. It was a regulation of internal police.”).

<sup>439</sup> *Id.* at 1358 (statement of Rep. Brent).

<sup>440</sup> To the contrary, three members of the House---Representatives Brent, Williams, and Swanwick---were at pains to clarify that their opposition to the first paragraph did not arise because they were “unreasonably jealous of the power of the Executive. Surely, to prevent the landing of diseased persons or infected goods, could not have any relation to a jealousy of that power.” *Id.* at 1356 (statement of Rep. Swanwick); see also *id.* at 1352 (statement of Rep. Williams) (averring the same); *id.* at 1358 (statement of Rep. Brent) (joining the sentiment).

A few members voiced policy objections to the delegation. Representative Giles wanted the states to regulate quarantine, “but if it were the business of the General Government, it was Legislative and not Executive business.” *Id.* at

force to foreign affairs: the entire premise of the opponents' objection was that the quarantine law did *not* entail the regulation of foreign commerce.<sup>441</sup> If the nondelegation doctrine was a well-understood feature of the original constitutional understanding, the law's opponents could have---and surely would have---invoked it alongside their other constitutional objections. Yet they said nothing about it.

Eventually, the House of Representatives voted to strike the offending clause, leaving only the second paragraph of the original bill in place.<sup>442</sup> But that paragraph *also* contained an expansive delegation, albeit one more sensitive to state power: The President was authorized "to aid in the execution of quarantine, and also in the execution of the health laws of the states, respectively, *in such manner as may to him appear necessary*."<sup>443</sup> The amended bill was signed into law later that month, still without a hint of delegation-related objections.<sup>444</sup>

Third, as Professor Nicholas Parrillo has recently and meticulously documented, Congress in 1798 adopted a direct tax on real estate to finance possible war with France.<sup>445</sup> Because such a tax had to be apportioned among the states relative to their populations, Congress created a cadre of many thousands of federal officers to estimate the value of virtually all property in the country.<sup>446</sup> To assure that local valuations were not out of line with valuations elsewhere in the state, Congress also created a board of federal tax commissioners to adjust the valuations "as shall appear to be just and equitable."<sup>447</sup> The commissioners' decisions were final and not subject to judicial review, even though they directly affected how much individual Americans would owe in federal taxes.<sup>448</sup> As Parrillo notes, "the 1798 direct tax provides a clear founding-era example of congressional delegation of rulemaking authority in a context that was both coercive and domestic---the taxation of real estate."<sup>449</sup> Yet the direct tax, like most sweeping delegations in the Founding era, occasioned no nondelegation objections in any recorded debate.<sup>450</sup>

Even as the thoroughly permissive approach to legislative delegations continued apace, a few people---James Madison among them---began to raise occasional objections to particular delegations. Sometimes, they even couched these objections in a constitutional register. Every time, however, their arguments were rejected.

In 1792, for example, in response to a request from President Washington for an arrangement to redeem the public debt,<sup>451</sup> Congress debated a resolution directing the Secretary of the Treasury, Alexander Hamilton, "to report a plan for that purpose."<sup>452</sup> Implacably opposed to Hamilton's financial plans, Madison objected even to this mild delegation of an advisory authority:

He insisted that a reference to the Secretary of the Treasury on subjects of loans, taxes, and provision for loans, etc, was, in fact, a delegation of the authority of the Legislature, although it would admit of much sophistical argument to the contrary. . . . [I]t was evident the Secretary's plans were not introduced in such manner as to leave the House the freedom of exercising their own understandings in a proper constitutional manner.<sup>453</sup>

---

1351 (statement of Rep. Giles). Representative Page said that he would "wish to vote against the bill itself, as it was an attempt to extend the power of the Executive unnecessarily." *Id.* at 1357 (statement of Rep. Page). And Representative Heister feared that "if the power [of quarantine] was to be transferred from the President to the Collectors at each port, (and that he conceived must be the case,) it would put a vast deal too much power into their hands." *Id.* at 1348 (statement of Rep. Heister). But no member raised a constitutional objection.

<sup>441</sup> See, e.g., *id.* at 1359 (statement of Rep. Brent) (arguing that if the broad construction of the commerce power "was carried to its extent" to encompass quarantine, "there would be no bounds to it").

<sup>442</sup> *Id.* at 1359.

