NONDELEGATION BLUES

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ABSTRACT

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

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

The Article also shows the refinement of the Constitution's approach. The Constitution's sophistication has not been much appreciated in the scholarly literature. But it will be seen that the Constitution was anything but crude in barring transfers of powers. For example, it adopted the separation of powers not in an absolute way, but as a default principle. While it precluded the transfer of legislative power, it left much room for executive rulemaking. Even though its powers were externally exclusive, they were not always exclusive internally—that is, some of them could be subdelegated within the branches of government. And the eternally exclusive powers permitted much nonexclusive authority to be exercised under those powers. Wherever one stands on the transfer of legislative power, these important distinctions qualify the larger point about the location of legislative power.

Not narrowly an originalist or technical matter, the problem here involves visceral social and political concerns. This Article therefore concludes by showing that congressional transfers of legislative power rest on a legacy of prejudice and that, even today, they are mechanisms for discrimination and disenfranchisement.

TABLE OF CONTENTS

[1] Maurice and Hilda Friedman Professor of Law, Columbia Law School.

INRODUCTION

The nondelegation doctrine has long been a mainstay of the administrative state.[2] It explains how Congress can authorize agencies to make rules that might otherwise be considered executive exercises of legislative power. The nondelegation doctrine, however, is on its last legs. As revealed in *Gundy v. United States*, much of the Supreme Court has lost confidence in doctrine.[3] But the justices have not decided what will replace it. They therefore need to figure out what to do.

Recent scholarship confirms that the nondelegation doctrine is indefensible. Rather than indorse the doctrine, the scholarship scatters in other directions. According to some work, the Constitution places no obstacle on congressional delegation of legislative power.[4] Other scholarship argues that the Constitution limits or completely bars such delegation.[5] Yet other writing urges a middle ground—the compromise of confining important rules to Congress and leaving others to be delegated to agencies.[6] This Article is a further contribution to the debate, offering a broad account of the Constitution's powers and the limits on transferring them.

At stake is not merely another judicial doctrine. The nondelegation doctrine is what justifies the shift of regulatory power from Congress to agencies. It thus is a foundation stone of the administrative state.

This Article argues that the Constitution bars any transfer of its powers, whether legislative, judicial, or executive. At the same time, by distinguishing between the Constitution's *powers* and the *authority* exercised under them, this Article explains how Congress can authorize agencies and courts to do some of what Congress itself could do.

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[2] J.W. Hampton v. United States, 276 U.S. 394 (1928). Note that in all quotations (other than those from the Constitution) contractions are completed, and spelling and capitalization are modernized.

I am most grateful to Nicholas "Cole" Campbell and Henry Monaghan for their invaluable comments on my manuscript.

[3] Gundy v. United States, 139 S. Ct. 2116 (2019).

[4] Julian Davis Mortenson & Nicholas Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 279-80 (2021).

[5] Philip Hamburger, Delegating or Divesting, 115 N.W.U. L. Rev. Online 88 (2020) (hereinafter Hamburger, Delegating); Aaron Gordon, Nondelegation, 12 N.Y. Univ. J. of L. & Lib. 718 (2019); Philip Hamburger, Is Administrative Law Unlawful? 377-402 (Chicago Univ. Press, 2014) (hereinafter, Hamburger, Is Administrative Law Unlawful?)

[6] Ilan Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490 (2021); Gary Lawson, Discretion as Delegation: The "Proper Understanding of the Nondelegation Doctrine, George Washington Law Review, 73: 235, 236, 265 (2005); D. Schoenbrod, Power without Responsibility (Yale U. Press 1993).

The result is different from the administrative state but not as severe might be supposed. It is often feared that a barrier to the delegation of legislative power would require Congress to make all rules and would bar any agency discretion. But nothing in the Constitution is so rigid. Instead, as argued here, the Constitution confines binding agency rules to Congress, and binding adjudications to the courts, while leaving room for a wide range of other agency rules and adjudications. Even as to binding rules, the Constitution would require little change in their framing or formulation. Agencies still could frame rules very much akin to current agencies. The only difference would be that whereas now binding rules can be adopted by heads of agencies, a more constitutional approach would require agencies to send such rules to Congress to enact.

Put another way, the Constitution demarcates its own a middle ground. As already hinted, there has been an attempt to find a compromise by distinguishing between important and unimportant rules—a suggestion that draws upon language in the old case of *Wayman v. Southard*.[7] The Constitution's middle ground, however, is different. It bars at least binding agency rules and adjudications while leaving room for a wide range of other agency rules and adjudications.

This Article's Contributions. The contribution of this work to the scholarship includes a host of particulars. For example:

- The piece explains that laws can bind only when made with the consent that comes through the people's elected representative legislature.
- It observes the natural differences among the tripartite powers.
- It reveals how the Constitution distinguishes questions of *external* and *internal* exclusivity—more specifically, how it permits two of the powers to be non-exclusive within their respective branches, while preserving the exclusivity of all of the powers *vis a vis* other branches.
- It further distinguishes between *power* and *authority*, showing that while the constitutional powers are exclusive in relation to other branches, the authority exercised under these powers is not always exclusive.
- It shows that the framers rejected all congressional delegation, even of executive power, let alone legislative or judicial power.
- It draws new attention to the phrase "shall be vested." Rather than merely *delegate* its powers, or even *vest* them, the Constitution says they "shall be vested." This phrase does not just transfer the powers; it also makes their locations mandatory.
- Lest it be thought that the Necessary and Proper Clause can justify transfers of power, this Article explains how that clause carefully any such evasion.
- Moving beyond the narrow confines of doctrine, the Article shows how transfers of legislative power responded to prejudice. Indeed, such transfers still dilute voting rights and impose class discrimination and disenfranchisement.
- Finally, the Article explains that although administrative lawmaking has long been justified as rational and scientific, it actually threatens

[7] Wayman v. Southard, 23 U.S. 1, 42-43 (1825).

rational decisionmaking by introducing a series of decisionmaking biases and by encouraging congressional irresponsibility, popular alienation, and political conflict.

Conceptually Layered. Unlike prior scholarship, this Article offers a conceptually layered argument. It builds up its analysis one principle at a time.

Contemporary scholarship on what judges call *nondelegation* tends to focus on a single concept, whether *delegation*, its *importance*, or *vesting*. But eighteenth-century commentators relied on a range of different principles to explain their views. So to understand the Constitution's approach, this Article similarly explores layers of principles, building up from the most basic to the most specific. One needs to recognize the importance of consent and the differences among the tripartite powers before turning to the separation of powers. Only then can one understand the exclusivity of the powers, the barriers to delegation, and the Constitution's textual commands about where the powers *shall be vested*.

One of the risks of the current tendency to focus narrowly on one notion, be it delegation or vesting, is an artificial narrowing of the conceptual and evidentiary inquiry. When one merely searches for evidence of a single principle, one inevitably fails to recognize the weight of other principles. So, the layered approach here allows one to see the problem in the round—in its full dimensionality—with all of its conceptual richness.

Principles, Drafting, and Text. The Article also offers a more complete range of evidence. The layered concepts reveal the depth of fundamental principles barring transfers of powers. On top of this, the Article adds the drafting history, which has not been sufficiently understood. The framers thought the Constitution should delegate any constitutional powers to the branches of government, so they rejected all congressional delegation, not just legislative power, but even of executive power. Last but not least is the text. Rather than merely transfer the powers, the Constitution mandates their location with the phrase "shall be vested." The word "vested," standing alone, might seem merely to transfer the powers, without any barring further transfers. But with the addition of "shall be," the Constitution expressly decrees where they must be located.

This Article thereby goes far beyond existing scholarship in showing how fundamental principles, drafting assumptions, and text were all aligned in barring transfers of power among the branches of government. Rarely in constitutional law does a conclusion about a highly contested question rest on such a powerful combination of underlying principles, framing assumptions, and text.

Refinement. Constitution's refinement in sorting out the delegation problem needs attention. The literature on delegation, especially that defending delegation, tends to miss the Constitution's sophistication, and this is a pity. It is difficult to have much confidence in a founding document that is misunderstood to the point of seeming crude and implausible.

The Constitution differentiates its powers with more subtlety than has been recognized. It differentiates its powers to avoid overlap. It adopts the separation of powers not in an absolute way, but as a default principle. It establishes its powers with external exclusivity, but not always internal exclusivity. Although its powers are

eternally exclusive, they permit much nonexclusive authority to be exercised under those powers. It echoes old political theory barring the delegation of powers but speaks in terms of *vested* powers. Rather than simply saying it *vested* its powers, which might have left room for them to be subsequently vested elsewhere, it carefully recited that its powers *shall be vested*. And although it might seem necessary and proper to rearrange legislative or judicial power in the abstract, the Constitution authorizes Congress to enact what was necessary and proper only for carrying out the powers as vested by the Constitution.

These barriers to delegation (what the Supreme Court quaintly calls *nondelegation*) are relatively sophisticated. Far more so than commentators have thus far understood.

The Political and Social Problem. Although this Article aims to recognize the multiplicity of relevant juridical concepts, it seems a mistake to understand the problem narrowly in juridical terms. Too often the question is discussed, by judges and academics, merely in terms of *delegation*. But a focus on delegation or nondelegation as a legal solution fails to acknowledge the breadth and depth of the problem.

Not merely a technical answer to a technical question about the distribution of powers, it is part of a sobering crisis of governance and legitimacy. This Article therefore tops off its layered analysis of different juridical principles by pointing to the underlying political and social problem, its foundation in prejudice, its continuing discrimination and disenfranchisement, and its threat to rational decisionmaking. There should be no illusion that the nondelegation doctrine is merely a doctrinal matter.

Organization. This Article begins (in Parts I and II) by recognizing the depth of the nondelegation problem. Then (in Parts III through X) it explores the Constitution's solution by working through layers of principles. Finally (in Parts XI and XII), it explains the dangers of not embracing the Constitution's approach. Of course, the Constitution's is not the only possible solution. But it has the merit of being that offered by the Constitution, and the alternative approaches come with substantial risks.

Part I explains that the collapse of the nondelegation doctrine has created a constitutional crisis. It observes that the nondelegation doctrine is fictional, lax, and of dubious constitutionality, and so has lost the confidence of the justices. They now need to figure out their next step.

Part II adds that although some have hoped to split the baby along lines of importance, but this cure is at least as bad as the disease. The appeal of this solution is that it would limit but not eliminate the administrative state. In its support, Chief Justice John Marshall's opinion in *Wayman v. Southard* has been mined to suggest that although important rules must be decided by Congress, that body can leave less important rules to others.[8] But this misreads Marshall's opinion. He did not propose importance as a measure of what can and cannot be delegated; nor even was his opinion understood to permit any delegation of legislative power. And although the misreading of *Wayman* might seem to moderate the administrative state, the

[8] Wayman v. Southard, 23 U.S. 1, 42-43 (1825).

importance standard has its own constitutional difficulties and dangers. All of this means that, if there is to be solution to the nondelegation problem, it is unlikely to be found in a distinction between important and less important rules.

What, then, is the Constitution's approach to transfers of power? Rather than jump simply to the question of delegation, Parts III through IX explore a series of constitutional principles. These principles range from the explicit to the understated, but all are illuminating. Briefly enumerated, they are: consent, difference, separation, exclusivity, delegation, vesting, and necessary and proper.

Part III notes that the fundamental principle underlying the American government is consent—to be precise, consent by an elected representative body. Without such consent, our laws are without obligation or legitimacy. So it is worrisome that much legislative power, including binding legislative power, is delegated or otherwise shunted off to unelected agencies.

Part IV observes that the Constitution's tripartite powers are different—sufficiently different that they could be located in different branches. Part V delves into the Constitution's separation of powers and how it allocates different powers to different branches of government. Rather than recite separation as abstract principle, the Constitution established it as a default rule.

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

The next question is delegation. Part VIII shows that, contrary to some scholarly claims, eighteenth-century delegation theory barred legislative subdelegations. It also explains the theory's enduring value in protecting the people's constitutional choices and their consensual representative government. The theory, in other words, protects both constitutional and legislative self-government. Unsurprisingly, the Constitutional Convention made clear its assumption that there should be no delegation of power that was legislative or judicial in nature. It even rejected a proposal that would have authorized the Executive to exercise congressionally delegated executive power. The Constitution itself would dictate the location of its powers, and there consequently was no need for any further delegation. Delegation, however, is not the end of the matter.

As shown in Part IX, the Constitution more specifically "vested" its powers. Indeed, it said that they "shall be vested" in their different branches of government. If the Constitution had merely said that its powers *hereby are vested*, it might be possible to claim that was just an initial distribution of powers, which then could be rearranged. But in saying that its powers "shall be vested" in their distinct branches of government, the Constitution makes clear that its location of its powers was to continue into the future.

The Constitution's vesting language is clarifying. First, the legislative and judicial powers cannot be *divested* from the bodies in which the Constitution says they

shall be vested. Second, such powers cannot be *vested* where the Constitution did not vest them.

Part X confirms this conclusion by showing that the Necessary and Proper Clause was carefully written to avoid justifying any transfer of the vested powers. This is clear from its phrase *necessary and proper*, which stands in contrast to its later phrase *necessary and expedient*.[9] It is even clearer from the authorization for Congress to enact what is necessary and proper for carrying out vested powers—for example, the legislative powers vested in Congress and the judicial power vested in the courts.

Finally, the article points out some of the contemporary dangers of allowing transfers of legislative power. The nondelegation doctrine is too often analyzed merely in juridical terms, as if it were merely a formal doctrinal question, without connecting it either outwardly to its social context or inwardly to the mechanisms of administrative decisionmaking. So the last two parts briefly draw attention to these considerations.

Part XI places the dislocation of legislative power in the context of more visceral social and political values. It observes that the delegation of legislative power dilutes consensual representative government and even voting rights, that it developed in the federal government in response to overtly racial and ethnic prejudice. It was designed to limit the power of newly enfranchised but distrusted lower-class Americans. They still would be able vote, but much legislative power would be removed from the persons they elected. Although much of the distinctively racial and ethnic prejudice has abated, the transfer of legislative power under the guise of the nondelegation doctrine remains an instrument of class discrimination and disenfranchisement.

Part XII evaluates the transfer of legislative power in terms of the alleged rationality of administrative decision-making. The administrative process justifies itself on the basis of its rationality. But administrative power turns out to be structurally burdened with a series of dangerous decision-making biases, with irresponsibility, and with a tendency to produce alienation and political conflict.

The practical implications of this Article can be put simply. The power to make binding rules cannot be moved out of Congress, and the power to make binding adjudications cannot be taken out of the courts. Such transfers violate the principle of consent, ignore the differences among the powers, violate the separation of powers, undermine their exclusivity, conflict with principles barring subdelegation, violate the Constitution's command that the powers *shall be vested*, and cannot be justified by the Necessary and Proper Clause. Such transfers, moreover, come with profound social dangers.

This Article ends with an appendix showing that what are commonly taken as early federal examples of delegation include no binding national domestic rulemaking. None. Although this Article explores the conceptual objections to delegation, it is worth adding that delegation also has little support in early federal practices.

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[9] U.S. Const, art. I, §8 & art. II, §3.

This Article makes no pretense of evaluating the full merits or demerits of administrative power. But it does claim that the debate about the nondelegation doctrine could benefit from a better understanding of questions about consent and about different, separated, exclusive, delegated, exclusive, and vested powers. Any one of these inquiries should raise doubts about transfers of the Constitution's tripartite powers. Taken together, these inquiries strongly suggest that the Constitution cannot be understood to permit such transfers—a point confirmed by the associated dangers.

I. NONDELEGATION BLUES

The nondelegation doctrine is in crisis. For approximately a century, it has been the answer to questions about transfers of legislative power.[10] But its internal contradictions and its laxity are an embarrassment. And its constitutional foundations are in question. So, as became apparent in *Gundy v. United States*, the Supreme Court is struggling to figure out what to do with it.[11]

A. Fictional and Lax

As at least some justices began to recognize in *Gundy* and its aftermath, the nondelegation doctrine is collapsing under the weight of its own untruth and laxity.[12]

The nondelegation doctrine purports to hold the line against congressional delegation but actually lets Congress delegate legislative power to agencies—as long as Congress provides them with an "intelligible principle."[13] The theory is that while an agency carries out such a principle, it is merely executing the statute and so is not exercising legislative power. In reality, however, the nondelegation doctrine serves as little more than an open gate for the delegation of legislative power—even if the sign above declares the opposite. In thus claiming to bar delegation while largely enabling it, the doctrine is fictional.

The doctrine's fictional quality has never been a secret. Even James Landis recognized that its claims were "[c]onfused."[14] And in the past two decades, many scholars have described it as a "fiction."[15]

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[10] J.W. Hampton v. United States, 276 U.S. 394 (1928).

[11] Gundy v. United States, 139 S. Ct. 2116 (2019).

[12] Gundy v. United States, 139 S. Ct. 2116 (2019), concurrence by Justice Alito, and dissent by Justice Gorsuch, joined by Chief Justice Roberts and Justice Thomas; Paul v. United States, 589 U.S. ___ (op. of Justice Kavanaugh on denial of certiorari).

[13] J.W. Hampton v. United States, 276 U.S. 394, 409 (1928).

[14] James M. Landis, The Administrative Process 15 (1938) ("the resort to the administrative process is not, as some suppose, simply an extension of executive power. Confused observers have sought to liken this development to a pervasive use of executive power. . .") He echoed Elihu Root's 1916 observation that that "the old doctrine prohibiting the delegation of legislative power has virtually retired from the field and given up the fight." Id at 51 (citing Elihu Root, Addresses on Citizenship and Government 534 (1916)).

[15] Markham S. Chenoweth & Michael P. DeGrandis, Out of the Separation-of-Powers Frying Pan and Into the Nondelegation Fire: How the Court's Decision in *Seila Law* Makes CFPB's Unlawful Structure Even Worse, Univ. of Chi. L. Rev. Online, at

The doctrine is also utterly lax. It places no clear limit on who can be delegated to exercise legislative power. So it allows Congress to delegate its power even to centrally executive departments and officers, such as the Attorney General.[16] And because the president can issue executive orders directing executive agencies and officers, he can effectively control their delegated legislative power—as if he were an elective king, ruling if not by proclamations, then at least by executive orders. The doctrine thus shifts much legislative power to the president and his subordinates and leaves any veto to Congress, producing a strange inversion of constitutional structure. The nondelegation doctrine even lets Congress delegate its legislative power to nearly private bodies, such as Amtrak.[17]

The nondelegation doctrine also places no substantive limit on delegation. In letting Congress relocate its powers as long as it provides an "intelligible principle," the doctrine merely requires a congressional process that is too easily satisfied.[18] So, even when used to empower agencies, the doctrine is entirely lax about the substantive extent of delegation.

The intelligible principle laid down by Congress is so indeterminate as to be almost unconfining. In some cases, the Supreme Court does not even require any intelligible principle.[19] This standard is so vague that its toothless application is perhaps inevitable. And the failure to enforce what little confining effect can be found in the doctrine only accentuates the contradiction between the doctrine's claim of nondelegation and the reality of what it accomplishes. All in all, it is no exaggeration to say that the doctrine is both fictional and too permissive.

Nonetheless, for nearly a century, the doctrine remained respectable. It reconciled administrative power with the Constitution, and therefore had great appeal as a sort of useful double-speak. All that was required was for the justices to shut their eyes to the reality that "nondelegation" doctrine permits what it claims to forbid.