<sup>443</sup> Act of May 27, 1796, ch. 31, 1 Stat. 474, 474 (repealed 1799) (emphasis added); see also 5 Annals of Cong. 1354 (1796) (statement of Rep. Kittera) (mentioning that, in the "second" section of the law, "officers of the United States are commanded to aid in the execution of the State laws").

<sup>444</sup> Act of May 27, 1796, 1 Stat. at 474.

<sup>445</sup> Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 131 Yale L.J. (forthcoming 2021) (manuscript at 20), [https://papers.ssrn.com/abstract\\_id=3696860](https://papers.ssrn.com/abstract_id=3696860) [<https://perma.cc/ZUK2-YRE7>].

<sup>446</sup> See *id.* (manuscript at 38--39).

<sup>447</sup> Act of July 9, 1798, ch. 70, § 22, 1 Stat. 580, 589.

<sup>448</sup> Parrillo, *supra* note 445 (manuscript at at 84--85).

<sup>449</sup> *Id.* (manuscript at 11).

<sup>450</sup> See, e.g., *id.* (manuscript at 94) (noting that despite the strong political incentive to do so, even "Jefferson himself made no constitutional objections to the delegations to the federal boards").

<sup>451</sup> See President George Washington, State of the Union Address, (Nov. 6, 1792), [https://avalon.law.yale.edu/18th\\_century/washs04.asp](https://avalon.law.yale.edu/18th_century/washs04.asp) [<https://perma.cc/TYM4-UKBM>] (exhorting Congress "to enter upon a systematic and effectual arrangement for the regular redemption and discharge of the public debt").

<sup>452</sup> 3 Annals of Cong. 711 (1792).

<sup>453</sup> *Id.* at 722 (statement of Rep. Madison); see also *id.* at 712 (statement of Rep. Findley) ("[I]t is of the nature of Executive power to be transferrable to subordinate officers; but Legislative authority is incommunicable, and cannot be transferred."); cf. Alexander Hamilton, Pacificus No. 1 (June 29, 1793), reprinted in 15 The Papers of Alexander Hamilton

Madison wasn't actually objecting here to the delegation of legislative power simpliciter. As the broader context of the debate indicates, he was focused on the House of Representatives' constitutional duty to originate any revenue-raising bill.<sup>454</sup> (Hence Madison's reference to the "manner" in which the report was "introduced.") How a report would have had that effect isn't clear, and it certainly perplexed Madison's opponents.<sup>455</sup> In any event, the objection failed to carry the day: A motion to strike the offending language was voted down, thirty-two to twenty-five.<sup>456</sup>

Nondelegation objections surfaced with more intensity in two debates in the late 1790s. As tensions with France rose in the wake of the XYZ Affair, Congress passed a string of laws delegating broad powers to the President.<sup>457</sup> As Currie explains:

The President was empowered to build whatever fortifications the public safety might require, to build more ships if he found them necessary to protect the United States, to discontinue the statutory ban on intercourse with France if it ceased to violate our neutrality, to make rules for the training of volunteer companies, and even to authorize the capture of French warships, which looked suspiciously like a delegation of the power to determine whether or not to go to war.<sup>458</sup>

The bill that occasioned the sharpest and most extensive constitutional debate would have empowered the President to raise a provisional army of up to 20,000 troops "whenever he shall judge the public safety shall require the measure."<sup>459</sup> The Senate, apparently untroubled, had already passed the bill, but Republican members in the House objected on the ground that it would license the president to raise a standing army.<sup>460</sup> Representative Albert Gallatin of Pennsylvania took the lead in arguing that the law was ill-advised: Why go to the risk and expense of raising a standing army when state militias offered adequate protection in the unlikely event of an invasion?<sup>461</sup> "He must confess he looked upon all that was said of an invasion by France as a mere *bugbear*."<sup>462</sup>

Gallatin and his colleagues joined a constitutional claim to their policy objection: "He believed the principle of the bill to be improper . . . because it vested Legislative power in the President of the United States."<sup>463</sup> Every legislator who voiced agreement with Gallatin's argument also objected to the law on policy grounds.<sup>464</sup> Gallatin continued: "If the principle upon which this bill is founded, were to be established, our Constitution would become a mere blank; it would be to transform our Government into a Monarchy, or, if gentlemen like the expression better, into a despotic Government."<sup>465</sup>

As in the debate over post roads, the law's supporters were baffled by the constitutional move: "[U]pon the principles of the gentleman from Pennsylvania, Congress must turn tax-gatherers, borrowers of money or money brokers, apprehenders of coiners, and recruiting sergeants . . . [Mr. Gallatin's] construction, therefore, proves too much, and is perfectly ridiculous."<sup>466</sup> Channeling the conventional view, Representative Lewis Sewall said that, "[i]n a variety of cases, Congress did not exercise their Constitutional powers themselves; they were frequently obliged to authorize the President

---

33, 42 (Harold C. Syrett ed., digital ed. 2011) ("The Legislature is free to perform its own duties according to its own sense of them--though the Executive in the exercise of its constitutional powers, may establish an antecedent state of things which ought to weigh in the legislative decisions.").

<sup>454</sup> See 3 Annals of Cong. 712 (1792) (statement of Rep. Findley) ("To give the first form to revenue plans is a peculiar trust reposed in this House that we cannot transfer even to the Senate; and if that body were to propose a plan to us, we could not accept of it.").

<sup>455</sup> See *id.* at 717 (statement of Rep. Ames) ("[W]ill it be seriously affirmed that, according to the spirit and natural meaning of the Constitution, the Report of the Secretary will be a revenue bill, or any other bill, and that this proposition is originating such a bill?").

<sup>456</sup> *Id.* at 722.

<sup>457</sup> Currie, *supra* note 82, at 244--45.

<sup>458</sup> *Id.*

<sup>459</sup> 8 Annals of Cong. 1631--32 (1798) (internal quotation marks omitted).

<sup>460</sup> See *id.* at 1631--32 (statement of Rep. Gallatin).

<sup>461</sup> *Id.* at 1632--34 (statement of Rep. Gallatin).

<sup>462</sup> *Id.* at 1633.

<sup>463</sup> *Id.* at 1538 (statement of Rep. Gallatin).

<sup>464</sup> See, e.g., *id.* at 1526 (statement of Rep. Nicholas) ("If an army was necessary, the Legislature ought to raise it . . ."); *id.* at 1532 (statement of Rep. Baldwin) (arguing that if the House was not convinced it needed to raise an army at the time, then "the law ought not to pass" because "[t]he Constitution made the Legislature the sole judge on this subject" and "he thought it a very improper transfer of Legislative power").

<sup>465</sup> *Id.* at 1539 (statement of Rep. Gallatin). In addition to Gallatin, ten members of the House raised constitutional objections to the supposed transfer of legislative power. See, e.g., *id.* at 1644 (statement of Rep. McDowell) ("He believed the power of determining the fit time to raise an army was vested in Congress, and could not be transferred.").

<sup>466</sup> *Id.* at 1637 (statement of Rep. Dana).

to act for them."<sup>467</sup> Representative Thomas Pinckney, meanwhile, offered a version of the anti-alienation principle in contrast: "If this power [to raise an army] was generally transferred to the President, he might at all times raise an army, without the consent of Congress; but it would not be said that this would be the case, if this bill should pass."<sup>468</sup>

Supporters also pointed to precedent,<sup>469</sup> including a 1791 law giving the president the authority to raise 2,000 soldiers for protection of the frontier "if the President should be of opinion, that it will be conducive to the public service"<sup>470</sup> and a 1794 law authorizing the president to call up 2,500 soldiers "if, in the judgment of the President, the same shall be deemed necessary to suppress unlawful combinations."<sup>471</sup> As Pinckney put it, "where a thing has frequently been done in one way, and no objections raised to that course, it was reasonable to suppose that course was not unconstitutional."<sup>472</sup>

Representative Nicholas, along with other objectors, acknowledged that "some" of the precedents "were in point," but that "he was not for being bound by precedent."<sup>473</sup> The law's supporters snorted: "[W]ill the gentleman from Pennsylvania [Gallatin] come forward, as if he were the oracle of political wisdom, the only high-priest of the Constitution, and say, that these authorities have no weight? In doing this he set at naught the wisdom of all who had preceded him."<sup>474</sup> Speaker of the House Jonathan Dayton twisted the knife:

As to the unconstitutionality of the principle contained in this first section, as had been objected by its opponents, it was truly remarkable for the novelty of the discovery, which was now, for the first time, made by the enlightened members of the 5th Congress, although not a session had passed since 1791, in which the same had not been acted upon and sanctioned. Mr. D[ayton] said, he recollected perfectly well that, six years ago, in the session of 1792, the section which contains this very principle, in its broadest latitude, was drawn up and moved by a very respectable member from the State of Virginia; one, indeed, of the most respectable of those who had ever occupied a seat in that House, and who was a member of the Federal Convention, (Mr. Madison.) That gentleman had done him the favor to show him the proposition before it was moved, and to ask if he would give it his support, which it received, not only from himself, but from the whole House. It thus became incorporated with the act passed in that year, and that, too, without the least suggestion from any member of its being unconstitutional, either then or at any time since, although it had been renewed in many of their laws.<sup>475</sup>

It is worth dwelling on this for a moment, and not just for the irony of conscripting Madison as an opponent of the nondelegation doctrine. As we have shown, Dayton exaggerated only a little in mocking the doctrine as a "discovery" made "for the first time . . . by the enlightened members of the 5th Congress."<sup>476</sup> Even Gallatin recognized that prior congresses hadn't felt much compunction about delegating. On the 1792 law that Dayton referred to, for example, Gallatin only offered the wan retort that "it proved that they [Congress] had heretofore done wrong, and that they ought to be more careful in [the] future."<sup>477</sup> Dayton had thus drawn blood in implying that Gallatin manufactured a constitutional objection to bolster his opposition to the law. The very novelty of the nondelegation objection is yet another piece of evidence that the doctrine was not a widely shared premise of the original constitutional understanding.

<sup>467</sup> Id. at 1635 (statement of Rep. Sewall); see also id. at 1530 (statement of Rep. Harper) ("He had no hesitation in saying . . . that the House might determine upon a tax, and authorize the collecting of it, only in case the President should find it necessary, or in case a certain event should take . . . place").

<sup>468</sup> Id. at 1660 (statement of Rep. Pinckney).

<sup>469</sup> Id. at 1534 (statement of Rep. Rutledge) ("Mr. R. adduced, as in point, the law enabling the President to call out troops in consequence of the Western insurrection, and that making provision for the effectual protection of the frontiers of the United States."); see also id. at 1535 (statement of Rep. Craik).

<sup>470</sup> Act of Mar. 3, 1791, ch. 28, § 8, 1 Stat. 222, 223 (repealed 1795).

<sup>471</sup> Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 403, 403. A few months earlier, Representative James Madison had objected on something like nondelegation grounds to a bill allowing the president to raise troops: "He thought that it was a wise principle in the Constitution, to make one branch of Government raise an army, and another conduct it." 4 Annals of Congress 738 (1794) (statement of Rep. Madison). Though that bill went down to defeat, the later 1794 law suggests Congress as a whole did not share Madison's view. See Act of Nov. 29, 1794 § 1, 1 Stat. at 403.

<sup>472</sup> 8 Annals of Cong. 1660 (1798) (statement of Rep. Pinckney).

<sup>473</sup> Id. at 1541 (statement of Rep. Nicholas); see also id. at 1638 (statement of Rep. Brent) ("[T]hose precedents had no influence upon him. If the acts referred to were unconstitutional, they still remain so. Error will continue to be error however frequently it is repeated.").

<sup>474</sup> Id. at 1637 (statement of Rep. Dana).

<sup>475</sup> Id. at 1679 (statement of Rep. Dayton). Dayton was referring to a 1792 law providing for "three additional regiments" to protect the frontier. See Act of Mar. 5, 1792, ch. 9, § 12, 1 Stat. 241, 243 (repealed 1795). The law said that it was "lawful for the President of the United States, to forbear to raise, or to discharge, after they shall be raised, the whole or any part of the said three additional regiments, in case events shall in his judgment, render his doing so consistent with the public safety." Id. (emphasis added). Dayton's point was that there's no constitutionally significant difference between vesting in the president the open-ended discretion to *forbear* from raising a specified number of troops and vesting in the president the open-ended discretion to *raise* a specified number of troops.

<sup>476</sup> 8 Annals of Cong. 1678 (1798) (statement of Rep. Dayton).

<sup>477</sup> Id. at 1538--39 (statement of Rep. Gallatin).