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https://lawreviewblog.uchicago.edu/2020/08/27/seila-chenoweth-degrandis/ (referring to the "intelligible principle fiction"); Travis H. Mallen, Note, Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory, 81 Notre Dame L. Rev. 419, 432 (2005) (noting that the sole test for impermissible delegations—the "intelligible principle" test—"advances the fiction that administrative rulemaking is not an exercise of legislative power when it does not involve too much discretion")' Linda D. Jellum, The Impact of the Rise and Fall of Chevron on the Executive's Power to Make and Interpret Law, 44 Loy U. Chi. L.J. 141, 157 (2012) ("It is, perhaps, a fiction to say that agencies are enforcing congressionally made law."); Note, Judicial Review of Congressional Factfinding, 122 Harv. L. Rev. 767, 774 n.57 (2008) (noting that the Court has "fictionalized Congress's grants of authority as something other than legislative power in order to maintain that they do not violate separation of powers"); Katheryn A. Watts, Rulemaking as Legislating, 103 Georgetown L. Rev. 1003, 1052-53, 1060 (2015) (referring to the doctrine as a "doctrinal fiction"). Justice White observed that in practice "restrictions on the scope of the power that could be delegated diminished and all but disappeared." *INS v. Chadha*, 462 U.S. 919, 985 (1983) (Justice White dissenting).

[16] Gundy v. United States, 139 S. Ct. 2116 (2019).

[17] Department of Transportation v. Association of American Railroads, 575 U.S. ___ (2015). As the Court noted, Congress by statute has declared that Amtrak "is not a department, agency, or instrumentality of the United States Government." Id, slip op. at 6.

[18] J.W. Hampton v. United States, 276 U.S. 394 (1928) ("intelligible principle").

[19] Gundy v. United States, 588 U. S. ___ (2019). In his dissent, Justice Gorsuch writes that the underlying statute "gave the Attorney General unfettered discretion to decide which requirements to impose on which pre-Act offenders." Id., slip op. at 24)

In a free society, however, power cannot long be sustained with untruth. And the growing amount of delegated power has revealed the doctrine's falsity for all to see. Whatever could have been said with a straight face in the middle of the twentieth century, the "nondelegation doctrine" now clearly is a delegation doctrine.

The flood of delegated legislative power has brought some justices around to recognizing that the doctrine may be too permissive. The doctrine long seemed acceptable while the shift of legislative and judicial powers to the Executive was moderated by political restraint. Now that such restraint has been thrown to the winds, the Supreme Court is beginning to see that if the doctrine stands in its current form, little will remain of the separation of powers and representative lawmaking.[20] And even if the principles of equality and consent that require representative lawmaking have lost much of their currency, it is difficult for justices to avoid noticing the simmering discontent provoked by the deliberate exclusion of the public from much of the lawmaking process.

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

At a more mundane level, the nondelegation doctrine does not adequately help judges sort out their cases. Administrative power requires a relaxation of the Constitution's allocation of legislative powers to Congress and judicial power to the courts. But the development of the administrative state does not mean that anything goes. For example, it does not mean that Congress can delegate any and all legislative power to agencies.[21] Thus, even if there is to be some administrative power, there needs to be a gatekeeping principle. So, wherever judges stand on the administrative state, they need a working measure of when to permit an agency's exercise of legislative or judicial power. But that is exactly what the nondelegation doctrine does not provide. It is so lax that it no longer can be understood to serve the gate-keeping function.

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

B. Unconstitutional?

Adding to the unease about the nondelegation doctrine are the constitutional doubts. The court in *Gundy* left such questions for another day, but a constitutional reckoning cannot be put off indefinitely.

One difficulty is that the nondelegation doctrine seems to lack any clear foundation in the Constitution. And this absence of a constitutional hook on which to hang so heavy a hat has inspired much skepticism. Cass Sunstein observes: "There

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[20] See Gundy and Paul, as cited in note ___.

The nondelegation doctrine is only one of many highly permissive judicial doctrines that initially seemed plausible in a period of some political restraint, but eventually revealed themselves to be dangerously unrestrictive. Consider, for example, the judicial doctrines on commerce power and necessary and proper.

[21] For the "anything-goes" approach, see generally Mortenson & Bagley, supra note ___ .

is no unambiguous textual barrier to delegations—no constitutional provision says that the legislative power is nondelegable."[22] Of course, Professor Sunstein is not exactly a textualist. And even from a textualist standard, one would not expect an "unambiguous textual barrier." The Constitution is rarely beyond dispute, and it reveals itself in many inexplicit ways, including its structure and its understated assumptions.

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

A key question, therefore, has been what the Constitution says about delegation. Some of the justices in *Gundy* focused on this problem.[23] Since then, scholars have responded by exploring the history. Professors Julian Mortensen and Nicholas Bagley argue that the Constitution places no limit at all on congressional delegation of legislative power—a bold view that has provoked serious concerns about the underlying evidence.[24] Professors Gary Lawson and Illan Wurman look for a middle ground in *Wayman v. Southard*, relying on Marshall's opinion to suggest that Congress can delegate some legislative power, but not what is "important."[25] Jed Shugerman traces dictionary uses of the word *vested* in the eighteenth century and concludes that it did not imply any limit on divesting; but for other reasons, he doubts the Constitution permitted any delegation of legislative power.[26] Yet other scholars—including David Schoenbrod, Aaron Gordon, and myself—argue that the Constitution bars Congress from delegating any legislative power.[27]

Tellingly, the nondelegation doctrine and its intelligible-principle standard have not been saliently defended in the current scholarly debate. Professors Mortensen and Bagley say there was no nondelegation doctrine at the founding. Certainly the current nondelegation doctrine has no originalist foundation.

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[22] Cass Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315, 322 (2000).

[23] See Gundy v. United States, 588 U. S. ___ (2019), Kagan slip op. at 4-5; Gorsuch slip op. at 5-9.

[24] Mortenson & Bagely, Delegation. For some of the evidentiary errors in their account, see Hamburger, Delegating, 88 (observing that "the article's most central historical claims are mistaken. For example, when quoting key eighteenth-century authors, the article makes errors of omission and commission—leaving out passages that contradict its position and misunderstanding the passages it recites"); Wurman, supra note __ , at 1493-94, 1496 (concluding that that "Mortenson and Bagley have not come close to demonstrating their claim that there was no nondelegation doctrine at the Founding. Although the history is messy, there is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little evidence that clearly supports the proposition that the Founding generation believed that Congress could freely delegate its legislative power." Indeed, "[b]eyond . . . inapposite statements, a careful reading of Mortenson and Bagley's article uncovers probably only one statement—and a vague one at that—to the effect that there are no limits on what Congress can delegate to the Executive."). For further evidentiary problems, see infra notes ____ & _____ .

[25] Wurman, supra note ___ , at 516-17; Gary Lawson, Discretion, at 236, 265. Similarly, see Ronald A. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Policy 147, 160 (2016).

[26] Jed Handelsman Shugerman, Vesting, 74 Stan. L. Rev. 1 (2021), at file:///C:/Users/phambu/Downloads/SSRN-id3793213%20(2).pdf.

[27] Schoenbrod, supra note ___; Gordon, supra note ___ , at 719; Hamburger, Delegating or Divesting? 88.

But there remains the question of whether the Constitution reveals a nondelegation principle or another barrier to transferring powers. This question is crucial, it inevitably will soon come before the Court.

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

II. THE UNIMPORTANCE OF IMPORTANCE

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

A. Not in the Constitution, But Perhaps in Precedent?

The Constitution does not obviously lend itself to the endeavor of distinguishing between important and unimportant rulemaking. Nor should this be a surprise, because the proposal to use importance as a measure of permissible delegation is at least as much about politic compromise as about constitutional principle.

The problem is that the Constitution enumerates its legislative powers by subject matter and vests these powers in Congress without saying anything about differentiating important and unimportant legislation. So any attempt to find such a division must depend on something that, at least in Constitution, is very elusive. Whatever the constitutional foundation of the importance-unimportance distinction, it does not meet Professor Sunstein's expectation of an unambiguous textual provision; nor is it discernable on more moderate interpretative assumptions. In fact, it seems to directly opposed to the Constitution's statement that "All legislative Powers herein granted shall be vested in a Congress of the United States."[28] If *all* such powers are in Congress, how can Congress delegate some but not others?

The importance test thus must rest on precedent, not exactly the Constitution. Hence, the current interest in Marshall's opinion in *Wayman v. Southard*—notably from Gary Lawson and Illan Wurman.[29]

[28] U.S. Const., art. I, §1.

[29] Wurman, Nondelegation, at 516-17; Gary Lawson, Discretion, at 236, 265.

But *Wayman* is not much of a precedent for delegation, even a moderate version of it. Marshall emphasized that his ideas were merely dicta.[30] And whatever he thought, contemporaries did not think he was legitimizing any delegation. In the margin where Marshall began to discuss delegation, the reporter Henry Wheaton summarized that the Process Act "is not a delegation of legislative authority, and is conformable to the constitution."[31]

So it is no surprise that some explorations of an importance test have not bothered with *Wayman*. Justice Kavanaugh did not even mention it when he hinted in *Paul v. United States* that Congress could not delegate "major policy questions." So limited are the traditional sources for such a doctrine that he could only cite a recent case on *Chevron* deference.[32]

B. Importance Not the Measure in *Wayman*

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

Wayman was a Kentucky challenge to a federal rule of court. If it had been an ordinary rule of court, which involved "the regulation of the conduct of the officer of the court in giving effect to its judgments," Marshall could have simply concluded that a "general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."[33] But rather than involve rules of court in general, *Wayman* involved an execution and a replevin bond taken on the execution, and the rules on such process could well be understood to bind members of the public. So although Marshall did not want a narrow Kentucky rule to displace any federal rule, he faced a real difficulty. The federal courts were authorized by Congress to make the rules.[34] But there was a danger that these rules moved from

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[30] Wayman, 23 U.S. at 46, 48-49 ("the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily. . . . But the question respecting the right of the courts to alter the modes of proceeding in suits at common law, established in the Process Act, does not arise in this case. That is not the point on which the judges at the circuit were divided and which they have adjourned to this Court.").

[31] Wayman, 23 U.S. at 42, marginal note.

[32] Paul v. United States, 589 U.S. ___ (op. of Justice Kavanaugh on denial of certiorari) (drawing on, inter alia, FDA v. Brown & Williamson Tobacco Corp., 529 U. S. 120 (2000), to express skepticism about "congressional delegations to agencies of authority to decide major policy questions—even if Congress expressly and specifically delegates that authority."). Justice Thomas has written:

> I am not convinced that the intelligible principle doctrine serves to prevent all cessions of legislative power. I believe that there are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than "legislative."

Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 487 (2001) (Justice Thomas concurring).

[33] Wayman, 23 U.S. at 45.

[34] The 1789 Judiciary Act authorized federal courts "to make and establish all necessary rules for the orderly conducting business in the said courts." An Act to establish the Judicial Courts of the United States, §17 (Sept. 24, 1789), 1 Stat. 72, 83. Expanding upon this, the 1792 Process Act provided that federal courts could alter or add to "the forms of writs, executions and other process" and "the forms and modes of proceeding." An Act for regulating Processes in the Courts of the United States, and

what "that which may be done by the judiciary under the authority of the legislature" toward "that for which the legislature must expressly and directly provide."[35]

When the federal rules on execution were challenged in *Wayman* as unconstitutionally delegated legislative power, Marshall argued that, although Congress itself could establish such rules, it also could authorize the courts to do so: "It will not be contended, that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."[36] Nonetheless, there were instances in which "Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself."[37]

Rather than elaborate the distinction between exclusive and nonexclusive legislative powers, Marshall merely observed: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details."[38] This is the slender reed on which commentators base their suggestion that importance is the measure of what is exclusive and what is not.

Marshall made abundantly clear that he was not stating a legal standard for what must be exclusively regulated by Congress. His whole point was that "[t]he line has not been exactly drawn."[39] And because he was merely offering dicta, the line had to remain unexplored: "the precise boundary of this power is a subject of delicate and difficult inquiry, into which a court will not enter unnecessarily."[40]

So, in speaking about "those important subjects, which must be entirely regulated by the legislature itself," he was merely alluding to the significance of the subjects on the congressional side of the line, not delineating or offering a measure of that line.[41] His opinion in *Wayman* therefore does not support using the notion of importance to define what must be left for Congress and what it can leave to others.

Nonetheless, some academics look to *Wayman* to justify relying on importance as a measure of exclusively legislative powers.[42] This approach seems appealing precisely because it splits the baby—because it places some limits on delegation while continuing to permit much administrative power.

The difficulties, however, remain. Recall that the Constitution enumerates legislative powers by subject-matter and vests *all* of them, without any qualification, in Congress. So the Constitution seems an inhospitable nursery for the birth and nurturing of a newly important importance test. And the situation is no better when one turns to early precedent. *Wayman*—offering mere dicta, which was not understood as justifying any delegation—stands alone as the alleged

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providing Compensation for the Officers of the said Courts, and for Jurors and Witnesses, §2 (May 8, 1792), 1 Stat. 275, 276.

[35] Wayman, 23 U.S. at 46. In this respect,

[36] Wayman, 23 U.S. at 42.

[37] Wayman, 23 U.S. at 43.

[38] Wayman, 23 U.S. at 43.

[39] Wayman, 23 U.S. at 43.

[40] Wayman, 23 U.S. at 46.

[41] Wayman, 23 U.S. at 43.

[42] Wurman, supra note ___ , at 516-17; Gary Lawson, Discretion, at 236, 265. Justice Gorsuch alludes to the importance distinction without quite making clear where he stands on it. Gundy v. United States, 588 U. S. at ___ (slip opinion, 10, 28, 30).

judicial foundation of the importance test. And that test cannot really be found in *Wayman* without some indifference to what Marshall actually said.

C. The Importance of Not Relying on Importance

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

For starters, the importance standard would bar much executive rulemaking that has always been considered entirely constitutional. Throughout the existence of the United States, from the Founding to the present, it has been widely accepted that Congress can authorize the Executive to make many important and lawful rules—for example, on the duties of executive officers,[43] on the treatment of enemy aliens and aliens in amity,[44] on the distribution of pensions,[45] on the distribution of federal lands,[46] and on other privileges. The resulting rules have always been viewed as important. Very important. Yet it has almost always been understood that, when acting with statutory authorization, the Executive can make such rules. On this, there is little if any disagreement between the defenders and the critics of administrative power. The importance standard thus conflicts with otherwise undisputed assumptions about lawful executive rulemaking.

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

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

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[43] For example, An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, §1 (July 27, 1789), Public Statutes at Large of the United States, 1: 29 (authorizing the principal officer of the Department of Foreign Affairs to "conduct the business of the said department in such manner as the President of the United States shall from time to time order or instruct").

[44] For regulation of aliens in amity, see Philip Hamburger, Beyond Protection, 109 Colum. L. Rev., 1823, 1896–97 (2009).

[45] For example, An Act for regulating the Military Establishment of the United States, §11 (Apr. 30, 1790), id, 1: 121 (providing pension for the wounded soldiers and that invalids "shall be placed on the list of the invalids of the United States at such rate of pay, and under such regulations as shall be directed by the President of the United States").

[46] For example, Regulations and forms for applications, and the authorization for the same, to be observed by Indians applying for the benefit of the bounty-land laws (Office Indian Affairs, April 2, 1855), in Message of the President of the United States to the Two Houses of Congress at the Commencement of the First Session of the Thirty-Fourth Congress, 553 (Part I) (Washington 1855) 34th Congress, 1st Session, Ex. Doc. No. 1.

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

The dangers of such an approach are evident from the Regulations from the Executive in Need of Scrutiny Act—a bill commonly known as the REINS Act.[47] This bill would require prior approval in a joint resolution of Congress for "major rules"—meaning primarily those with over $100 million in economic significance.[48] But this is just a proposed statute. Could the constitutional line between importance and unimportance be drawn with an arbitrary dollar figure? And could the courts step in to do this where the Constitution says nothing of the sort? Such a monetary distinction between what is exclusively congressional and what can be left to the Executive may fit the vision of a businessperson or economist. But it would be passing strange from a Supreme Court justice.

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

Indeed, a judicial nquiry into the idea of importance is apt to be very political. Whether or not something is important is apt to be perceived differently by different persons, depending on their situations. It therefore is unsurprising that such decisions tend to be very political. For example, it is the role of the people or their legislature to decide whether a right or duty is important enough to become a matter of law.[49] At that point, the judges should apply the duty or protect the right, even if they take another view of the matter. Their office is to discern the law, not to make political judgments, let alone about something as open-ended as importance.

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

The Boston Tea Party is a reminder that apparently trivial things can be important, depending on one's vantage point. The American Revolution began in Boston harbor with a protest against a three-penny tax on tea—something that the British considered a minor imposition. The British, however, did not realize the

[47] S.92, Regulations from the Executive in Need of Scrutiny Act of 2019, _____ .
[48] Id, §801. Section 804 defines "major rule" to mean any rule resulting or likely to result in "an annual effect on the economy of $100 million or more." Id, §804.
[49] U.S. Const., art I, §1.

importance of living under laws made with elective consent. Importance, in short, is apt to be understood differently by the rules and those who are ruled.

Ultimately, importance fails as a standard because it is antithetical to the Constitution's allocation of powers. As already suggested, the Constitution enumerates legislative powers in terms of subject matter, and it vests *all* legislative powers in Congress, not in the President or the courts. However this is understood, it is not a half-and-half measure, which splits the child between Congress and the Executive, let alone on grounds of importance.

Even unimportant uses of legislative power remain legislative and so remain vested in Congress. They are as legislative and as vested in Congress as important uses of legislative power. So how can the Constitution be read to permit the delegation of the one and not the other?

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The delegation problem is serious. It has been seen that the current nondelegation doctrine is unsustainably fictional, lax, and unconstitutional. Part II has added that a middle ground along the line of importance is also implausible.

Whatever else might be drawn from Marshall's opinion in *Wayman*, the Chief Justice did not offer importance as a measure of the line between exclusive and nonexclusive powers. He had good reason for not doing so, because this measure is untenable, dangerous, and absent from the Constitution.

So how is a lawful position to be found? The answer will come in a series of conceptual layers, the first being consent.

III. CONSENT

The key principle underlying the formation of the United States and its governments was consent—in particular, consent by an elected representative body. This consent was essential for the enactment of both the Constitution and statutes. Without such consent, these laws would not really be laws; they would be without obligation or legitimacy. It therefore is sobering that administrative rules are not made by elected lawmakers.

The fundamental question in political theory has long been how to reconcile individual freedom with governmental power. The answer lies in the natural significance of consent—a solution that became evident already in the Middle Ages and was explained systematically in the seventeenth and eighteenth centuries by English theorists such as John Locke and numerous Americans.[50]

[50] The rich history of the medieval development of ideas of consent has been traced, for example, by R. W. Carlyle & A. J. Carlyle, A History of Medæval Political Theory in the West, 6: 83, and 149, 460 (New York: Barnes & Noble, n.d.). Brian Tierney notes the glosses c. 1200 that "commonly cited the Roman law dictum 'What touches all is to be approved by all.'" Brian Tierney, Origins of Papal Infallibility 1150-1350, at 48 (E.J. Brill 1972). And this was sometimes tied to notions of the "consent of a corporation which was binding on all is members." Id, 49. The peak of medieval philosophical requiring consent came from Nicholas of Cusa, The Catholic Concordance, 98, ed., Paul E. Sigmund (Cambridge Univ. Press 1995) ("if by nature men are equal in power and equally free, the true

Their theory was roughly as follows. Individuals in the absence of government are not naturally subordinated to each other, but are equally free.[51] Individuals therefore cannot be subject to anyone, including any government, without their consent.[52]

This was the key principle underlying the formation of the United States. As put by the Continental Congress's October 1775 Declaration and Resolves, Americans were "entitled to life, liberty, and property, and they have never ceded to any sovereign power whatever a right to dispose of either without their consent."[53] Or in the words of the Declaration of Independence, "all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness," and that "to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed."[54]

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

John Locke, for example, spoke of "bonds of laws made by persons authorized thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws,

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properly ordered authority of one common ruler who is their equal in power cannot be naturally established except by the election and consent of the others and law is also established by consent.").

For Locke, see John Locke, Two Treatises of Government 349-51 (book II, chapter viii, §§ 95-99), ed., Peter Laslett (Cambridge Univ. Press, 1963) (1690). Among the other English theorists whose ideas about consensual government were widely appreciated in America was Algernon Sidney, who had argued from principles of nature that "governments arise from the consent of men, and are instituted by men according to their own inclinations." Algernon Sidney, Discourses Concerning Government, 38 (ch. I, §16) (London 1698). Incidentally, the Mortenson-and-Bagley article chops up one of Sidney's sentences to suggest that he countenanced statutory delegations of legislative power: Sidney "observed . . . that while the King 'can [not] have the Legislative power in himself,' the legislative branch could choose to give him the 'part in it' that 'is necessarily to be performed by him, as the Law prescribes." Mortenson & Bagley, supra note ___ , at 298. But when the sentence as a whole is examined, it merely refers to how ancient English constitutional custom gave the king the role of assenting to bills. Id, 459 (ch. III, § 46).

For the role of Lockean political thought in America, see John Dunn, The Politics of Locke in England and America in the Eighteenth Century, in Political Obligation in Its Historical Context: Essays in Political Theory 53 (2002); Steven M. Dworetz, The Unvarnished Doctrine: Locke, Liberalism, and The American Revolution (1990); Jerome Huyler, Locke on America: The Moral Philosophy of The Founding Era (1995); C. Bradley Thompson, America's Revolutionary Mind: A Moral History of The American Revolution and the Declaration That Defined It 21–37 (2019); Merle Curti, The Great Mr. Locke: America's Philosopher, 1783–1861, Huntington Libr. Bull. 107 (1937).

[51] See Locke, supra note __, at 289, (book II, chapter ii, §6).

[52] Id, 348 (book II, chapter VIII, §95) ("Men being . . . by nature, all free, equal and independent, no one can be put out of this estate and subjected to the political power of another, without his own consent.").

[53] Decl. and Resolves of the Continental Congress (Oct. 14, 1774).

[54] Decl. of Ind. (July 4, 1776). In the Pennsylvania Ratifying Convention, James Wilson quoted the Declaration, including the statement that "governments are instituted among men, deriving their just powers from the consent of the governed, and observed: "This is the broad basis on which our independence was placed; on the same certain and solid foundation this system [the U.S. Constitution] is erected." James Wilson in Pa. Ratifying Convention, 2 The Documentary History of the Ratification of the Constitution 473, ed. Merrill Jensen (State Hist. Soc. of Wisc. 1976).

that should be binding to the rest."[55] The philosopher added: "When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey."[56] On the basis of this need for elective representation, American colonists declared it "the first principle in civil society, founded in nature and reason, that no law of the society can be binding on any individual[], without his consent, given by himself in person, or by his representative of his own free election."[57] Rules could bind only if made by an elected representative legislature.

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

Most governments in human history have not relied on elected representative legislatures to make laws. The United States is therefore a notable experiment in self-government. Administrative rulemaking, however, threatens this self-governance. Whether delegated or supposedly not delegated by Congress, this pathway of power displaces the Constitution's elected and representative avenue for consent.

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

IV. DIFFERENT POWERS

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

The leading alternative visions focus on the Constitution's processes. From this perspective, legislative power is whatever is done through the Constitution's lawmaking process—that is, through the process of enactment and presentment.[58]

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[55] Locke, supra note __ , 425-26 (book II, chapter xix, §212).
[56] Id.
[57] Resolutions of the Boston Town Meeting (Sept. 13, 1768), in A Report of the Record Commissioners of the City of Boston, Containing the Boston Town Records, 1758 to 1769, at 261 (Boston: Rockwell & Churchill, 1886).
[58] Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1726 (2002).

And executive power is just an "empty vessel," which includes whatever Congress delegates to the Executive for it to execute.[59] Along the same lines, perhaps the judicial power is to be understood as whatever is done through judicial process. One way or another, the processes defines the powers.[60]

But the Constitution's tripartite powers were understood as different in their very nature, not merely in their processes. A committee of Pennsylvania's Council of Censors said in 1784 that the Pennsylvania Constitution allocates power "to the legislative, or the executive, according to its nature."[61] In the 1787 Constitutional Constitution, James Madison proposed that the Executive should be able to exercise congressionally delegated powers only if they were "not Legislative nor Judiciary in their nature"—a proposal to which this Article will return.[62] A decade later, Madison assumed that "all will agree" that each of the different departments was of a different "nature."[63] In this vision, each of the tripartite powers is, at least at its core, naturally different from the others.

In tracing the natural differences among the Constitution's powers, Part IV will often allude to legal obligation—the binding quality of law and legal judgments. Such enactments and judgments traditionally were thought to come with both internal and external obligation, with both an interior commitment to obey and the exterior coercion of government.[64] This binding or sticky character of law is a key measure of the differences among the powers. Put simply, judicial power is centrally the power to make binding judgments in cases about binding rights or duties. Legislative power centrally includes making binding rules, though it is not entirely limited to this. And executive power is not binding, albeit its

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[59] Id, 1725; Mortenson & Bagley, supra note ___ , at 279-81.

[60] Another view is that

[61] Report of the Committee of the Council of Censors, 18 (Philadelphia: 1784).

[62] 1 The Records of the Federal Convention of 1787, 66-67, ed. Max Farrand (Yale University Press, 1911) (hereinafter Farrand); see infra Part VIII.C. Madison's proposal was rejected because its objectives had already been achieved. Id.

[63] Virginia, House of Delegates, Report of the Committee . . . Concerning the Alien and Sedition Laws (1798), in Instructions to the Senators of Virginia in the Congress of the United States . . . , 31 (Richmond 1819) ("However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional.").

[64] The *locus classicus* for discussion of the obligation of law was Justinian, Institutes (III.13) (*obligatio est iuris vinculum, quo necessitate adstringimur alicuius solvendae rei, secundum nostrae civitatis iura*). See also Samuel Pufendorf, Of the Law of Nature and Nations, 60 (Book I, Chapter vi, §5), trans., Basil Kennett (London: 1729) ("The Roman lawyers call it *the bond of the law*."). On this basis, it was conventional to speak of both the force and the obligation of law. See Samuel von Pufendorf, The Two Books on the Duty of Man and Citizen According to the Natural Law, 15 (Chapter II, §7) (Cambridge: 1682) (associating the "power to oblige, that is, to impose an inward necessity, and the power to force or compel by penalties to observe the law."). Echoing such ideas, men often spoke about the "force and obligation" of law. See, for example, An Act to repeal the several Acts of Assembly for seizure and condemnation of British goods found on land, §2, Acts Passed at a General Assembly of the Commonwealth of Virginia (Richmond [1783]) ("this act shall have the force and obligation of law, from and after the thirteenth day of May, in the present year").

Note that H. L. A. Hart's observations about the difficulty of understanding law as a coercive command and about the corresponding significance of an internal sense of obligation. For example, H.L.A. Hart, The Concept of Law, 42, 48 (Oxford: Clarendon Press, 1990) (regarding the inability to understand law as a limit on officials when the law is considered mere coercive command).

factual determinations can have consequences under binding laws. So it will be important to pay attention to what is binding and what is not.

A. Judicial Power

The Constitution vests the courts with the "judicial power"—a power primarily involving binding judgments about binding law.[65] At its periphery, the judicial power includes the direction of court officers, control over court rooms, holding persons in contempt, and making rules of court. But the core of the power has always been to make binding judgments about binding law.

The Constitution gave the courts the judicial power, and this centrally involved reaching binding judgments about what the law required in cases or controversies.[66] The judgments were binding on the parties.[67] And cases and controversies were actual disputes about questions of law—that is, in accord with legally binding duties, powers, and rights.[68] Reinforcing this understanding of judicial power, the judges, by virtue of their office, were understood have a duty to exercise their judgment in accord with the law of the land.[69] This was what it meant to be a judge.[70] So, for layers of reasons, the judicial power was a power to make judgments binding on the parties about binding law.

This dual focus on legal obligation—the obligation of both the underlying laws and the judgments of the courts—fits with other, more familiar observations about judicial power. Although the courts can issue binding judgments, the judges cannot give advisory opinions.[71] Nor can the courts give judgments that are subject to executive or legislative review.[72] And because judicial power resolves only

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[65] U.S. Const, art. III, §1.

[66] U.S. Const, art. III, §1 & 2.

[67] That court judgments were binding was so basic it was rarely discussed. Nonetheless, it occasionally came to the surface. For example, it was said that "there is a necessity of obeying" the order or "command of a judge." Argument for the plaintiff in *Oldum a Allerton & Pope* (Gen. Ct. Va. 1739), 2 Virginia Colonial Decisions B331, B332 (Boston 1909).

[68] Philip Hamburger, Law and Judicial Duty, 537-43 (Harvard University Press 2008) (hereinafter Hamburger, Law and Judicial Duty) (on seventeenth-century distinction between understanding of "cases" and "controversies" in contrast to political or philosophical questions, which were "extra-judicial" and on 1780 Virginia dispute over the contrast between "cases" and "questions.").

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

[69] Hamburger, Law and Judicial Duty 9-14, 105-06 (on the office and duty of judges in English law).

[70] Id.

[71] Letter from Supreme Court Justices to George Washington (Aug. 8, 1793), at National Archives, https://founders.archives.gov/documents/Washington/05-13-02-0263 (refusing to give advisory opinion).

[72] Hayburn's Case, 2 U.S. 409 (1792) (refusal of courts to make decisions under Invalid Pension Act that would be reviewable by the political branches); 6 The Documentary History of the Supreme Court of the United States, 1789–1800, at 53–54, 370–71, ed. Maeva Marcus (Columbia University Press, 1998) (providing details of Hayburn's Case); Gordon v. United States, 69 U.S. 561 (1864)

decisions about binding law, the courts traditionally could not adjudicate nonbinding rules, such as rules on the distribution of benefits—unless the benefits had become legally binding rights (what once were called *vested* rights). The Supreme Court has increasingly recognized that the denial of a benefit can sometimes have the same effect as a constraint and so should be treated as if it were binding.[73] But even though such cases stretch the idea of what is binding, they do not disturb the broader argument here that judicial power centrally involves binding judgments about binding law.

The conceptual point that judicial power centers on judgments about binding law is buttressed by the particular elements of the courts' jurisdiction. Article III, section 2, specifies how far "[t]he judicial Power shall extend."[74] This power includes "all Cases, in Law and Equity, arising under this Constitution" and "the Laws of the United States."[75] "Controversies . . . between Citizens of different States" is a jurisdictional category defined by the identity of the parties, not by subject matter, and so it is not defined in terms of what arises under the laws.[76] But even this category is entirely consistent with the argument here that the judicial power involves binding judgments about binding law.

In contrast to the courts, the Congress and the Executive are not vested with the judicial power. And under their constitutional powers, they do not enjoy any authority to make legally binding judgments about binding duties or rights.

The closest thing to an exception is the Senate's power try impeachments.[77] But the Constitution carefully ensures that "Judgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of honor, Trust or Profit under the United States," leaving any punishment to the courts "according to Law."[78] The Constitution's provision for impeachments thus confines such judgments to the denial of privileges. Even if this is an exception to the broader point here about judicial power, it at least partly recognizes that binding judgments about binding law are judicial in nature.

Another possible exception might have been the capacity of the legislature to pass bills of attainder. In such enactments, legislation clearly would become a binding judgment about binding law. The Constitution, however, expressly bars such intrusions into judicial power.[79]

Of course, in their exercise of their own powers, Congress and the Executive must exercise their own judgment about binding duties, powers, and rights. But these are not binding judgments. When the Executive decides to grant patents, title to federal lands, and other privileges, or makes determinations about the factual predicates for statutory duties, there are consequences for many Americans under

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(holding that the Supreme Court lacks jurisdiction to hear appeals from the Court of Claims, apparently because a court could not exercise executive power and that its judicial power could not be subject to review by the political branches).

[73] Goldberg v. Kelly, 397 U.S. 254 (1970) (treating the denial of some benefits as a denial of due process); Matthews v. Eldridge, 424 U.S. 319 (1976) (specifying a test for when a denial of benefits amounts to a denial of due process).

[74] U.S. Const. art. III, §2.

[75] Id.

[76] Id.

[77] U.S. Const, art. I, §2, 3.

[78] U.S. Const, art. I, §3.

[79] U.S. Const, art I, §9.

binding law, and the Executive must struggle to get the underlying law and facts right. The decisions themselves, however, even if judiciously reached, are not exercises of judicial power and are not binding as judgments. That is, they do not create legal obligation. They thus confirm the distinctively judicial character of the judicial power vested in the courts.

Of course, the development of administrative power has relocated much judicial power. With legislative authorization and judicial blessing, executive and independent agencies make binding judgments about binding laws—or at least about binding rules, interpretations, and other administrative edicts.

The claim at this point is merely that the judicial power is at its core the power to make binding judgments in cases and controversies about binding duties and rights, and that this is substantively different from the legislative or executive powers. So, whatever one thinks of Congress's transfer of judicial power to agencies, the judicial power is different from the other powers. It thus is possible for the Constitution to locate the judicial power solely in the courts, not the other branches.

B. Legislative Powers

The Constitution vests its legislative powers in Congress and then enumerates them. Like the judicial power, the legislative powers centrally come with legal obligation. But the judicial and legislative powers are different. The core of judicial power is to render binding judgments in cases or controversies about binding powers, rights, or duties. In contrast, legislative power is the only type of power to involve an exercise of will in ordaining legally binding rules. This power to make binding rules is the natural core of legislative power.

Legislative Will. Law has long been understood as the will of the legislature. A statute or constitution was thus an expression of legislative will, this being what made the law binding.

This legislative will sounds like intent, and this is not a coincidence. Intent is often understood as an approach to interpretation, as if it were merely a methodology chosen by some judges. Yet it traditionally was understood as the lawmaker's will, this being what made law binding.[80] Judges had to give effect to legislative will because this was binding as law.[81]

The relevant will was not the multiple wills of myriad legislators, let alone their interior aims or goals. Rather, it was the will or intent of the lawmaking body as expressed in its statute or constitution. In this sense, its will or intent was no different than the enactment's sense and could be summed up as *the intent of the enactment*.[82]

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[80] As summarized by the eighteenth-century Cambridge professor Thomas Rutherforth, "the obligations that are produced by the civil laws of our country, arise from the intention of the legislature; not merely as this intention is an act of the mind, but as it is declared or expressed." Thomas Rutherforth, Institutes of Natural Law, Being the Substance of a Course of Lectures on Grotius de Jure Belli et Pacis 404 (II.vii.1) (Baltimore 1832) (1754–56).

[81] See text above at note ___ .

[82] Hamburger, Law and Judicial Duty, 57; J.H. Baker, 6 Oxford History of English Law, 79 (Oxford University Press 2003).

A legislative body was of course expected to exercise judgment, both legal judgment about what the Constitution required and more broadly policy judgment. But its legislative power was a power to make law through an exercise of its will.

In the *Federalist*, Alexander Hamilton contrasted legislative *will* with executive *force* and the *judgment* of the courts. [83] It therefore was necessary to focus on "the will of the legislature, declared in its statutes."[84] He added that where the legislature's will "stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former."[85] Chancellor Wythe of Virginia explained in a 1794 case: "A statute is a declaration of the legislative will—the publication of that will is all that remains to give it energy."[86] The next year, another Virginia judge, St. George Tucker, said: "I consider a statute as an evidence of the will of the legislature, which shall have the most full and complete effect in every part."[87] The legislative power was an exercise of will.

Binding Rules. Binding rules—those that come with legal obligation—were understood to be naturally legislative and so had to be exercises of the legislature's will. To understand this, one must recall the relation between consent and legal obligation.

It was seen (in Part III) that government could not be legitimate and its laws could not bind without consent. If all individuals were by nature equally free, then none could be subject to government without their consent. This consent was necessary not only for the constitution but also for legislation. In a large society, this meant that laws had to be enacted by an elected representative legislature. Only in this way could the laws be binding. Legislative power thus naturally seemed to include at least the making of binding rules—the rules that come with legal obligation.

From this point of view, though Congress's legislative powers included some nonbinding matters, such as borrowing money, they necessarily included at least the making of binding rules—such as laying taxes and regulating commerce among the states.[88] As Alexander Hamilton explained in the *Federalist*, "The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated."[89]

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[83] The Federalist, 523, No. 78, ed. Jacob E. Cooke (Wesleyan 1961) ("The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

[84] Id, 525.

[85] Id.

[86] Harrison v. Allen (Va High Ct of Chancery 1794), St. George Tucker's Law Reports and Selected Papers 1782-1825, at I: 333, ed., Charles F. Hobson (Chapel Hill: University of North Carolina Press, 2013).

[87] Commonwealth v. Potter (Va Genl Ct 1795), St. George Tucker's Law Reports and Selected Papers 1782-1825, at I: 369, ed., Charles F. Hobson (Chapel Hill: University of North Carolina Press, 2013). Tucker also objected that to decide "ex arbitrio judicis" would be "making legislators of judges." Id.

[88] U.S. Const, art I, §8.

[89] Federalist, supra note __ , at 522–23, No. 78.

Indeed, the Constitution vests Congress with all of the powers to make binding rules that are mentioned by the Constitution. An authority to make such rules is included, for example, in the power to make lay and collect taxes, to regulate interstate commerce, to establish uniform laws on bankruptcies, to regulate the value of money, to fix the standard of weights and measures, to provide for punishment of counterfeiting, to define and punish piracies and felonies committed on the high seas and offenses against the law of nations, and to legislate in the District of Columbia and other federal enclaves.[90] The only power to make binding rules that the Constitution places elsewhere is the power to ratify treaties.[91] Yet this ratification, which brought treatises within the supreme law of the land, belonged to the Senate, itself an elected body.[92] Even the exception thus proves the rule.

The Constitution places all binding rulemaking in Congress. If binding rules naturally had to be made with consent, they logically had to be part of the legislative power, vested in a representative legislature.

Non-Binding Laws, Including Authorization. Although the binding rules naturally had to be included in the legislative powers, the Constitution's legislative powers could also include nonbinding rules. Consider, for example, the powers to borrow money, to coin money, to establish post offices and post roads, to constitute inferior courts, to raise and support armies, to provide and maintain a navy, and so forth.[93] Although some of these powers (at least in conjunction with the Necessary and Proper Clause) could justify the making of binding laws, they more broadly involve non-binding enactments.

To sort out what was legislative and what was executive, it is useful to look ahead to the nature of executive power. It will be seen below that executive power includes the government's action, strength, or force.[94] So, executive power includes any actions in coining money, establishing post offices, and so forth. It also includes issuing directions to executive officers. Such things must be done by the Executive.

What, then, does the Constitution require when it vests Congress with coining money, establishing post offices and roads, constituting inferior courts, raising and supporting armies, and providing and maintaining a navy, and so forth?[95] Although the physical establishing, constituting, supporting, and maintaining of such things, as well directions to executive officers about such things, are executive acts, vested in the Executive, the Constitution would seem to require that such things be at least authorized by Congress. The carrying out is executive, but the authorization is legislative. For example, Congress must

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[90] U.S. Const, art I, §8.