Gallatin's argument undercuts originalist claims in two additional ways. First, drawing on Hamburger's work, Justice Gorsuch claims that the nondelegation principle applies only to "the power to adopt generally applicable rules of conduct governing future actions by private persons."<sup>478</sup> But Gallatin wouldn't have agreed with that characterization. We know that because the law governing the provisional army did *not* involve any delegation of prescriptive authority; it called for volunteers, not conscripts.<sup>479</sup> Justice Gorsuch and modern commentators frequently aver that broad delegations are acceptable if "the discretion is to be exercised over matters already within the scope of executive power"<sup>480</sup>---a proviso meant to explain away early delegations relating to foreign affairs, national security, and the military.<sup>481</sup> Again, however, Gallatin argued the opposite---that nondelegation fears should be at their apex when it came to raising a standing army under the president's control.<sup>482</sup> Whatever constitutional doctrine Gallatin was attempting to create, it wasn't the one that Justice Gorsuch and many originalist commentators envision today.

In any event, the House of Representatives rejected Gallatin's objections and passed the law by a vote of fifty-one to forty.<sup>483</sup> The bill was narrowed before its passage, but only slightly. The troop level was capped at 10,000 and the president's authority was limited to a declared war, an actual invasion, or "imminent danger of such invasion discovered in his opinion to exist."<sup>484</sup> Gallatin understood that the "in his opinion" language afforded the president wide discretion with only the haziest of guidance: The revised statute, he said, "is liable to the same Constitutional objection to which the original bill was liable, as it left it to the opinion of the President to decide the proper time of raising an army."<sup>485</sup> But a majority of Gallatin's colleagues in the Fifth Congress was unpersuaded.

A second nondelegation debate arose out of the same panic over a possible French invasion. In 1798, the Virginia legislature adopted a resolution, drafted by Madison, objecting to the constitutionality of the federal Alien and Sedition

<sup>478</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>479</sup> See Act of May 28, 1798, ch. 47, §§ 1, 3, 1 Stat. 558, 558 (repealed 1802).

<sup>480</sup> *Gundy v. United States*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223, 1260 (1985)); see also Rappaport, *supra* note 42, at 271 (building an originalist argument for a nondelegation doctrine that "does not apply to various matters, including foreign and military affairs").

<sup>481</sup> As one of us has explained, the Founders didn't actually think "the executive power" had anything to do with these specific subject matters as such---or any other ones, for that matter. See Mortenson, *Royal Prerogative*, *supra* note 14, at 1235--42 ("[T]he subordinacy of 'executive power' was one of its constitutive features: Without some preexisting intention or instruction, that power is an empty vessel that has nothing to execute.").

<sup>482</sup> See, e.g., 8 *Annals of Cong.* 1655--56 (1798) (statement of Rep. Gallatin). Gallatin argued:

[O]ne of the most important powers that could be vested in Congress, viz: the power of raising an army, is, by this bill, proposed to be transferred from Congress to the President. This he considered as a dangerous principle, and if once admitted, it would be in the power of Congress to destroy the Constitution.

*Id.*; see also *id.* at 1673 (statement of Rep. Brent) ("He said a certain evil; for however other gentlemen may consider them, he considered standing armies as the bane of the liberty and happiness of every country where they are established."); *id.* at 1653 (May 1798) (statement of Rep. Claiborne) ("We need only to look at the nations of Europe to see that the loading of one Executive with power has frequently enabled his successor, at some future day, to enslave the people.").

<sup>483</sup> See *id.* at 1772.

<sup>484</sup> Act of May 28, 1798 § 1, 1 Stat. at 558. The president's authority was also confined to the congressional recess. *Id.*

<sup>485</sup> See 8 *Annals of Cong.* 1632 (1798) (statement of Rep. Gallatin). The final language recalled a law adopted by the Second Congress empowering the president to call forth the militia where necessary "to execute the laws of the Union, suppress insurrections, and repel invasions." Act of May 2, 1792, ch. 28, 1 Stat. 264 (repealed 1795). As that earlier law worked its way through Congress, a few members objected to various drafts "as vesting a dangerous power in the Supreme Executive; that circumstances did not render the delegation necessary." 3 *Annals of Cong.* 553 (1792) (statement of Rep. Gerry); see also *id.* at 576--77 (statement of Rep. Baldwin); *id.* at 574 (statement of Rep. Livermore); *id.* at 554 (statement of Rep. Murray). The objections were sometimes couched in constitutional terms: One member, for example, "adverted to the Constitution to show that it was not contemplated thereby that this power [to call forth the militia] should be slightly delegated to the Executive." *Id.* at 576 (statement of Rep. Baldwin). But no one is reported as pressing a hard-edged nondelegation argument along Gallatin's lines.