[91] U.S. Const, art II, §2.

[92] U.S. Const, art. II, §2, & art. VI. Although the Senate originally was not elected directly by the people, it was elected, even if only indirectly. For the Supremacy Clause's approach to treaties, requiring them to be ratified before they could become part of the supreme law of the land, see Bradford R. Clark, The Procedural Safeguards of Federalism, Notre Dame Law Review 83: 1681, 1711–1712 (2008).

[93] U.S. Const. art I, §8.

[94] See infra Part III.C.

[95] U.S. Const. art I, §8.

authorize coinage, post offices, the navy, and pensions for invalid seamen before the Executive can do the physical acts of coining, building, hiring, and paying.

Other indications of what is legislative come from the Constitution's limits. For example, "[n]o Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[96] The appropriation of money, at least in the sense of its authorization, must be done by Congress.[97]

All such authorizing legislation—ranging from post offices and navel pensions to appropriation—is distinct from legislation that binds, but not entirely distinct. Such laws do not on their own oblige the public to do anything—or not do anything. Yet they authorize the Executive, and once the Executive acts, they bind others not to interfere.[98] In authorizing the Executive, these authorizing laws are thus indirectly binding. So it is appropriate, even necessary, for such underlying authorization to come from Congress. At the same time, as H.L.A. Hart explains, such authorizing laws should not be confused with what ordinarily are considered binding laws.[99]

None of this is to insist that the Constitution's legislative powers on coinage, post offices, and so forth merely require authorization from Congress. It is possible that such powers also require Congress to authorize with a degree of specificity. This was a common argument in, for example, the Post Roads Debate.[100] It also was James Madison's complaint about the Aliens Act when he protested that the authorization for the president to license aliens was insufficiently detailed.[101]

But whereas laws can bind only to the extent they make evident what they require, laws can authorize with less detail.[102] A statute on coining money,

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[96] U.S. Const. art I, §9.

[97] Note that the word "authorization" is used here as a general characterization of appropriations and should not be understood to blur the distinction between appropriations and legislation authorizing the use of the appropriated money.

[98] In the positivist vision that H.L.A. Hart considers reductionistic, such authorizing laws can be viewed as "statements of the conditions under which duties arise." H.L.A. Hart, The Concept of Law, 41 (Clarendon Press, 1961).

[99] Id ("Such power-conferring rules are thought of, spoken of, and used in social life differently from rules which impose duties, and they are valued for different reasons.").

[100] See statements of Reps. Livermore, Hartley, and Page at 3 Annals of Cong. 229, 231, 233-34 (1791).

[101] See the next note, infra.

[102] When Madison argued against the Aliens Act, he suggested it was akin to laws imposing civil or even criminal obligation:

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

establishing post roads and offices, constituting inferior courts, raising and supporting armies, providing and maintaining a navy, or appropriating money can authorize these activities in relatively general terms. Of course, an authorizing statute can protect the Executive from interference only as far as it makes evident the extent of its authorizing protection, but being merely a matter of authorization (and often involving much that is merely internal to the Executive), it need not be very detailed.

Legislative power thus includes all of the nation's authority to make binding rules—plus the authority to make a range of non-binding rules.[103] The binding rules, by their nature, had to be made with consent and so had to be legislative. And they could bind only to the extent they made evident what they required. In contrast, non-binding rules mostly provided for congressional authorization. They were obligatory in the limited sense that they bound others not to interfere with the Executive, but more generally were not binding.

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

Whereas laws are prototypically rules, in the sense of being generalities, directed to the society as a whole, judicial decisions are judgments in particular cases or controversies applying such rules to particular persons. When lecturing on the Constitution in the 1790s, St. George Tucker explained that "the legislative power may be defined to be the power of making laws, or general rules in all cases not prohibited by the Constitution: the application of these rules to particular cases being the province of the judiciary."[104] Both the legislative and the judicial power could bind, but the one did so generally by will, the other in particular cases through judgment.

It thus becomes further apparent that the legislative and judicial power were fundamentally different. Each could therefore belong to its own branch of government.

C. Executive Power

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

James Madison, The Report of 1800, in 17 The Papers of James Madison 303, 324, ed. David B. Mattern, J.C.A. Stagg, Jeanne K. Cross & Susan Holbrook Perdue eds. (1991). On this basis, Madison insisted that Aliens Act was too open-ended. But licensing for enemy aliens had always been a matter of executive license, as he knew because he drafted Virginia's 1785 statute authorizing the state's Executive to exclude enemy aliens. See Hamburger, Beyond Protection, supra note ___, at 1932-33.

[103] One might suppose that rules of court are a possible counterexample, given that they can be made by a court and perhaps can be binding. They generally, however, were not legally binding. See infra ___.

[104] St. George Tucker, Law Lectures, 6: 220, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

The executive power did not include the power to bind. It thus stands in sharp contrast to the other powers.

The Constitution vests the executive power of the United States in the President.[105] It then includes more specific provisions, which add to, and subtract from, the general grant.[106] So it is essential to begin by understanding the concept of executive power, before turning to how it was refined with more specific provisions.

This Article will show that the Constitution's executive power was the action, strength, or force of the nation. The power thus included both law enforcement and all other governmental action—in contrast to making laws and adjudicating violations of them. But whichever conception of executive power one adopts, there is agreement that the power to make binding rules was legislative power, not executive.[107]

Law Execution. One account of executive power suggests that it was the power to execute the law. This approach has has some support in eighteenth-century sources.[108] But it is a mistake to claim that it was the consensus or even dominant eighteenth-century position, let alone that it can be attributed to the Constitution.[109]

The improbability of the law-execution vision becomes apparent already when one considers its application to foreign affairs. As noted by Saikrishna Prakash and Michael Ramsey, it was widely understood that "foreign affairs powers were part of the executive power."[110] Significant American commentators and leaders made this assumption "immediately before, during, and after the Constitution's ratification."[111] And this is a problem for the law execution view of executive power.

In foreign affairs, the president and his subordinates cannot always expect to find legal guidance or even authority. They often have acted, and must act, in ways that are difficult to understand as executing the law. Locke, Montesquieu, and Blackstone already viewed foreign affairs as part of the monarch's executive power.[112] And foreign matters are similarly with the president's executive power.

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[105] U.S. Const. art II, §1.

[106] U.S. Const. art II.

[107] See text at infra notes ___ .

[108] St. George Tucker, for example, said that the executive power, in its "abstract definition," was "the duty of carrying the laws into effect." St. George Tucker, Law Lectures, 6: 220, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary.

[109] For such claims, see Julian Davis Mortenson, Article II Vests the Executive Power, Not the Royal Prerogative, 119 Colum. L. Rev. 1169, 1188, 1234 (2019) (arguing about executive power that "the meaning was unambiguously limited to law execution," in particular that it was meant as a "empty vessel"); Mortenson & Bagley, supra note __ , at 314-15 ("Without exception of which we are aware, late eighteenth-century Anglo-American lawyers, academics, and politicians understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power."). For criticism of this position, see Michael W. McConnell, The President Who Would Not Be King, 251-55 (Princeton Univ. Press 2020) (quoting, among other things, the Essex Result).

[110] Saikrishna B. Prakash & Michael D. Ramsey, The Executive Power over Foreign Affairs, 111 Yale L. J. 231, 253 (2001).

[111] Id, 253.

[112] Id.

The point is not that a president can or should act contrary to law, but rather that foreign policy takes executive power outside the realm of merely executing American law. American law typically does not bind foreigners, let alone foreign countries. And it would be offensive to them and dangerous to suggest that they are bound by American law. The executive power of the American president therefore typically involves much that cannot be conceptualized as the execution of law.[113]

Another difficulty with the law-execution concept of executive power lies in the very quotations recited by its supporters. The scholarship of Mortenson and Bagley quotes Jean Jacques Rousseau and Thomas Rutherforth.[114] But the quoted passages actually define executive power in terms of the nation's "strength."[115] (Rousseau spoke about executive power as the "strength" of the body politic, and Rutherforth said that the executive power was its "joint strength.")[116] And this is from the passages quoted to suggest otherwise!

The Constitution's text confirms that the Constitution did not simply adopt the law-executing vision. Article II of the Constitution initially grants the president "executive Power" and much later stipulates his duty to "take Care that the Laws be faithfully executed."[117] The distinction between the *executive power* and the faithful *execution duty* is significant. Whereas the one generalizes about executive power, the other speaks much more specifically about the execution of the laws. And because the duty is so specific about law execution, it becomes apparent evident that the executive power meant something broader.

Executive power evidently included law execution, but was not limited to that. Put another way, the scholars who urge a law-execution vision of executive power have mistaken the duty for the power. Yes, the duty specifies law execution. But that suggests that the Constitution's generic grant of executive power meant more than law execution.

Exactly what the Constitution's meant by *executive power* must wait. But it evidently went beyond executing the law.

Notwithstanding these difficulties, the law executing vision has been adapted in support of delegation. A modest version of the law-execution approach would view executive power as prosecution and other law enforcement. Not content with this, a more ambitious version (presented by Julius Mortenson and seconded by Nicholas Bagley) claims that law execution meant carrying out congressional instructions.[118] On this assumption, executive power is an "empty vessel," and Congress can delegate its legislative power to the Executive.[119]

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[113] Id. See McConnell, supra note ___, at 251-53.

[114] Mortenson & Bagley, supra note ___ , at 294, 315 (relying Rousseau and Rutherforth quotations that refer to executive power as the society's "strength").

[115] Id.

[116] Id. See Hamburger, Delegating, supra note ___, at 111-13 (pointing out the misreading of Rousseau and Rutherforth).

[117] U.S. Const. art II., §§1 & 3.

[118] Mortenson & Bagley, supra note ___ , at 280 ("The executive power, however, was simply the authority to execute the laws—an empty vessel for Congress to fill").

[119] Id.

This bold version of the law-executing vision, however, suffers the same evidentiary weaknesses as the modest version. It is contradicted by some of the very quotations recited in by its supporters and thus was rejected by significant eighteenth-century theorists.[120] It is profoundly impractical as it cannot explain the president's power in foreign policy.[121] And it conflicts with the Constitution's textual distinction between the law-executing duty and the more generic grant of executive power.[122]

Whatever one thinks of either version of the law-executing vision, both recognize that the power to make binding rules was legislative. Even the more ambitious version of this view does not claim that executive power by itself included any binding power. Instead, it merely suggests that the power to make binding rules was legislative and Congress could delegate its legislative power to the Executive.[123]

A Residual Power. A second conceptual approach is to treat executive power as a residual category. The nature of executive power remained more open debate in the eighteenth century than the nature of legislative and judicial power.[124] So it is unsurprising that there were competing versions of it. And also unsurprising is that one possibility was simply to view it as a residual power—what was left over beyond the legislative and judicial powers.

Although James Madison probably had some substantive views of executive power, he readily relied upon the residual view when this was advantageous. In the Constitutional Convention, for example, he spoke of powers "not Legislative nor Judiciary in their nature."[125]

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

The Nation's Action, Strength, or Force. A third conceptual understanding is that executive power consists of the nation's lawful action, strength, or force. This view had a deep history in European philosophy on the separated powers—as will explained in Part V. For now, suffice it say that it was endorsed by a commentators in not only England but also Europe. Explaining the powers of the "body politic," Rousseau wrote that "force and will are distinct: The latter being called *legislative power*, the former *executive power*."[126]

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[120] See text at supra note ___.
[121] See text at supra note ___.
[122] See text at supra note ___.
[123] Mortenson & Bagley, supra note ___, at 280.
[124] Hamburger, Is Administrative Law Unlawful? 328, n.a ("The definition of executive power . . . remained open to dispute even as late as the founding of the United States. Some commentators understood it to be at least the power of executing the law, and from this perspective they said it was ministerial.").
[125] Madison's Notes, 1 Farrand 66–67.
[126] Jean Jacques Rousseau, The Social Contract (book III, part 1), in Rousseau, The Social Contract and Other Later Political Writings, 84 trans., Victor Gourevitch (Cambridge Univ. Press, 2019).

This position was subtly presented by the Cambridge professor Thomas Rutherforth. He repeatedly defined executive power as a power of "acting" with the society's "joint strength."[127] Academically, he preferred the law-execution vision, for he thought "the executive power, in the nature of the thing, is not discretionary in any part."[128] Being an academic, however, he recognized that constitutions could vary from the assumption he drew from nature. He observed that in external or foreign matters, constitutions frequently had to leave wide executive discretion, unconfined and sometimes even unauthorized by legislation.[129]

The nation's joint strength thus had two applications. Internally, it served to protect rights and duties defined by the legislative power; externally, it protected against foreign threats without being so closely confined by legislation.[130]

The nation's action, strength, or force was the understanding of executive power was so deeply ingrained that Alexander Hamilton simply took it for granted in the *Federalist*. When expounding judicial power, he distinguished between legislative *will*, judicial *judgment*, and executive *force*.[131] It was the only vision of executive power endorsed in the *Federalist*.

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[127] Rutherforth, supra note ___ , at 273.

[128] Id, 279.

[129] Rutherforth observed, the executive needed the constitution to assure areas of executive discretion or prerogative—internally in pardons, and externally in matters of war, peace, and treaties:

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

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

[130] Rutherforth wrote:

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

Id, 273. Similarly, Montesquieu distinguished between "the executive power with respect to those acts of state which relate to the law of nations; and the executive power with respect to the internal government of the country, or to those domestic exertions of authority which are directed by the civil, or municipal, laws established in it." Baron de Montesquieu, A View of the English Constitution, 2 (London: 1781).

[131] Federalist, supra note ___ , at 523–24, No. 78 ("The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.").

This vision matches the textual distinction between executive power and the take care duty. Recall the difference between the president's duty to take care that the laws be faithfully *executed* and his *executive power*. The disparity suggests that the former is not the full definition of his executive power. And this makes sense conceptually when one understands executive power as the nation's action, strength, or force. Such is the vision of executive power that most naturally fits the practicalities, history, and text.

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

A similar puzzle involves the president's foreign affairs power. Although the Constitution offers no direct textual foundation for it, courts know something like it must exist and so speak of it as a "power."[132] But far from being a distinct power granted by the Constitution, it is just part of the president's executive power, in the sense of the action or force of the nation. So one can better understand it by speaking of the president's foreign affairs authority under his executive power.

Of course, the definition of executive power as the nation's action, strength, or force is very expansive. But even in its breadth, it does not include any power to bind. It includes a wide range of lawful action, including coercive action abroad, but no power to bind, whether to make binding rules or adjudications.[133]

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

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

[133] Of course, this not to deny that executive power included the authority, as defined by statute, to impose distress, collect duties, make inspections, and so forth. These actions involved executive coercion under binding statutes, but they themselves did not bind. In other words, it was the underlying statutes rather than the inspections and so forth that created legal obligation. Similarly, executive power included making determinations of facts and legal duties under federal statutes. Such determinations increasingly were stretched into justifications for making binding rules and adjudications. See, for example, Marshall Field & Co. v. Clark, 143 U.S. 649, 690 (1892). But at least formally, determinations did not go so far.

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

V. SEPARATION OF POWERS

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

The separation of powers has long been disparaged. Eighteenth-century German scholars derided the separation of powers and disparaged constitutional formalities as unrealistic obstacles to good government.[134] Drawing on that heritage, late nineteenth-century progressive scholars in America similarly questioned any formal separation of powers—an attitude that persists in much American administrative scholarship.[135]

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

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

A. Decisionmaking Theory

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

Many philosophers beginning in the Middle Ages distinguished three human faculties or capabilities. In the soul or mind, there were two faculties: that of judgment (or understanding or intellect) and that of will (or passion).[136] Of course,

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134 Hamburger, Is Administrative Law Unlawful? 449-50.

135 Hamburger, Is Administrative Law Unlawful? 471, 477, 495; Gary Lawson, "The Rise and Rise of the Administrative State," 107 Harv. L. Rev. 1231 (1994) (observing that the work of James Landis "fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers.").

136 2 Frederick Copleston, A History of Philosophy, 381-82 (Newman Press 1962) (regarding judgment and will); 3 Frederick Copleston, A History of Philosophy, 100, 102 (Doubleday, 1993) (explaining Ockham's ideas of will and judgment in relation to Franciscan traditions).

these faculties of the mind did not stand alone, for the will could be carried out only by another faculty, the action, strength, or force of the body.

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

What is simplistically taught to children is inculcated with more sophistication in adults. Doctors and scientists train themselves to put aside their precommitments when evaluating evidence.[137] Military pilots learn to outmaneuver their opponents by following the "OODA Loop," which stands for Observing and Orienting, Deciding, and then Acting. That is, they need to Judge, exercise Will or choice, and then Act.[138] Thus throughout our lives, not merely in government, decisionmaking theory requires self-conscious distinctions between judgment, choice, and action.

Of course, some decisionmaking must be intuitive and therefore cannot be segregated into judgment, will, and bodily execution. But at least when caution is advisable and time is available, the benefits of separately focusing on these human faculties or powers is obvious enough.[139] This separate exercise of the specialized tripartite faculties or powers of individuals is very traditional but remains fully contemporary.

It therefore is unsurprising that the separation of human powers became a model for ideas about a separation of governmental powers. An individual can exercise his powers separately only by being self-conscious about them. But government can keep them apart only by dividing them institutionally among

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[137] Vimla L. Patela, David R. Kaufmana, Jose F. Arochab, Emerging Paradigms of Cognition in Medical Decision-Making, 35 Journal of Biomedical Informatics 52 (2002) ("The stereotypical version of the medical decision maker suggests a coolly dispassionate, hyper-rational physician systematically considering well-defined options (i.e., therapeutic choices or diagnostic alternatives) on the basis of a careful weighing of the evidence. Equally common is his or her decidedly less competent colleague—a fallible reasoner—subject to biases and particularly deficient in the application of probability theory to decision problems. These shortcomings frequently result in faulty decision practices.").

[138] John R. Boyd, The Essence of Winning and Losing (June 28, 1995 slide set), at https://web.archive.org/web/20110324054054/http://www.danford.net/boyd/essence.htm, including The OODA Loop, at https://web.archive.org/web/20110514132512/http://www.danford.net/boyd/essence4.htm; Frans Osinga, Science, Strategy and War: The Strategic Theory of John Boyd, 270 (Alburon Academic Publishers, 2005).

[139] Much current literature, in medicine and law, emphasizes the importance of compassion or empathy and notes that this may conflict with ideals of dispassionate judgment. See, for example, Vimla L. Patela, David R. Kaufmana, Jose F. Arochab, Emerging paradigms of cognition in medical decision-making, 35 Journal of Biomedical Informatics, 52 (2002) (regarding medicine); Terry A. Maroney, The Persistent Cultural Script of Judicial Dispassion, 99 California Law Review 629 (2011) (regarding law). But whether there really is such a conflict depends on where and how the compassion or empathy enters the medical or legal analysis.

different parts of government. This was advocated as early as the fourteenth century and was widely popularized in the eighteenth.[140]

According to the political theory that prevailed in eighteenth-century America, when individuals formed themselves into a society, they already enjoyed the tripartite powers as a people. And because the people allegedly enjoyed all three powers, they could convey to them government. Edmund Randolph—the attorney general of Virginia—argued in 1782 about his state's constitution that a people "who have either never yet entered into a formal social compact, or having abolished an old one are about to conclude another . . . possess every power, legislative, executive and judiciary."[141] The people in their constitution thus "delineat[ed] the degree, to which they have parted with legislative, executive and judiciary power."[142] As was said more succinctly of the Pennsylvania Constitution, "The legislative, executive, and judicial powers of the people" had been "severally, delegated to different bodies."[143]

The specialized powers of individuals became the powers of the people, and by means of a constitution they became governmental powers, located in different parts of government. A vision of specialized decisionmaking in individuals thus justified a theory of specialized decisionmaking in government.