In 1827, the Supreme Court, per Justice Story, dismissed any constitutional objections to a slightly revised 1795 version of the 1792 militia law:

In our opinion there is no ground for a doubt [that the law is within Congress's constitutional authority.] . . . for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasion, as the necessary and proper means to effectuate the object. . . . The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. . . . But it is not a power which can be executed without a correspondent responsibility.

*Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 29 (1827).

Acts, which had just been signed into law.<sup>486</sup> The following year, Madison, who had by then joined the Virginia legislature, was moved to prepare a lengthy defense of the Virginia Resolution in what came to be called the Report of 1800.<sup>487</sup>

Madison's report--which attracted little notice at the time--dwelled on the appropriateness of interposing state objections to the laws, on the absence of any constitutional power authorizing the Acts' adoption, and on the need to protect a free press.<sup>488</sup> In a brief passage, Madison also raised what looks like a nondelegation claim:

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.<sup>489</sup>

The Alien and Sedition Acts violated that principle, Madison warned, by conferring broad authority on the president to deport "all such aliens as he shall judge *dangerous* to the peace and safety of the United States."<sup>490</sup> The terms "leave every thing to the President," Madison argued. "His will is the law."<sup>491</sup>

Contrary to the assumption of some commentators,<sup>492</sup> Madison's nondelegation challenge to the Alien and Sedition Acts was unusual to the point of idiosyncrasy. At least one pamphlet rebutting his claim seems to have understood this piece of his argument as sounding in prudential policy concerns rather than as a traditional claim of legal restriction.<sup>493</sup> More to the point, the legislative debate over the constitutionality of the Alien and Sedition Acts raged in Congress for days--*but not over delegation*. Debate instead focused on which if any of Congress's enumerated powers (the general welfare clause? the commerce clause? the war power? the necessary and proper clause?) could support the laws.<sup>494</sup> Legislators also clashed over whether a constitutional restriction designed to protect the slave trade<sup>495</sup> prohibited Congress from authorizing the expulsion of aliens.<sup>496</sup>

Opponents of the Alien and Sedition Acts, including Gallatin, didn't raise nondelegation objections even when they lingered over the dangers of vesting sweeping authority to the president and begged for greater specificity in the legislative text.<sup>497</sup> Over the entire course of the extensive debate, only two House members--Robert Williams and Edward Livingston--voiced anything that bore a resemblance to a nondelegation argument.<sup>498</sup> And that argument failed:

<sup>486</sup> James Madison, Virginia Resolutions, 21 December 1798, available at Nat'l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-17-02-0128> [<https://perma.cc/AAE7-9GHU>] (last visited Oct. 10, 2020).

<sup>487</sup> James Madison, The Report of 1800, [7 January] 1800, available at Nat'l Archives: Founders Online, <https://founders.archives.gov/documents/Madison/01-17-02-0202> [<https://perma.cc/GB2M-CPWB>] (last visited Oct. 10, 2020).

<sup>488</sup> *Id.*; see also *id.* (editor's note) (noting that Madison's Report "was little commented upon outside of Virginia, and even there it seems to have had limited impact").

<sup>489</sup> *Id.*

<sup>490</sup> *Id.*

<sup>491</sup> *Id.*

<sup>492</sup> See, e.g., Nathan S. Chapman & Michael W. McConnell, Due Process as Separation of Powers, 121 *Yale L.J.* 1672, 1806 (2012) (misreading Madison's position as characteristic of the Founding era).

<sup>493</sup> See Alexander Addison, Analysis of the Report of the Committee of the Virginia Assembly (1800), reprinted in 1 *American Political Writing*, supra note 116, at 1055, 1068 ("I shall not spend time in discussing conjectures like these; but will just observe that any prerogative, given by the legislature to the executive, may be restrained, or reclaimed by the power which gave it, and the legislature will always be under the control of the people . . ."). Addison also observed that Madison had been in the minority on related arguments for more than a decade. *Id.* at 1061 ("[T]he censure of the report[s] discussion of the fourth resolution] looks rather like a pettish adherence to an obstinate prejudice than a sound opinion of a constitutional point.").