One might fear an anthropomorphization of government, but that has never been the point. Rather, the goal has always been to secure specialized decisionmaking, so that the different powers of will, judgment, and action will be exercised separately. What individuals do through self-conscious differentiation, government accomplishes through the separation of powers.

B. Protection for Liberty

In the eighteenth century, not least in the Constitution, the separation of powers was much valued for protecting liberty. But the point here is not merely about old theory and originalism. Rather, the goal is to understand why it was and still should be considered essential for liberty.

Eighteenth-century American appreciation for the separation of powers is well documented.[144] Just to give an example, a New Hampshire minister noted of

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[140] For the earliest known analysis of the separation of powers, see Brian Tierney, Religion, Law, and the Growth of Constitutional Thought, 1150–1650, at 45 (Cambridge University Press, 1982); Brian Tierney, "Hierarchy, Consent, and the 'Western Tradition,'" Political Theory, 15: 649 (1987) (both discussing the ideas of Hervaeus Natalis c. 1315).

[141] Edmund Randolph, Ms. Notes of Argument in Commonwealth v. Lamb &c., James Madison Papers, 91: 104, at page 9, Library of Congress.

[142] Id, 11.

[143] Report of the Committee of the Council of Censors, Appointed to Enquire, "Whether the Constitution has been preserved inviolate in every part, and whether the legislative and executive branches of government have performed their duty as guardians of the people, or assumed to themselves or exercised other or greater powers, than they are entitled to by the Constitution," 4 (Francis Bailey, 1784). (Note that this is the 27 page version of the pamphlet published under this title.)

Note that Locke did not go so far as to say that all three powers of government were originally in the people. But he considered the judicial power to be part of the executive power and thought individuals enjoyed both in the state of nature. Locke, supra note __ , at 293-94 (book II, chapter ii, §13).

[144] M. J. C. Vile, Constitutionalism and the Separation of Powers, 153 (Liberty Fund, 1998).

his state's new constitution: "the several powers of government are nicely adjusted, so as to have a mutual check on each other, and despotic power guarded against by keeping the legislative, judicial and executive powers, distinct and separate, an essential arrangement in a free government."[145]

Few constitutional principles were more widely endorsed. Even James Madison, who was qualified in his appreciation of the separation of powers, called it "this essential precaution in favor of liberty" and said: "No political truth is certainly of greater intrinsic value or is stamped with the authority of more enlightened patrons of liberty."[146]

Montesquieu—the preeminent theorist of separation—had explained: "When the legislative and executive powers are united in the same person, or in the same body of the magistracy, there can be then no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner."[147] He added that "there is no liberty, if the power of judging be not separated from the legislative and executive powers."[148] Otherwise, the judge would "be then the legislator" or might "behave with all the violence of an oppressor."[149] Worst of all was the combination of all three powers, when "the same body" could "exercise those three powers . . . of enacting laws, . . . executing the public resolutions, and . . . of judging the crimes or differences of individuals."[150] This was the situation in Turkey, "where the three powers are united in the Sultan's person," and "the subjects groan under the . . . oppression."[151] It was also, however, a danger in republics, as evident from the Italian republics.[152]

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

The Securities and Exchange Commission is a good example. It is one of the most revered of federal agencies, and it undoubtedly serves valuable governmental ends. But it exercises all three powers of government. It enjoys legislative power in making and "interpreting" rules; it has executive power in setting enforcement policy and overseeing its Enforcement Division; it even exercises judicial power through its Administrative Law Judges and through its power to review their decisions.[153]

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[145] Samuel M'Clintock, A Sermon Preached Before the Honorable the Council, and the Honorable the Senate and House of Representatives, of the State of New Hampshire, June 3, 1784: On Occasion of the Commencement of the New Constitution and Form of Government, 24 (Portsmouth: 1784).
[146] Federalist, supra note ___ , at 323-24 (Federalist No. 47).
[147] Montesquieu, The Spirit of the Laws 185 (book XI, chapter vi) (Dublin: 1751).
[148] Id.
[149] Id, 185-86.
[150] Id, 186.
[151] Id.
[152] Id.
[153] "An administrative law judge's initial decision is subject to de novo review by the Commission, which may affirm, reverse, modify, set aside, or remand for further proceedings. A party may petition the Commission for review, or the Commission may choose to review an initial decision on its own initiative. If a party does not petition for review, and the Commission does not order review on its own initiative, the SEC's Rules of Practice provide that the Commission will issue an order stating

One might take comfort in the Administrative Procedure Act's separation of functions within agencies.[154] But for regulated parties, this is little consolation, as the statute leaves plenty of room for the conflation of powers.

Consider, for example, the use of executive and judicial power for legislative ends. Enforcement and adjudication should be pursued in response to a judgment about when the law has been violated. But agencies can use enforcement and adjudication to reshape the law. Although such practices are especially brazen at the National Labor Relations Board and the Federal Trade Commission, more subtle examples can be found across the administrative state.[155] And of course when an agency knows that it can shape enforcement and adjudication, it can take advantage of this to leave its rules relatively vague.

Worst of all, is the corruption of the judicial process. Administrative Law Judges usually try their best to be fair. But they know that their decisions are reviewable or need to be finalized by the heads of their agency. So, they are always looking over their shoulders to avoid reversal by anticipating their superiors' wishes.[156] Defendants thus cannot get independent and unbiased adjudications from these "judges." They are even less likely to get unbiased decisions on review or finalization by the heads of the agency, as have precommitments to its legislative and enforcement policies.[157] And because such adjudications occur within the agency rather than a court, they are also slanted by the usual administrative restrictions on procedural rights, including discovery biased against defendants, reversed burdens of proof and persuasion, and unavailability of juries.[158]

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that the initial decision has become final." SEC, Office of Administrative Law Judges, at https://www.sec.gov/page/aljsectionlanding.

[154] Bernard Schwartz, Adjudication and the Administrative Procedure Act, 32 Tulsa L. J. 203, 208 (2013) (regarding the APA's aim "to ameliorate the evils from the commingling of functions").

[155] For the FTC's use of enforcement and consent decrees, see Philip Hamburger, Purchasing Submission: Conditions, Power, and Freedom, 97, 222-23 (Harv. Univ. Press 2021).

[156] The problem is pervasive:

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

Philip Hamburger, The Administrative Threat to Procedural Rights, 11 N.Y. Univ. J. of L. & Lib. 915, 950-51 (2018).

[157] Id.

[158] Even on appeal defendants cannot get a jury, and because of deference to agency interpretation and factfinding, the value of review in the courts is limited. As for discovery, agencies usually rely on subpoenas without allowing the same discovery for defendants. The burdens of proof and persuasion, moreover, are often reversed:

> [T]the applicable burdens of proof and persuasion, whether civil or criminal, are often reversed. Unlike a district court judge, an ALJ can take "official notice" of a material fact even when it does not appear in the record, even when it is not adjudicative, even when it is not within the agency's expertise, even when it is within reasonable dispute, and even without a hearing. And whenever an ALJ takes "official notice" of a fact, the defendant ends up having to undertake the burdens of proof and persuasion. The reversal of burdens is

These grim realities of unseparated powers in administrative agencies give some texture to Montesquieu's abstractions. Each type of power gets twisted when it is exercised by persons who also exercise the other powers. The result is vagueness in the exercise of legislative power, executive decisions shaped by legislative desires, and judgments that are institutionally biased against Americans. So, the importance of separation of powers for freedom rest not merely on old theory and originalism, but also on the grim realities of contemporary government.

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

Notwithstanding the numerous Founding-era discussions of the Constitution's separation of powers, it is sometimes protested that the Constitution did not generalize about this principle.[159] Or that the Constitution's check and balances, such as the veto, show that the powers were not really separated.[160] From these perspectives, it is an error to speak about the Constitution's separation of powers.

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

Some state constitutions declared the separation of powers a constitutional principle. Virginia's 1776 Constitution, for example, announced: "The legislative, executive, and judiciary department, shall be separate and distinct, so that neither exercise the powers properly belonging to the other."[161] Similarly, the Massachusetts Constitution of 1780 declared that "the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them; to the end it may be a government of laws, and not of men."[162] But categorical statements of this sort ran into difficulty.

The awkwardness was that constitutions inevitably tinkered with the separation of powers—adding to, or subtracting from, the idealized version. One reason was to ensure checks and balances. James Madison explained: "No political truth is certainly of greater intrinsic value," but the branches of government could not be "totally separate and distinct from each other," for each branch needed some

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> especially far reaching when it results from an understated agency assumption—such as the expectation, alleged by McEwen at the SEC, that "the burden was on the people who were accused to show that they didn't do what the agency said they did." Thus, even where agency actions are criminal in nature, defendants often have to prove their innocence.

Hamburger, The Administrative Threat to Procedural Rights, 11 N.Y. Univ. J. of L. & Lib. 952.

[159] Jed Handelsman Shugerman, Vesting, 74 Stan. L. Rev. 20 (2021).

[160] Id, 15.

[161] Va. Const. (1776). As if this were not enough, the state's bill of rights similarly recited: "That the legislative and executive powers of the State should be separate and distinct from the judiciary." Va. Bill of Rights, §5 (1776).

[162] Mass Const. of 1780, Part First, Art. XXX.

"control" over the others.[163] Accordingly, when state constitutions announced separation as an abstract principle, there was a danger that separation would become a rigid overgeneralization.

Recognizing the problem, but without clarity as to how to solve it, the New Hampshire Constitution announced the separation of powers, but with a caveat: that the powers of government were to be "kept as separate and independent . . . as is consistent with that chain of connection that binds the whole fabric of the constitution in one dissoluble bond of union and amity."[164] The statement of separation as a general principle seemed to require this open-ended qualification.

To avoid this unsatisfactory solution, most constitutions, including the U.S. Constitution, did not generalize about the ideal of separation.[165] Instead, such constitutions simply granted each specialized power to its own specialized part of government, and then carved out exceptions. The result was very concrete. Rather than declare the abstract separation of powers and then backtrack by recognizing an abstract qualification, a typical American constitution carefully vested the different powers in different branches and then recited specified exceptions.

In this approach, a constitution's grant of specialized powers to different branches of government was a default allocation.[166] For example, after noting how the Pennsylvania Constitution had distributed the three powers, a committee of the state's Council of Censors explained, "All power therefore, not placed out of its proper hands, belongs to the legislative, or the executive, according to its nature."[167] Along the same lines, the Virginia judge St. George Tucker observed that "one of the fundamental principles of the American government" was "to keep these powers separate and distinct, except in the cases positively enumerated."[168]

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[163] Federalist, supra note ___ , at 323-24 (Federalist No. 47).

[164] NH Const., Art. XXXVII (1784).

[165] When Madison proposed a separation of powers amendment, Rep. Livermore thought it "subversive of the Constitution" and it was not adopted. Speech of Livermore in House, in Creating the Bill of Rights: The Documentary History from the First Federal Congress, 193 (Johns Hopkins Univ. Press 1991).

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

[167] Report of the Committee of the Council of Censors, 18 (Philadelphia: 1784).

[168] St. George Tucker, Law Lectures, p. 4 of four loose pages inserted in volume 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary. A Philadelphia newspaper essay observed that "each of these branches, of right, exercises all authority, devolved by the community, which property belongs to it, unless the contrary be clearly expressed." A.B., Pennsylvania Gazette (Apr. 28, 1784), as quoted by Vile, supra

The U.S. Constitution similarly locates each power in the appropriate branch of the federal government, subject to specified subtractions, additions, and clarifications. The president has the executive power with a range of adjustments, such as a veto on legislation.[169] The courts have the judicial power, though the judges can serve in executive roles.[170] Congress has the enumerated legislative powers, but the Senate in impeachments has what might otherwise look like judicial power.[171] Other than as allowed by such adjustments, each specialized power belongs to its own specialized part of government.

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

D. Recharacterization of Deviations at the Edges to Preserve Separation

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

It is often assumed that the President's veto gives him an element of legislative power and that the Senate's trial of impeachments gives it some judicial power, and so forth. Indeed, already in the 1780s, this sort of mixing and matching of powers at the edges of the separation of powers was discussed.[172] One might therefore think that the Constitution does not fully embrace the separation of powers and, in fact, permits overlapping powers.

But such a view can easily be taken too far. One corrective is to note that these elements of apparent overlap are only little adjustments to the more clear-cut separation of the major tripartite powers. They are small-scale adjustments that were added primarily to ensure checks and balances.[173]

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

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note __, at 153. Note also Hamilton's subsequent observation: "The general doctrine then of our constitution is, that the Executive Power of the Nation is vested in the President; subject only to the exceptions and qu[a]lifi cations which are expressed in the instrument." Pacificus No. I, in The Pacificus-Helvidius Debates of 1793-1794, at 13, ed., Morton J. Frisch (Liberty Fund 2007).

[169] U.S. Const., art. II.

[170] U.S. Const., art. III.

[171] U.S. Const., art. I.

[172] See Federalist, supra note ___ , at 332, No. 48 by James Madison. Being more a political theorist than a lawyer, Madison did not attend to how the Constitution conserved the differences among the separated powers.

[173] Id.

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

The veto had been legislative. The English constitution was said to divide legislative power among the Lords, the Commons, and the King—so that the royal veto was part of the legislative power.[174] In contrast, the U.S. Constitution carefully vests its legislative powers in Congress, consisting of its two houses.[175] The Constitution thereby makes clear that whatever the veto may have been in England, it is not part of the Constitution's legislative power.[176]

A similar recharacterization happened to the trial of impeachments. In the English constitution, the House of Lords was the highest judicial body and its trials of impeachments were judicial. The U.S. Constitution, however, places the judicial power of the United States in the Supreme Court and other federal courts. This means that the power of impeachments is not part of the Constitution's judicial power.

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

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

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

VI. EXCLUSIVITY

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[174] 1 William Blackstone, Commentaries on the Laws of England *85. Reflecting this English assumption about the legislative character of the veto, it was observed that in the English constitution, "the negative voice, and executive power, are in the same person." William P[uds]y, The Constitution and Laws of England Consider'd, 46 (London: 1701).

[175] U.S. Const., art. I, §1.

[176] As put by James Madison, "The magistrate in whom the whole executive power resides cannot of himself make a law, though he can put a negative on every law." Federalist, supra note ___, at 326, No. 47.

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

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

A. Externally Exclusive

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

The 1787 North Carolina case of *Bayard v. Singleton* held a state statute unconstitutional and void.[177] A year prior to the final decision, while still wrestling with the issues in the case, one of the judges, Samuel Ashe, observed:

> The people of this country, with a general union of sentiment, by their delegates met in Congress, and formed that system, on those fundamental principles of government comprised in the [North Carolina] Constitution dividing the powers of government into separate and distinct branches, to wit, the Legislative[,] the Judicial, and Executive; and assigning to each, several and distinct powers, and prescribing their several limits and boundaries.[178]

Judge Ashe clearly assumed that the "several and distinct powers" were assigned to the "separate and distinct branches" —that each power was exclusively in its own branch.

In 1788, in the *Federalist*, Alexander Hamilton observed: "The interpretation of the laws is the proper and peculiar province of the courts."[179] Although this passage nowadays tends to feature in discussions of judicial review, it also suggests the exclusivity of the Constitution's powers. Certainly, that is how St. George Tucker understood it. In *Kamper v. Hawkins*—a 1793 Virginia case—Judge Tucker argued from the exclusivity of the different powers. He opined that "since it is the province of the legislature to *make*, and of the Executive to *enforce* obedience to the laws, the *duty* of expounding must be exclusively vested in the judiciary."[180] On this basis, he

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[177] For the details of the case, see Hamburger, Law and Judicial Duty, 449-61.

[178] Philip Hamburger, Law and Judicial Duty, 453 (Harvard University Press, 2008), quoting Letter from Judge Samuel Ashe to the Speakers of the House of the General Assembly (Dec. 14, 1786) (recalling what he said in Bayard v. Singleton).

[179] Federalist, supra note ___ , at 525, No. 78.

[180] Kamper v. Hawkins (Va Genl Ct 1793), St. George Tucker's Law Reports and Selected Papers 1782-1825, at I: 280, ed., Charles F. Hobson (Chapel Hill: University of North Carolina Press, 2013).

echoed Hamilton that "[t]he interpretation of the laws is the proper and peculiar province of the courts."[181]

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

> [A]ll the powers granted by the Constitution are either legislative, executive, or judicial; and to keep them forever separate and distinct, except in the Cases positively *enumerated*, has been uniformly the policy, and constitutes one of the fundamental principles of the American Government.[182]

This was the standard default approach to the separation of powers, in which the Constitution allocated the different powers to their different branches, except as enumerated. What is revealing here is Tucker's view that the Constitution aimed to keep the powers "forever separate and distinct." The powers evidently were to be exclusively in their branches and not open to being shifted around.[183]

One of the earliest treatises on the Constitution was *Sketches of the Principles of Government*, published in 1793 by Nathaniel Chipman— the first judge of the United States District Court for the District of Vermont. This treatise was not very original; it merely recited familiar truths. For example, it observed: "The government of the United States is constituted with legislative, judicial, and executive powers, vested in distinct and separate departments."[184] More interestingly, the book then made clear that this distribution of powers was not merely an initial distribution of cards, but was a continuing limit. In Chipman's words, the Constitution had the effect of "drawing a line between the several branches" for it "has pointed out generally the objects of federal legislation, and has limited and modified the several powers of the general government."[185] The different powers apparently were to be exclusively in their different branches.

In his Farewell Address, George Washington closed his public life and the century with a reminder of the nation's first principles. Washington was aided in writing the final draft by Alexander Hamilton, who had as broad a conception of the federal government's power as any of the founders. So, it is significant that Washington urged those entrusted with power to "confine themselves within their respective constitutional spheres, avoiding in the exercise of the powers of one department to encroach upon another."[186] He feared that the "spirit of encroachment tends to consolidate the powers of all the departments in one, and

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[181] Id, 281.

[182] St. George Tucker, Law Lectures, p. 4 of four loose pages inserted in volume 2, Tucker-Coleman Papers, Mss. 39.1 T79, Box 62, Special Collections Research Center, Earl Gregg Swem Library, College of William and Mary. Later printed in St. George Tucker, View of the Constitution of the United States with Selected Writings, 149 (1803; Liberty Fund, 1999).

[183] Tucker was sufficiently anxious to find a textual foundation for the external exclusivity of the powers that he claimed: "The word *The*, used in defining powers of the Executive, and of the judiciary, is, with their Exceptions, co-extensive in its signification, with *all*." Id. He thereby failed to recognize how the Constitution carefully distinguished among the powers to ensure that at least some of them would be internally nonexclusive. See Part VI.B.

[184] Nathaniel Chipman, Sketches of the Principles of Government, 256 (J. Lyon, 1793).

[185] Id, 261.

[186] George Washington, Farewell Address (Sept. 19, 1796), 20 Papers of George Washington, Presidential Series, 697, 711, eds., Jennifer E. Steenshorne, David R. Hoth et al (Univ. of Va. Press 2019).

thus to create whatever the form of government, a real despotism."[187] Leaving aside how far we have gone toward such a consolidation, Washington and Hamilton clearly thought that those who led the different departments of government should remain within their own "constitutional spheres" and not "encroach" on the powers granted to other departments.

A final illustration of the powers' exclusivity comes from *Hayburn's Case*.[188] When Congress decided to give pensions to war veterans who had been rendered invalids, it requested the federal circuit courts to decide who was eligible. As recorded in *Hayburn's Case*, three circuit courts in 1792 refused.[189]

Although the circuits made slightly different arguments, they all agreed that, under the Constitution, their power was merely judicial—so even with congressional authorization, they could not do acts that were of another character. The Circuit Court for the District of Pennsylvania protested that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must consequently have proceeded without constitutional authority."[190] The Circuit Court for the District of North Carolina declared that "the legislative, executive, and judicial departments are each formed in a separate and independent manner, and that the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority."[191] So, "such courts cannot be warranted, as we conceive, by virtue of that part of the Constitution delegating judicial power, . . . in exercising . . . any power not in its nature judicial."[192] The Circuit Court for the District of New York similarly said that that "by the Constitution of the United States, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from and to oppose, encroachments on either."[193] Consequently, "neither the legislative nor the executive branches can constitutionally assign to the judicial any duties but such as are properly judicial."[194] Put another way, even with congressional authorization, the courts could not exercise any power other than their own.[195]

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

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[187] Id. He added: "If in the opinion of the people, the distribution or modification of the constitutional powers be in any particular wrong, let it be corrected by an amendment in the way which the Constitution designates. But let there be no change by usurpation; for though this, in one instance, may be the instrument of good, it is the customary weapon by which free governments are destroyed. The precedent must always greatly overbalance in permanent evil any partial or transient benefit which the use can at any time yield." Id, 7111-12.

[188] Hayburn's Case, 2 U.S. 409 (1792) (CC for Dist. Pa., NC, & NY).

[189] Id.

[190] Hayburn's Case, 2 U.S. 409, 411 (1792) (CC for Dist. Pa.).

[191] Id., at 412 (CC for Dist. NC)

[192] Id., at 412-13.

[193] Id., at 414 (CC for Dist. NY)

[194] Id.

[195] Similarly, one circuit added that Congress, having only legislative power, could not exercise judicial power: "[N]o decision of any court of the United States can under any circumstances, in our opinion, agreeable to the Constitution, be liable to a reversion or even suspension by the legislature itself, in whom no judicial power of any kind appears to be vested but the important one relative to impeachments." 2 U.S. at 413 (CC for Dist. NC).

B. Internally Not Always Exclusive

However exclusively the Constitution vests its powers in their respective branches, this is not to say its powers are entirely exclusive within the branches. Indeed, the Constitution carefully distinguishes between what is exclusive as to other branches and what is exclusive as to subordinate parts of each branch. The effect is to bar any shift of power to another branch while permitting some delegation within the branches.[196]

The Constitution vests all of its legislative powers in Congress, stating: "All legislative powers herein granted shall be vested in a Congress of the United States."[197] In contrast, when the Constitution vests executive power in the President, and judicial power in the courts, it does not use the word *all*.[198] This variation has long been recognized.[199] Rather than a coincidence, it seems to signal that the legislative powers are exclusive not only externally but also internally.

The Constitution's vesting of *all* of its legislative powers in Congress is entirely exclusive—both as to other branches and as to bodies subordinate to Congress. If all legislative powers are to be in Congress, they cannot be elsewhere. If the grant were merely permissive, not exclusive, there would be no reason for the word *all*. This word is thus significant in signaling that the legislative powers are exclusively in Congress—not only vis a vis other branches but also vis a vis subordinate bodies.[200]

Of course, Congress can delegate some incidental authority to subordinates. The houses can authorize clerks to keep records and doorkeepers to control access, and Congress can authorize the Congressional Budget Office and the Congressional Research Service to provide information. But Congress cannot delegate its power to legislate. Only one body, Congress, can exercise this power—a conclusion confirmed by the Constitution's bicameral process for enacting laws.[201]

In contrast, when it comes to executive power, the Constitution must omit the word *all*. The Constitution has to leave room for the President to delegate much executive power to his subordinates. For example, though only the President can

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[196] The Mortenson and Bagley article confuses this internal exclusivity with the external. They write:

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

Mortenson and Bagley, supra note ___, at 298. This mistakenly assumes that courts generally can delegate their judicial power. See text at infra note ___. It also mistakenly assumes that the Constitution treats all of the tripartite powers as equally nonexclusive.

[197] U.S. Const., art I, §1.

[198] U.S. Const., art II, §1, art. III., §1.

[199] See supra note _____.

[200] For the external exclusivity evident from the word *all*, see Hamburger, Is Administrative Law Unlawful? 386-88; Justice Thomas's opinion in Whitman v. American Trucking Associations, 531 U.S. 457, 487 (2001) (Thomas, J., concurring); Shugerman, supra note ___ , at 7-8, 59, 60.

Note that whereas prior scholarship, including my own, has focused on the word *all* for understanding external exclusivity, the point in the text here is that it makes even more of a difference for questions of internal exclusivity.

[201] U.S. Const, art I, §7.

veto a bill or grant a pardon, he can and inevitably must leave the enforcement of the laws to subordinates. The Constitution therefore cannot vest *all* executive power in the President, lest this preclude the exercise of executive power by those who serve under him.

Indeed, the Constitution makes clear that the president may and should leave much executive power to subordinates. Domestically, it provides that he "shall take Care that the Laws be faithfully executed," thus revealing his dependence on others to execute the laws.[202] In foreign affairs, it says that he "shall appoint Ambassadors, other public Ministers and Consuls" and "shall be Commander in Chief," all of which confirms that he must rely on subordinates in diplomacy and war.[203] The Constitution's text thus not merely permits but requires that much executive power be internally nonexclusive.

Similarly, the Constitution does not use the word *all* regarding the judicial power, but for more complex reasons. Some commentators conclude from the absence of the word *all* that it is "unproblematic" to shift adjudication to executive agencies.[204] But this argument moves too quickly. It ignores institutional arrangements such as the separation of powers and the external exclusivity of the powers. It also forgets the personal duty of the judges.

Although in the Roman-derived civil law system judges had long been able to delegate their power, in the common law system the duty of a judge required him to exercise his own judgment; he could not delegate it to anyone else, not even his clerk or a master in chancery.[205] The Constitution captures this tradition of judicial duty simply by using the word "Judges."[206] This personal duty of a judge effectively precluded any external transfer of judicial power.

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

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

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[202] U.S. Const., art II, §3.
[203] U.S. Const., art II, §2.
[204] Shugerman, supra note __, at 60 ("it seems that if Article III vesting is less exclusive, then adjudication by administrative agencies in the executive branch is unproblematic").
[205] Hamburger, Law and Judicial Duty, 396-98.
[206] U.S. Const., art III, §1, art. VI.

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

VII. NONEXCLUSIVE AUTHORITY UNDER EXCLUSIVE POWERS

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

A. The Problem

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

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

This conundrum is as important as it is puzzling. Already in the aftermath of the Founding, Congress authorized the Executive and the courts to do some things that Congress might have done—for example, it authorized the courts to make rules of court and authorized some executive departments to make rules governing their personnel and rules and decisions on the distribution of privileges, such as pensions.[207] Since then, the problem of overlap or nonexclusivity has become only more salient on account of the growth of administrative power. Administrative agencies—some located in the executive branch and others allegedly independent—enjoy congressional authorization to exercise what by all appearances are versions of the legislative and judicial powers. Such agencies thus epitomize the overlap of powers; they seem to prove that the powers cannot be exclusively in their own branches.

[207] Wayman, supra note ___ (regarding statutory authorization for rules of court); Hamburger, Is Administrative Law Unlawful? 86 (regarding statutory authorization for departmental rules instructing officers, including on pensions).

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

B. Exclusive Powers and Nonexclusive Authority

The difficulty may seem insuperable. The powers cannot be both exclusive and nonexclusive. Yet there is a solution.

The problem largely evaporates with a more careful use of language—in particular, with a distinction between the Constitution's *powers* and the *authority* exercised under them. The Constitution's different powers are vested exclusively in the different branches of government, but the authority exercised under these powers is not always exclusive. That is, although some such authority is exclusive, some of it can overlap. Exclusive powers permit an extensive degree of nonexclusive authority.

This distinction has already been noted by Gary Lawson in slightly different terms. He explains that "certain functions might fit within more than one kind of power."[208] Closer to the language used here, Justice Gorsuch notes that "[w]hile the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with authority the Constitution separately vests in another branch."[209]

The conceptual claim is that by distinguishing power and authority, one can reconcile the separation of powers with the overlapping use of the powers. At the risk of repetition, the Constitution's powers are exclusive, but the authority exercised under them is sometimes nonexclusive. Put another way, the separated powers come with much unseparated authority.

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

C. Power vs. Authority

The initial step must be to distinguish power and authority—the former being a realm of power granted by the Constitution, and the latter being a part or application of that power. The Constitution, for instance, gives Congress the *power* to regulate commerce among the states, and within that power, Congress has the *authority* to

[208] Gary Lawson, Delegation and Original Meaning, 88 Virg. L. Rev. 327, 358 (2002).
[209] Gundy v. United States, 139 S. Ct. 2116, ___ (2019).

restrict the interstate shipping of explosives.[210] To take a judicial example, the courts have the judicial *power* and thereby enjoy the *authority* to make rules of court.[211]

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

This distinction, in other words, avoids confusion between definitional powers and nondefinitional authority. Under its power over commerce, for example, Congress can bar the sale of particular pesticides across state lines. The legislature's power is defined in terms of regulating commerce among the states, and this includes its authority to restrict the interstate sale of the pesticides. Similarly, under its necessary and proper power, Congress can authorize the Secret Service to protect the president. The power to make necessary and proper laws is definitional as to what Congress may do, but the authority exercised under this power is not; instead, it is merely part of the lawful reach or application of the constitutional power.

D. Exclusive vs. Nonexclusive Authority

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

The Difficulty of Distinguishing Between Exclusive and Nonexclusive Constitutional Powers. Recall that some commentators have distinguished between exclusive and nonexclusive constitutional powers. Chief Justice Marshall spoke in this manner in *Wayman v. Southard*, saying that Congress cannot "delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative."[212] On this foundation, it has been suggested that the power of making rules of court in *Wayman* was legislative, but not exclusively legislative, the implication being that Congress could leave part of its legislative power to be exercised by the courts.[213]

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

Moreover, if the word *powers* in such discussions is understood to mean the powers designated by the Constitution, a distinction between exclusive and nonexclusive powers runs into severe difficulties. For one thing, it collides with the

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[210] U.S. Const., art. I, §8.
[211] U.S. Const., art. III, §1.
[212] Wayman, 23 U.S. at 42-43.
[213] Wurman, supra note ___, at 1502 ("In my view, the evidence suggests that Chief Justice John Marshall was likely right in his analysis of nondelegation in 1825: there are 'important subjects' with respect to which Congress must make the relevant decisions, and there are matters of "less interest" with respect to which the executive may 'fill up the details.'").

Constitution's reliance on consent, its different powers, its separation of powers, and its exclusivity (documented in Parts III through V of this Article). In addition, if the passing allusion to nonexclusive powers in *Wayman* is admitted to defeat these constitutional principles, then the justices must confront the insuperable problem of how to draw a line between the exclusive and nonexclusive legislative powers.

Some commentators invite the justices to conclude that all legislative power is nonexclusive—but this complete abandonment of the separation of powers is not very persuasive.[214] It collides with the Constitution, its history, Chief Justice Marshall's opinion in *Wayman*, and even contemporary doctrine, which at least maintains the pretense of nondelegation.[215]

The only other solution currently on the table is to follow Marshall's *Wayman* opinion in distinguishing between important and unimportant legislation. But this approach (as seen in Part II) runs into sobering difficulties. A distinction among legislative powers along lines of importance and unimportance conflicts with the Constitution's distinctions among legislative powers by subject matter.[216] Such a distinction, moreover, invites the judiciary to pursue a highly political doctrinal goose chase.

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

Distinguishing Exclusive and Nonexclusive Authority. To avoid such risks, it is crucial to take seriously the distinctions offered here. Most basically, as has been seen, there is a distinction between constitutional powers and the constitutional authority exercised under such powers. In addition, there is a distinction between exclusive and nonexclusive authority.

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

The authority to make of rules of court surely exists under both the judicial and the legislative powers. When speaking in *Wayman* about "the regulation of the conduct of the officer of the court in giving effect to its judgments," Marshall said that a "general superintendence over this subject seems to be properly within the judicial province, and has been always so considered."[217] So Marshall might have said

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[214] Mortenson & Bagley, supra note ___ .

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

[216] Const., art. I, §8.

[217] Wayman, 23 U.S. at 45.

that the *authority* to make rules of court was not exclusively legislative or judicial.[218] From this point of view, Congress could authorize and direct the courts to make rules that they already had authority to make under their judicial power.

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

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

E. Binding vs. Nonbinding Rules and Adjudications

The distinctions between powers and authority, and between exclusive and nonexclusive authority, have divergent implications for binding and nonbinding government acts. The authority to make binding rules is exclusively within the legislative power, and the authority to make binding judgments about binding law is exclusively within the judicial power. Neither is within executive power.[219] So Congress cannot authorize the Executive to make such rules or adjudications.

But where rules and decisions allocating benefits and other privileges do not create binding rights or duties, such rules and decisions can be within executive as well as legislative power. Being nonexclusive, such rules and decisions can be made by both Congress and the Executive.

Binding Rules and Adjudications. Consider binding rules—those that come with legal obligation. If consent is necessary for rules to be binding, then the making of binding rules must be part of the legislative power and must be exclusively in Congress.[220] Moreover, if executive power is the nation's force, and if judicial power involves binding judgments about binding laws in cases or controversies, then these powers cannot include any authority to make binding rules.[221] On such grounds, it seems that the authority to make binding rules is exclusively legislative, not executive or judicial.

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

[219] See supra Part IV.

[220] See text at supra note ___.

[221] See supra Part IV.

Now, let's turn to adjudications. If an office of independent judgment is necessary for adjudications to be binding, the making of binding adjudications must be part of the judicial power.[222] And if executive power is merely the nation's force, and if legislative power, although binding, does not extend to adjudications of cases, then these powers do not include any authority to making binding adjudications. On dual grounds, the authority to make such adjudications is exclusively judicial, not executive or legislative.

Accordingly, the Executive and its agencies, not to mention the semi-independent agencies, cannot have any authority to make binding rules or adjudications.[223] The authority to do such things is, respectively, exclusively legislative or judicial.

This exclusivity obviously has jurisdictional and other limits. It broke down at the nation's borders, where Indian traders tended to go beyond the territory of the United States.[224] And the exclusivity did apply to legislation and adjudication in territories and the District of Columbia, where Congress could authorize local judicial and legislative powers—that is, where such powers were not those of the United States.[225] These jurisdictional limits, both external and internal, confined the exclusivity of the judicial and legislative powers. In addition, it must be remembered that factual determinations were not exercises of judicial power and so could be executive. Congress did not authorize judicial power when it made an American tariff rest on a presidential determination about a foreign tariff or when it made a land tax rest on an assessor's determination of the land's value.[226] So these apparent exceptions actually do not show that the executive could make binding rules or adjudications. Binding rules belonged exclusively to Congress, and binding adjudications were exclusively for the courts.

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[222] Although the statutes establishing administrative adjudication provide some protections for independence of administrative adjudicators, especially administrative law judges, the protections are always incomplete, leaving such adjudicators without the external independence, let alone the internal commitment to independence, that is the foundation of the Constitution's judicial power. For example, the administrative law judges employed by the Securities and Exchange Commission are not constitutionally protected in tenure or salary, and substantively their statutory protections are less than those enjoyed by Article III judges. Most seriously, their decisions are subject to review by the commissioners, who are political appointees and who make the agency's regulations and oversee the prosecutorial policies of its Enforcement Division.

[223] This Article discusses independent agencies together with executive agencies, on the ground that even the independent agencies are at least partly executive and probably should be considered wholly executive. If one were to draw a distinction, the reasoning in the text would still bar agencies from making binding rules or adjudications because the authority to do such things is, respectively, exclusively legislative and judicial.

[224] An Act to Regulate Trade and Intercourse with the Indian Tribes, §1 (July 22, 1790), 1 Statutes 137; Hamburger, Is Administrative Law Unlawful? 104-07.

[225] U.S. Const., art. I, §8 (giving Congress power "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards and other and other needful Buildings."). This presumably meant a power to exercise this power exclusively of the states.

[226] Hamburger, Is Administrative Law Unlawful? 107-10, 209-10. Of course, there was good reason to worry that such determinations could drift into executive adjudication or rulemaking, and this eventually happened. Marshall Field & Co. v. Clark, 143 U.S. 649, 690 (1892).

Incidentally, much of the authority exercised under executive power is also exclusive. Although Congress can in various ways authorize and even bind the Executive, only the Executive has the executive power—the power to exercise the nation's action, strength, or force.[227] So the authority to enforce the laws in court or to carry out a court's judgments is exclusively executive. Similarly, the authority physically to distribute benefits and other privileges is executive. As now will be seen, however, the rules and decisions allocating such largess can be either legislative or executive.

Benefits and Other Privileges. Much authority is not exclusive. Of particular importance, rules and decisions allocating benefits and other privileges are ordinarily nonexclusive.

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

Tellingly, congressional authorization was not always necessary for much Executive rulemaking. The secretary of the Treasury sometimes made regulations instructing Treasury officers with statutory authorization, but more typically without it.[228] Similarly, when the patent board made rules regularizing its granting of patents, it acted without congressional authorization for such rulemaking.[229] This independent rulemaking could not have been an exercise of congressionally delegated legislative power. Instead, it was within the executive power. Congressional action could be unnecessary because often the Executive already had sufficient authority under its own power.

In short, there was no overlapping authority to make binding rules.[230] But there was much overlapping rulemaking authority in other areas.

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[227] See supra Part IV.C.

[228] Hamburger, Is Administrative Law Unlawful? 86 (regarding no general statutory authorization for Treasury rules instructing officers).

[229] 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 (mentioning rules established by the patent board); An Act to Promote the Progress of Useful Arts, §1 (Apr. 10, 1790), 1 Stat. 109 (not authorizing rulemaking); An Act to Promote the Progress of Useful Arts; and to Repeal the Act Heretofore Made for That Purpose, §1 (Feb. 21, 1793), id, at 318 (not authorizing rulemaking).

[230] This Article's conclusion that the Executive could not make binding rules—that is, rules with legal obligation—may seem to collide with the rulemaking authority granted by the 1798 federal statute establishing a tax on real property and slaves. As explained in the Appendix, that statute authorized tax commissioners to make rules that were to be binding on the commissioners and their assessors—in other words, binding on themselves and their subordinates. Although these rules are not evidence that the Executive could make rules that were obligatory on the public, they provide at least one data point in support of the view that the Executive could make rules obligatory on executive officials.

But this treatment of executive rules as binding seems to have been quite unusual. The typical assumption was that wayward officials could merely be fired, not prosecuted. Indeed, as will be suggested in the Appendix, there is reason to think that the 1798 authorization for executive rules that were binding on officials was a deviation from the Constitution. But even if the 1798 authorization is informative about constitutional intent, it only suggests that executive rules could be binding on executive officers, not on the public.

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

VIII. DELEGATION

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

It will be seen that the prevailing English political theory rejected any such delegation, that the framers of the Constitution assumed it would not be permitted, and this is fortunate.