<sup>494</sup> See 8 *Annals of Cong.* 1785--96 (1798) (regarding alien enemies); *id.* at 1954--71 (seditious practices); *id.* at 1973--2029 (alien enemies again).

<sup>495</sup> U.S. Const. art. I, § 9, cl. 1 (banning regulation of the "Migration or Importation of such Persons as any of the States . . . shall think proper to admit" until 1808).

<sup>496</sup> See, e.g., 8 *Annals of Cong.* 1957 (1798) (statement of Rep. Gallatin).

<sup>497</sup> See, e.g., *id.* at 1980 (statement of Rep. Gallatin) ("He wished all crimes and punishments to be accurately defined; and he hoped gentlemen who profess to be warm supporters of this Government and Constitution, will not say that it is not in our power to reach the object.").

<sup>498</sup> See *id.* at 1963 (statement of Rep. Williams) ("Besides, it is inconsistent with the provisions of our Constitution, and our modes of jurisprudence, to transfer power in this manner . . ."); *id.* at 2007--08 (statement of Rep. Livingston) ("[D]o[es] not [the bill] confound these fundamental powers of Government, vest them all in the more unqualified terms in one

Congress adopted the Alien and Sedition Acts, replete with their sweeping delegations of authority.<sup>499</sup> The laws may have been awful, but they were not unconstitutional delegations.

## CONCLUSION

The original public meaning of the Constitution did not include anything like the modern nondelegation doctrine. Contemporary political theorists recognized the propriety of legislative delegations and were comfortable describing their exercise as an act of executive power.<sup>500</sup> Some eighteenth-century writers may have been committed to an anti-alienation principle, arguing that the legislature could not irrevocably transfer or renounce its ultimate authority to chart the nation's course. But any such prohibition on the everlasting transfer of legislative power is worlds apart from the nondelegation doctrine espoused by modern-day originalists.

Practice followed theory. Though early Congresses often issued instructions in painstaking detail, they also delegated in sweeping terms. These delegations were not ancillary or of secondary importance. They were vital to the establishment of a new country---to shore up its finances, to regulate its industry, to govern its nonstate territories, to secure its revenue, and to guard against internal and external threats. Contrary to the claims of many originalists, many of these delegations conveyed the authority to issue binding rules of conduct for private persons. As legislative disputes arose and partisan lines hardened over the 1790s, opponents of this policy or that began to make what sounded like nondelegation arguments in a constitutional register. But those arguments were never central to the debates, were rarely taken seriously, and bore no resemblance to the nondelegation arguments pressed by most originalists today. In any event, they were always rejected.

If you're committed to the nondelegation doctrine, you may be tempted to tell a complicated story about how the delegations in the early republic reflect particular exceptions to a general rule of nondelegation. So maybe there was an exception for post offices. An exception for post roads, at least when they connected to roads previously specified by Congress. An exception for commercial interactions with noncitizens. An exception for *non*-commercial relationships with noncitizens. An exception for federal benefits. An exception for debt restructuring. A exception for loan repayment. An exception for quarantines. An exception for embargoes. An exception for import duties. An exception for taxes on liquor and real property. An exception for territorial governance. An exception for the District of Columbia. An exception for intellectual property. An exception for search-and-seizure policy. An exception for immigration and naturalization. An exception for all ships and vessels. An exception for raising a standing army.

But if you have to stack all these epicycles to defend your theory, at some point you've got to admit it's the theory that's mistaken. There is a simpler explanation that incorporates the historical record rather than fighting it at every step. The Founders were concerned about consolidated power, so they dispersed it and created explicit textual mechanisms to protect that dispersal. The rest was left to the political process. There was no nondelegation doctrine at the Founding, and the question isn't close.

---

hand, and thus subvert the basis on which our liberties rest. . . . This, then, comes completely within the definition of despotism---an union of Legislative, Executive, and Judicial powers.”).

<sup>499</sup> See Currie, *supra* note 82, at 255 (“What to do with [aliens from a hostile nation] was up to the President; there were virtually no limits to this remarkable delegation of authority.”).

<sup>500</sup> See *supra* section II.B.