A. The Roman Law Tradition

The notion that a delegated power could not be further delegated was familiar already in the Roman law tradition. Defenders of contemporary delegation have long disparaged the Latin maxim against subdelegation, *potestas delegata non potest delegare*.[231] Most recently, the Mortenson-and-Bagley article argues that the maxim was merely a private law doctrine, not a constitutional principle.[232] The article further claims the maxim is not relevant for what the founders thought, because it allegedly lacked depth in common law literature and doesn't turn up in word searches of the Framing debates.[233]

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

[231] See, for example, Patrick W. Duff & Horace E. Whiteside, Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law, 14 Corn. L. Rev. 168 (1929) (disparaging the maxim's place in common law on account of Coke's reliance on an erroneous transcription of Bracton!). For a response, see Horst P. Ehmke, Delegata Potestas Non Postest Delegari, A Maxim of American Constitutional Law, 47 Corn. L. Rev. 50, 51 (1961).

[232] Mortenson & Bagley, supra note __ , at 297 (describing the maxim as one of "private law" and saying that "the sourcing even for the private law claim is thin" and that there is only "scanty source material").

[233] Id. Incidentally, the Mortenson-and-Bagley article complains that my 2014 book makes an "originalist[]" constitutional claim from the maxim *potestas delegata non potest delegare*—a claim that they then condemn for its "ahistoricity" because they cannot find that maxim in common law cases. Mortenson & Bagley, supra note ___ , 297. Their article then disparages my book for citing post-founding century cases on behalf of an originalist argument. Id. But this is a strange critique.

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

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

Roman law focused on the danger of subdelegating judicial authority. Unlike common law, Roman law permitted the delegation of judicial power.[234] But only once. Justinian's Digest recited: "It is obvious that one cannot delegate to another a jurisdiction which he holds by delegation."[235] It added: "It has been provided by ancestral custom that a person may delegate the administration of justice to another only where he had it in his own right and not by the favor of another.[236] At least as to judicial power, the bar against subdelegation seemed old and obvious.

What began as a constitutional limit on the subdelegation of judicial power was eventually generalized into a broad principle. Glosses (from the eleventh and twelfth centuries) recited *delegatus non potest delegare*.[237] And variations on this theme, such as *delegatus delegare non potest* and *delegates non potest delegare* appear in later canon law and civilian texts.[238] Such ideas inevitably entered English law. Chief Justice Edward Coke prominently declared: "delegatam potestatem, quae non potest delegari."[239]

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

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

[234] Hamburger, Is Administrative Law Unlawful? 396-98.

[235] 1 The Digest of Justinian, 1.21.5, trans. Alan Watson (Univ. of Pennsylvania Press, 1985).

[236] Id, 2.1.5.

[237] Duff & Whiteside, supra note ___ , at 171.

[238] Id. For sixteenth-century phrasing, Duff and Whiteside cite Flores Legum (1566), to which one might add other citations, such as Paulo Borgasio Feltrense, Tractatus de Irregularitatibus et Impedimentis Ordinum, Offciorum, et Beneficiorum Ecclesiasticorum 402 (Venice 1574) (*Delegatus non potest delegare*). For well-justified skepticism about Duff and Whiteside's emphasis on the phrasing of the different versions of the maxim, see Ehmke, supra note ___ , 51.

[239] 2 Coke, Institutes, 597. The maxim thus appeared in one of most authoritative of common law treatises. See also Coke's report that "if a man has a bare authority coupled with a trust, as executors have to sell land, they can't sell by attorney; but if a man has authority, as absolute owner of the land, then he may do it by attorney." *Combe's Case* (1614), 9 Coke 75b, 76. Note that this language about "authority coupled with a trust" is suggestive of what Locke would elaborate as governments delegated authority to be exercise in trust.

Common law doctrine on delegation developed in part from the preeminent Scottish discussion of the Roman law maxim. Continental civilians had "acknowledge[d]" the old maxim *delegatus non potest delegare* as a limit on the subdelegation of judicial power. James, Vicount of Stair, Institutions of the Law of Scotland, 221 (Book I, Title 12, §7), ed. David M. Walker (1693 edition; Edinburgh: University Presses of Edinburgh, 1981). But outside questions of jurisdiction, whether in constitutional or private matters, they tended to assume that delegated power could be subdelegated.

So, even before examining the political theory of John Locke, one can see that there were long-standing constitutional concerns about subdelegation. The objections ran so far back that even Justinianic lawyers considered them ancestral custom. And they became part of the canon and civil law commentaries on Roman law. This was a deep intellectual heritage.[240] It was the foundation on which the philosopher John Locke and the Lockean commentator Thomas Rutherforth would elaborate their theories.

B. Political Theory

Although there were contested views of delegation in seventeenth- and eighteenth-century Europe, it is possible to make two crucial generalizations.[241] First, the preeminent political theory of eighteenth-century England and America, that of John Locke, forcefully rejected any delegation by a legislature of its legislative power. Second, it is difficult to find any serious and widely appreciated Anglo-American political philosophy of the era that generally endorsed such delegation.

Locke. Apologists for delegation tend to emphasize a single passage in Locke's *Two Treatises of Government* to claim that he did not object to delegations, or at least not to revocable delegations.[242] But when one looks carefully at that passage and the rest of his book, it becomes clear that he thought that the legislature could never delegate or otherwise shift its legislative power—unless it had distinct constitutional authority to make new legislators. The evidence is overwhelming.[243]

Id. This troubled Lord Stair—the preeminent commentator on Scottish law—because it undermined the intent of a principal who delegated power to an agent on account of his "personal fitness." Id. So Stair suggested that delegated power could not ordinarily be subdelegated without the principal's "consent." Id. Stair's view was picked up by eighteenth-century English writers and soon entered the common law. Bacon's Abridgment, Authority, D; Joseph Story, Commentaries on the Law of Agency, §13 (2nd. ed., Boston 1844).

[240] Of course, the English had mixed feelings about the Roman law. They simultaneously borrowed many of its doctrines while rejecting its Imperial vision of absolute or administrative power. But at least on subdelegation, Roman law could be very appealing.

[241] Hamburger, Delegating, 97-98 (on contested views).

[242] Mortenson & Bagley, supra note ___ , 307 (quoting Locke's Two Treatises, book II, section 141, to suggest that Locke objected only to irrevocable alienations of legislative power); Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 Univ. of Chi. L. Rev. 1721, 1727 (quoting the same section to suggest that Locke only objected to transfers of the legislators' power of enactment). But see Larry Alexander & Saikrishna Prakash, Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated, 70 Univ. of Chi. L. Rev. 1297, 1298 (2003) (pointing out that Locke used the phrase "the legislative power: to refer to the power to make rules for society and not the ability to exercise the de jure powers of legislators, and that Posner and Vermeule's account "simply cannot make sense of Locke's repeated claims that only those whom the people have appointed as legislators can make rules for the people.").

[243] The Mortenson-and-Bagley article places great emphasis on the difference between, on the one hand, the words *alienation* and *transfer* and, on the other, the word *delegation*. Mortenson & Bagley, supra note ___ , 307-13. An alienation or transfer was irrevocable, but a delegation was not. On this basis, the article claims that Locke and others objected only to irrevocable alienations of legislative power, not mere delegations. Id, 307, 309. But this allows terminology to obscure substance. The key distinction was between original and subsequent shifts in power.

Absolutist writers in the seventeenth century, such as Jean Bodin and Francis Bacon, tended to suggest that when the people relinquished power to a king, the transfer was irrevocable. See

Locke wrote: *"freedom of men under government,* is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."[244] That is, the rules governing society had to be made by the legislature erected by the people. Locke also explained: "The *liberty of man*, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it."[245]

A people, in their constitution, could consent to let their legislature transfer its power. But the philosopher clearly thought this an aberration. And he differentiated the legislative power and the power to convey it. So the legislature could not shift its legislative power merely because it had been given this power. To delegate its power, the legislature had to have been given a distinct power of transferring it—to be precise, it had to have a power of making legislators: "The power of the legislative being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws, and place it in other hands."[246] Only with this additional power of making legislators could the legislature transfer its power.

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quotations in id, 309. In contrast, anti-absolutist writers tended to argue that the people could not irrevocably or completely sacrifice their power. The absolutist commentators therefore often spoke about the people's *alienation* of power, and their opponents tended to argue against such *alienation*.

Indeed, when anti-absolutist writers discussed the formation of government, they often said that the people *transferred* or *delegated* their power in order to emphasize that the conveyance was neither irrevocable nor complete. Daniel Defoe, for example, wrote that "[t]he people of England had delegated all the executive power to the king, the legislative to the king, Lords, and Commons, the sovereign judicature in the Lords," and "the remainder is reserved in themselves." [Daniel Defoe], The Original of the Collective Body of the People of England, Examined and Asserted, 9 (London 1702). The underlying point was that the people always retained at least enough power to preserve their liberty, including a power to recall what they had given.

After quoting Bodin and Bacon's absolutist view that the people had permanently alienated of power, the Mortenson-and-Bagley article claims that "*These* are the positions that Locke was rejecting in Section 141 of the Second Treatise." Id, 309. But this is simply mistaken, as evident from what Locke wrote.

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

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

[244] Locke, supra note __ , at 302 (book II, chapter iv, §22).

[245] Id., 301 (book II, chapter iv, §22).

[246] Locke, supra note ___, at 381 (book II, chapter xi, §141).

Locke further explained that governments are "dissolved from within" when "the legislative"—meaning the legislature—is "altered."[247] This included when laws were made by persons not appointed as lawmakers by the people:

> The Constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws made by persons authorized to thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws, that should be binding to the rest. When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey; by which means they come again to be out of subjection, and may constitute to themselves a new legislative, as they think best, being in full liberty to resist the force of those, who without authority would impose anything upon them. Everyone is at the disposure of his own will, when those who had by the delegation of the society, the declaring of the public will, are excluded from it, and others usurp the place who have no such authority or delegation.[248]

The dissolution of government was, of course, the opportunity for revolution. Locke's first example of this situation (as evident from the block quotation immediately above) was when laws are made by persons who are not appointed as lawmakers by the people.

It therefore is simply mistaken to claim that, under Locke's principles, a legislature such as Congress can make any (revocable or permanent) transfer of its legislative power. Having been granted the power "only to make laws, and not to make legislators," the legislature cannot convey its power.

Rutherforth. A version of this Lockean perspective was elaborated by the mid-eighteenth-century Cambridge academic Thomas Rutherforth. He similarly held that the legislature could convey its lawmaking power only if it had been given the additional power to transfer it.

Some commentators (Mortenson and Bagley) soften this conclusion. They quote Rutherforth to the effect that because the people "gave the legislative power, they could . . ., likewise, give a right of transferring that power."[249] On this basis, they claim that Rutherforth thought the right of transferring legislative power was conveyed whenever this was actually intended.[250] That is true as far as it goes; but it does not fully capture Rutherforth's expectation of popular consent to an additional power.

Echoing Locke, Rutherforth distinguished a governing power and an appointment power, saying that "a power to govern does not imply a power to

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[247] Id, 425 (book II, chapter xix, §212).
[248] Id, 425-26 (book II, chapter xix, §212).
[249] Mortenson & Bagley, supra note __ , 310, quoting Rutherforth, supra note __ , 320.
[250] Mortenson & Bagley, supra note __ , 311 ("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.").

choose and appoint a governor."[251] Put another way, the power to *exercise* legislative power did not include a power to *transfer* legislative power. The two were different. Accordingly, even when the people consented to the delegation of legislative power, it could not be presumed that they consented to any further transfer of this power. That transfer or subdelegation required the "consent of the people" in a distinct "grant" or "concurrence."[252] The legislature's power to transfer its power was different from its power to legislate and so required its own additional expression of consent—something not evident in the U.S. Constitution.

America. Lockean political theory was widely appreciated in America. The philosopher's *Two Treatises of Government* was familiar in American colleges and was present in numerous libraries.[253] Indeed, it was the preeminent theory of limited government in the Anglo-American world. No other philosophical account of the formation and dissolution of government was as prominent.

A sense of how this high political theory on delegation could be absorbed by ordinary men and women is suggested by the commonplace book of a revolutionary war soldier, George Gilmer. Among the passages from the philosopher Gilmer transcribed was this: *"freedom of men under government,* is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it."[254] More broadly, an anonymous newspaper essay recited Locke's Chapter 141 against legislative delegation and quoted Rutherforth that: "Mr. Locke's reasoning on this head seems decisive."[255]

Lockean theory generally barred legislative delegation. The sole exception was when the legislature enjoyed not only legislative power but also the power to make new legislators—an additional power that cannot be found in the Constitution. So, from this perspective, the argument for a legislature's delegation of its power must rest on a theory that this subdelegation was generally permissible or at least could be implied. Such a position, however, is precisely what cannot easily be found in any serious and widely circulated work of political philosophy. Not one.

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

C. The Framers' Rejection of Congressional Delegation

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[251] Rutherforth, supra note __ , 318. This passage gave as an example involved "a king with legislative power." Id, 320. But on the next page, he made clear that he was thinking ambidextrously of either a "king or legislative body." Id, 321.

[252] Rutherforth, supra note __ , 320.

[253] See supra note __ .

[254] George Gilmer, Commonplace Book, 134 (before May 1778), Virginia Historical Society, Mss 5:5, G4213:1.

[255] "Observations upon the Seven Articles, Reported by the Grand Committee, consisting of Mr. Livermore, Mr. Gagne, Mr. Manning, Mr. Johnson, Mr. Smith, Mr. Simmes, Mr. Pettit, Mr. Henry, Mr. Lee, Mr. Bloodworth, Mr. Pinckney, and Mr. Houston, and now lying on the table of Congress," Virginia Independent Chronicle (Feb. 21, 1787) (from the New-York Gazetteer of January 29).

The 1787 Constitutional Convention itself expressly rejected any congressional delegation of legislative power. If the Constitution would already delegate its three powers, there would be no need for Congress to make any further delegation to the Executive. No need for further delegation of executive power to that body, and certainly not any delegation of legislative or judicial power.

Some commentators (Mortenson and Bagley) boldly declare "there was no nondelegation doctrine at the Founding.[256] Indeed, they view executive power "an empty vessel for Congress to fill. . . . *Any* action authorized by law was an exercise of 'executive power' inasmuch as it served to execute the law."[257] It thus is "not just confused but incoherent to ask whether an executive action is so legislative in nature as to fall outside of [the executive] basket."[258]

Unmentioned by such scholars, however, is that James Madison and the rest of the Constitutional Convention clearly revealed their assumption that the Executive could not exercise any powers that were legislative or judicial in nature. The Convention even rejected any congressional delegation of executive power to the Executive.

When the Convention discussed how to establish a national Executive, James Madison apparently proposed that it have a series of powers, including the power to execute congressionally delegated powers. His initial suggestion along these lines provoked General Charles Cotesworth Pinkney to express concern that "improper powers" might be delegated.[259] So Madison came back with a proposal that limited the Executive's delegated powers to those that were not legislative or judicial. To be precise, he moved that the Executive be established:

> with power to carry into effect, the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature.[260]

This motion did not directly define the executive power that Congress could delegate to the Executive; instead, it treated executive power as residual—as whatever was not legislative or judicial in nature.

Although James Wilson seconded Madison's motion, Charles Pinkney—not to be confused with the General—moved to strike out the phrase: "and to execute such other powers not Legislative nor Judiciary in their nature as may from time to time be delegated."[261] He thought they "were unnecessary, the object of them being included in the 'power to carry into effect the national laws'."[262]

The power to effectuate or execute the national laws was a crucial part of the executive power. According to some commentators, it was the full extent of executive power.[263] So if the Executive already had the power to carry the national

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[256] Mortenson & Bagley, supra note ___ , 289.
[257] Id, 280-81.
[258] Id, 280-81.
[259] Madison's Notes, 1 Farrand 67.
[260] Id, 66–67. The commas in this quotation appear as periods in the original manuscript—it being very common for eighteenth-century manuscripts to use periods for commas.
[261] Id.
[262] Id.
[263] See supra Part IV.C.

laws into effect, it would not need any further executive power.[264] Accordingly, there was no need to empower the Executive to execute congressionally delegated powers—let alone to limit any such powers to those that were not legislative or judicial in nature.

When Edmund Randolph—Virginia's governor and formerly its attorney general—seconded Pinkney's motion, Madison largely bowed to the view of his fellow Virginian.[265] Madison conceded that his proposed words about delegation might not be "absolutely necessary" but thought there was no "inconveniency in retaining them" and that they "might serve to prevent doubts and misconstructions."[266] The Convention then voted (seven states to three) to remove Madison's delegation language.[267] It retained the rest of his proposal, about giving the Executive the power to carry into effect the national laws, and about making appointments in cases not otherwise provided for.[268]

This episode is illuminating. As noted by Aaron Gordon, it suggests that "at least some delegates," including Madison, thought "an overly permissive statutory grant of power to the executive could amount to an impermissible delegation of legislative power."[269] That's true. But not all.

First, the debates show an assumption, apparently undisputed, that if there was to be congressional delegation, the Executive should only exercise delegated powers that were neither "Legislative nor Judiciary in their nature."[270] In other words, Congress should not delegate powers that were legislative or judicial in their nature, and the Executive should not exercise any such delegated powers.

Second, the Executive should not even exercise any additional executive power delegated by Congress. This may initially seem puzzling, but it makes sense. Madison's attempt to authorize the exercise of congressionally delegated executive power seemed unnecessary because this would be adequately accomplished by the Constitution itself. That is, once the Constitution established an Executive with executive power, including the power to carry out the laws, there would be no need for congressional delegation of any other executive power—or for any authorization of the Executive to exercise that additional executive power.[271] Put generally, any delegation of the tripartite powers would be done by the Constitution, so there was no need any congressional delegation of such powers.

Third, the debates reveal an assumption that the problem was not merely that Congress could not delegate legislative or judicial power to the executive, but more immediately that the Executive could not exercise any such delegated powers. Even when it came to executive power, the question was whether the Executive should be able to exercise congressionally delegated executive power that was not conferred on

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[264] See, for example, the quotation from Thomas Rutherforth in supra note ___.
[265] 1 Farrand 67.
[266] Id.
[267] Id.
[268] Id.
[269] Aaron Gordon, supra note ___ , at 743.
[270] Id.
[271] Note that Madison was a political theorist rather than a lawyer, and he therefore was more familiar with language about delegation than about vesting. In contrast, the two Pinkneys and Randolph were distinguished lawyers, and they may have already understood that the Constitution might have to speak in terms other than *delegation*. But this is mere speculation.

it by the Constitution. Delegation is thus a twofold problem, not merely about what Congress can give, but also about what the Executive can accept.

The Convention clearly repudiated any Executive exercise of any power delegated by Congress. It most emphatically rejected any executive exercise of delegated legislative or judicial power. But it also rejected any executive exercise of executive power.

The point is not merely to dispel the curious claim that "there was no nondelegation doctrine at the Founding."[272] More seriously, what needs recognition is that the framers considered and rejected any congressional delegation of power. The Executive could not be given any power that was legislative or judicial in nature. In the end, it could not even receive any additional executive power.

D. The Value of a Principle Barring Delegation

The principle barring delegation is not merely historical. It is profoundly valuable, especially now that it has been so flagrantly abandoned.

An anti-delegation principle is essential, most basically, to keep legislative power in the hands of elected lawmakers. In other words, it preserves the foundation of law in popular consent. Such a principle is also necessary to preserve the people's constitutional choices. If the people delegate their legislative power to the legislature, and that body can subdelegate its power to other bodies, then the servant can almost effortlessly subvert its masters' constitutional framework.

On both grounds, there have long been ideals, at least in England and America, against letting a legislature delegate its lawmaking power. Even if there had never been such a principle, one might be inclined to invent it. It is, in this sense, not merely a historical ideal, but one of continuing vitality—dare one say, a living principle?

The Lockean argument against delegation is therefore not simply originalist evidence. It also is a still vital response to an enduring problem.

Locke gave classic expression to the idea that the legitimacy of political power and the obligation of law depend on consent. This consent is necessary both for statutory law and for a constitution. Locke therefore aimed to preserve not only consensual lawmaking but also the people's choice of constitutional structure, particularly their formation of the "legislative."[273] He argued that "the constitution of the legislative" was "the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people," and therefore "no inferior power can alter it."[274] So unless the people gave the legislature the distinct power to create alternative legislators, "[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."[275]

This conclusion followed not only from the constitution but also from the nature of constitutions:

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[272] Id, 280-81. Instead, they think "executive power . . . was simply the authority to execute the laws—an empty vessel for Congress to fill. . . . Any action authorized by law was an exercise of 'executive power' inasmuch as it served to execute the law." Id.

[273] Locke, supra note __ , at 391 (book II, chapter xiii, §157).

[274] Id.

[275] Id, 380 (book II, chapter xi, §141).

> The people alone can appoint the form of the commonwealth . . . . And when the people have said, we will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those, whom they have chosen, and authorized to make laws for them.[276]

On these assumptions about constitutional law—not to mention underlying ideas about consent—the legislature could not delegate its legislative power: "The legislative neither must nor can transfer the power of making laws to anybody else, or place it anywhere but where the people have."[277] And when the laws were made by anybody else, "the people are not therefore bound to obey."[278]

The logic of the nondelegation principle remains as powerful today as in the past. If laws are to be made with the people's consent, they must be enacted by the body elected by the people and established by them as their legislature. In Locke's words, laws can only be made by those whom the people have both "chosen, and authorized to make laws for them."[279]

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Lockean political theory rejected a legislature's delegation of legislative power, lest the legislature defeat consensual lawmaking and the people's constitutional choices. In this spirit, the Constitution Convention thought that the Executive should not exercise any congressionally delegated power—not legislative or judicial power, nor even executive power.

Put another way, the Constitution alone delegated power. Any further delegation by Congress would undermine the Constitution's structure and, even more fundamentally, the crucial underlying principle of legislative and constitutional consent.

IX. SHALL BE VESTED

Instead of speaking generically about delegation, the Constitution uses vesting language. And rather than merely say that its powers are vested, it says that they "shall be vested."[280]

Generic ideas about delegation must therefore be understood more specifically in terms of vesting. And even generic ideas about vesting must give way to the Constitution's mandate that its powers *shall be vested*.

A. Continuity of Delegation Talk

[276] Id, 380-81 (book II, chapter xi, §141).
[277] Id, 381 (book II, chapter xi, §142).
[278] Id, 426 (book II, chapter xix, §212).
[279] Id, 381 (book II, chapter xi, §141).
[280] U.S. Const. art. I, § 1; id. art. II, § 1, cl. 1; id. art. III, § 1.

Of course, even after the adoption of the Constitution, it still could make sense to speak generically about the problem in terms of *delegation*. Politicians, theorists, and even the Tenth Amendment persisted in using that term. And with good reason. *Delegation* was the language of old Roman law and modern political theory.

As shown in Part VIII, a long intellectual history, running from Roman law to the publications of John Locke and his followers, laid the foundation for ideas of delegation and objections to subdelegation. Although the Constitution drafted in 1787 did not speak in terms of *delegation*, it clearly built upon pre-existing thought and language, as evident from the debates in the Constitutional Convention (noted in Part VIII.B). And because of that pre-existing tradition, it is no surprise that the term *delegation* persisted in theoretical and legal debates.

The Tenth Amendment reveals exactly when it makes sense to use *delegation* language. The Constitution says its powers shall be *vested* in the branches of government. But when generalizing about the Constitution's vesting of powers, the Tenth Amendment speaks in terms of what was or was not *delegated*: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[281] This distinction between the operative word *vested* and the metalanguage *delegated* is crucial. It is a reminder that it has never been wrong to generalize in terms of *delegation*—as long as one does not forget that this is merely a way of speaking about the Constitution's more specific vesting of its powers.

B. Vesting Language More Accurate

There are distinct advantages to reframing the problem in the Constitution's terms. Delegation talk is useful up to a point—for example, in generic arguments about the threat to the people's elective consent and constitutional choices. But vesting language more accurately describes what is at stake in the U.S. Constitution.

First, vesting language avoids the inaccuracy of describing congressional shifts of power as delegations. A delegated power is one that can be resumed at the will or discretion of the delegator.[282] When the Secretary of the Interior, for example, delegates some of her powers to a subordinate, she can recall her power at her own discretion. Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress authorizes the Executive to exercise legislative power, even if only

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[281] U.S. Const. amend. X.

[282] The private law on what common lawyers call the "delegation" of powers developed in the context of the Roman "mandate"—this being a prototypically gratuitous agreement by which "one employs another to do some work or service." 1 [Andrew MacDowall Bankton], Institutes of the Law of Scotland in Civil Rights: With Observations upon the Agreement or Diversity between Them and the Laws of England, 392 (Edinburgh 1751). Being formed and revoked merely by intent, mandates were "not only revokable by express deed, but also tacitly." Id. Indeed, mandates, by definition, were revokable: "Mandates . . . determine, by the revocation of the mandant, even though they contain a term of endurance, or a clause that the same shall be irrevocable; and by the renunciation of the mandatary." Id, 397. To this Bankton merely added a caution about not causing damage by revocation: "but both ought to be done while the matter is entire, or otherwise such party is bound to indemnify the other as to bygones." Id. For the Roman background, see Alan Watson, Contract of Mandate in Roman Law (Clarendon Press 1961).

temporarily, Congress cannot predictably recover that power, as it may have to overcome a Presidential veto, and that will not always or even usually be possible.[283] So, congressional shifts of legislative power to the Executive cannot accurately be considered delegations—this being an initial reason to appreciate the Constitution's vesting language.

Second, vesting language avoids any strange inquiry into whether Congress can delegate judicial power to administrative agencies—as if Congress could delegate a power that does not belong to it. A doctrine on delegation, either allowing or barring it—simply cannot explain legislative transfers of judicial power. As a result, judicial and scholarly discussions of delegation and nondelegation tend to focus on congressional delegations of legislative power, without saying much at all about congressional transfers of judicial power.[284] Any theory framed in terms of *delegation* is therefore strangely incomplete; it has nothing to say about the congressional shift of judicial power to agencies.

In response, one might assume that the courts acquiesce in such transfers and thereby silently delegate their judicial power. But this would be factually untrue and legally scandalous.[285] (Recall that judges in common law systems cannot delegate their judgment.[286]) So the delegation vocabulary simply cannot account for shifts in judicial power. Once again, it is useful to acknowledge that the Constitution speaks in terms of vesting.

A similar problem arises when Congress transfers executive power to independent agencies. Congress does not have executive power and so cannot be delegating it to nonexecutive agencies. The Supreme Court at one point pretended that independent agencies do not exercise executive power.[287] But if one is to be honest, such agencies obviously do enjoy executive power—a power that Congress could not have delegated. So, as with the transfer of judicial power, vesting terminology makes more sense.

These examples reveal one of the great advantages of using vesting language—that it lets one speak about the full range of divested powers in the same terms. It is awkward and unpersuasive to have a special doctrine for analyzing congressional transfers of legislative powers to administrative agencies and no doctrine to analyze congressional transfers of judicial power—let alone the transfer of executive power to independent agencies. So, it is good to have the vesting analysis, which is general and thus equally applicable to the displacement of

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[283] U.S. Const. art. I, §7.

[284] An exception is the Mortenson-and-Bagley article, which bold claims that "seventeenth- and eighteenth-century thinkers reliably embraced" the "delegation" of "judicial authority." Mortenson & Bagley, supra note ___ , at 298. But the article support this proposition by echoing the delegation of judicial power by medieval kings to their judges, without pausing to recognize that this shows nothing about judicial subdelegation of judicial power, let alone in later centuries. Id. In fact, as is familiar from the literature on delegation, the common law barred courts and judges from delegating their judicial power. Hamburger, Is Administrative Law Unlawful? 396-98; 2 Coke, Institutes, 597 (objecting to delegation by judges).

[285] Hamburger, Is Administrative Law Unlawful? 296-98.

[286] See supra text at note __.

[287] Humphrey's Executor v. United States, 295 U.S. 602, 624 (1935) saying that the Federal Trade Commission's "duties are neither political nor executive, but predominantly *quasi*-judicial and *quasi*-legislative.").

legislative, judicial, and executive powers. It applies whenever any power is hived off from any branch of government.

Third, the notion of vesting places constitutional analysis on a more solid basis than ideas of delegation. When judges rely too much on pre-constitutional delegation theory or post-constitutional judicial doctrine, the Constitution falls by the wayside. Current constitutional analysis, for example, often seems unmoored from the Constitution. In contrast, when one focuses on the Constitution's *vesting* language, there is no doubt about the constitutional foundation.

In sum, a focus on vesting more accurately recognizes what is at stake. *Vesting* is more accurate than *delegation* in describing congressional transfers of legislative power. In contrast to *delegation*, it captures the full range of transfers of power. And it rests on the Constitution's distinctive drafting.

C. Shall Be Vested

Not content to say that its powers are vested, the Constitution says each of its tripartite powers "shall be vested" in its own branch of government. The Constitution thereby textually emphasizes that its powers cannot be rearranged.

Recall that the nondelegation doctrine has long seemed to lack any clear foundation in the Constitution. That's why Cass Sunstein protests that there is no clear "textual barrier to delegations."[288] And there is some merit to Sunstein's point. The nondelegation doctrine has been presented as a judicial doctrine, not a constitutional provision. And exactly how it is founded in the Constitution has not always been clear.

The answer, lies in plain sight, in the vesting clauses. It is widely assumed that the vesting clauses merely transfer the powers and therefore do not bar their further transfer. For example, ecent scholarship (by Jed Shugerman) surveys old dictionary definitions of the word *vesting* to observe that the word does not necessarily imply a limit on further transfer. From this, it is concluded that the Constitution's word *vested* does not bar any divesting or other shifting of power.[289] Certainly, when the word is considered on its own, as an abstraction in dictionaries, *vested* need not connote any limit on subsequent transfer.

Yet rather than simply vest its powers in the different parts of government, the Constitution enacts that such powers "shall be vested" in the different branches. This not merely conveys the powers, but makes their location mandatory.

If the Constitution had merely said that the legislative powers *are hereby vested* in Congress, one might suppose that the Constitution only transferred its powers, without any express textual indication that the legislative powers must stay in Congress. Accordingly, if one were to forget the underlying intellectual history—about consent and about powers that are different, separated, externally exclusive, and subject to old ideas barring subdelegation—one might suppose that the Constitution only transferred its legislative powers, without barring further transfers. On this supposition, Congress could subsequently share or even entirely convey its powers, so that they would end up being partly or even fully vested elsewhere.

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[288] Sunstein, supra note __ , 67 U. Chi. L. Rev. at 322.

[289] Professor Shugarman writes that "the word 'vest' did not connote exclusivity, indefeasiblity, or a special constitutional status for official power." Shugerman, supra note ___ , ___ .

The Constitution's vesting of powers would thus be like the vesting of title to land.[290] Such a vesting would transfer the powers without dictating their ultimate location. But transfers of powers were not treated the same as transfers of property—whether at common law or in the constitutional heritage that ran from Roman law to John Locke.[291] Of particular interest here, the Constitution does not merely vest its powers in the sense of transferring them.

The Constitution says that its powers *shall be vested*.[292] Its very text thus specifies not merely the transfer of its powers, but where they must be located. The legislative powers shall be in Congress, the executive power shall be in the President, and the judicial power shall be in the courts. Whatever *vested* might mean in the abstract, the Constitution's words *shall be vested* mandate not only its transfer of powers but also their location.

In defense of delegation, one might argue that when Congress shares some of its powers with the Executive, those powers remain vested in Congress. From this perspective, the devolution of the commerce power to the Department of Agriculture does not deprive Congress of that power. But that misses the point. When the Constitution says the legislative powers *shall be vested* in Congress, it requires them to be there, not elsewhere. That is, when legislative powers are shared with the Executive, they are no longer vested merely in Congress, and the sharing thus violates the Constitution's injunction that they *shall be vested* in Congress. The Constitution does not say that the legislative powers "shall be vested in a Congress of the United States *and anyone with whom Congress shares them*."

Similarly, when Congress shifts judicial power to the Executive, this violates the Constitution's directive that the judicial power *shall be vested* in the courts. Leaving aside that Congress cannot delegate the power of another branch (as noted in Part IX.B), the judicial power must be in the courts, and this means it cannot be in the Executive.[293]

The phrase *shall be vested* is decisive. It emphatically reinforces what already should be clear, that the Constitution's vesting of powers is not just an initial distribution—like an initial dealing out of cards. Rather, as evident from its text, the Constitution requires its powers to be vested in their respective branches of government. Because of the words *shall be vested*, this location is mandatory.[294]

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[290] It has been suggested that the Constitution's vesting of powers is akin to the vesting of property and that therefore vested powers, like vested property rights, can be freely transferred. Kurt Eggert, Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary, 24 Chap. L. Rev. 707, 733 (2021).

[291] See supra Parts VII.A & B.

[292] U.S. Const., art. I, §1, art. II, §1, art. III, §1.

[293] Incidentally, the excuse that judicial power is merely being shared is factually dubious. All too often, judicial power is largely dislodged from the courts, not merely shared with agencies. When agencies adjudicate, they often act informally to avoid final agency action thereby avoid judicial review. Philip Hamburger, Purchasing Submission: Conditions, Power, and Freedom, 116 (Harvard Univ. Press 2021). Although adjudications by administrative law judges can be taken by petition to a circuit court, this circumvents trials in court, let alone juries. And the doctrines requiring deference to agency interpretations and fact-finding leave courts only a fraction of the judicial power. So the judicial power transferred to agencies is not really shared with the courts. And of course, this judicial power that is taken out of the hands of the courts is the vast bulk of regulatory adjudication in the United States. *Cf.* Adrian Vermeule, Law's Abnegation: From Law's Empire to the Administrative State, 1 (Harvard Univ. Press 2016).

[294] U.S. Const. art I, §1; id. art II, §1; id. art. III, §1.

D. Implications for Legislative and Judicial Powers

The phrase *shall be vested* has a pair of implications for legislative power. A power that the Constitution says *shall be vested* in a branch of government cannot be located elsewhere. Nor can the body that the Constitution vests with the power be divested of it.

In terms of the administrative state, legislative powers cannot be divested from Congress or vested elsewhere. And judicial power cannot be divested from the courts or vested elsewhere.

Vesting. The initial way of framing the question is simply in terms of *vesting*. Once the Constitution says that its legislative powers *shall be vested* in Congress, and that its judicial power *shall be vested* in the courts, can elements of those powers be vested in an executive or other agency? This would seem to contradict the Constitution's vesting of the legislative powers in Congress.

Even when Congress retains all of its legislative power and merely shares some of it with the Executive, those portions are vested in the Executive. So it makes no difference that legislative power is merely shared with administrative agencies. This sharing vests legislative power contrary to where the Constitution says it *shall be vested*.

What is the alternative reading of the Constitution from the pro-delegation perspective? ---To say that the Constitution should be interpreted to mean: "All legislative Powers herein granted shall be vested in a Congress of the United States *and such other bodies as Congress chooses*"? That interpretation rewrites the Constitution.

The Constitution's phrase *shall be vested* is thus clarifying. It is difficult to understand how the powers that the Constitution says *shall be vested* in Congress can be vested elsewhere. Similarly, it is not easy to see how the power that the Constitution says *shall be vested* in the courts can be vested in other bodies. And so too for the executive power that *shall be vested* in the President. Such powers cannot constitutionally be vested anywhere but where the Constitution says they shall be vested.[295]

Divesting. Although what has been observed thus far should be enough to settle the matter, there is an additional way of framing the question: in terms of *divesting*. For example, does the Constitution permits Congress to be *divested* of the powers that the Constitution says *shall be vested* in it? Or does it permit the courts to be *divested* of the power that the Constitution says *shall be vested* in them?

The Constitution substitutes its language about vested powers for the more familiar language about delegated powers. Thus, what traditionally might have been

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The word *all* reinforces this conclusion. Recall (from Part VI.B) that when the Constitution says "All legislative powers herein granted shall be vested in a Congress of the United States," it suggests that those powers are both externally and internally exclusive. But the repeated phrase "shall be vested" is the clearest and most basic textual barrier to any transfer of any of the Constitution's powers. On top of this, the word *all* merely clarifies that, unlike executive and judicial powers, legislative powers cannot even be shared within its branch of government.

[295] This point does not conflict with the President's internal delegation of his executive power, because the Constitution expressly permits this. See text at supra note ___.

called a congressional *delegation* of legislative power should be viewed under the Constitution as a divesting of such power. And Congress cannot divest itself of what *shall be vested* in it.

Backing this up is the reality (seen above) that because of the veto power, Congress cannot predictably recover the legislative power it transfers to agencies. For this reason, such a transfer cannot accurately be considered a delegation. But it can accurately be understood as a divesting of legislative power. Any transfer of legislative power—whether Congress can or cannot predictably recall it—is a divestiture of legislative power. And once the Constitution has said that Congress *shall be vested* with such power, that body cannot be divested of it by a mere statute.

It may be protested that even after Congress authorizes an agency to exercise legislative power, that power remains vested in Congress. This is, once more, the question of sharing.[296] But if the Constitution's legislative powers *shall be vested* in Congress, they cannot be cannot even be shared outside Congress.

The logic of the Constitution's phrasing, saying its powers *shall be vested*, is very powerful. A mere statute cannot vest the Executive with powers that the Constitution says *shall be vested* in other branches. Nor can a statute divest Congress or the courts of the powers that the Constitution says *shall be vested* in them.

E. Implications for Executive Power

The Constitution's vesting of its powers has implications not only for the power that is transferred but also for the recipient and its power. In terms of the administrative state, even after one considers the implications for legislative and judicial powers, one still must think about the implications for executive power.

The Constitution vests the President with only executive power (along with the adjustments in the remainder of Article II).[297] This means he is not and cannot be vested with the other powers. That is, he cannot exercise legislative or judicial power.

In the era of the nondelegation doctrine, it seems enough to discuss such transfers of power merely in terms of the power being transferred. But in the late eighteenth century the question was also understood in term of the power of the recipient branch. That is, the transfer of legislative power to an executive agency is a problem not only for legislative power but also for executive power. Can the Executive exercise a power that the Constitution did not vest in it?

Recall (from Part VIII.C) that this was how the Constitutional Convention approached the delegation problem. James Madison moved that the national Executive should have a power to execute congressionally delegated powers. And when General Charles Cotesworth Pinkney worried that "improper powers" might be delegated, Madison added that the delegated powers were not to be legislative or judicial—that the Executive could "execute such other powers not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature."[298] Thus, in his view, the Executive needed constitutional authorization to exercise any congressionally delegated powers, even merely executive powers. In

[296] See text at supra note ___ .
[297] U.S. Const., art II, §1.
[298] Madison's Notes, 1 Farrand 66–67.

other words, the Executive could not exercise any power, even any executive power, that the Constitution had not vested in the Executive.

Thus, what is conventionally understood as delegation is really (as mentioned in Part IX.B) a twofold problem. The vesting of powers requires one to ask not merely about what Congress can give, but also about what the Executive can receive.

The point is further illuminated by *Hayburn's Case*.[299] When three circuits protested that the courts could not act under the Invalid Pension Act, they all reasoned that they could not exercise a power that the Constitution had not vested in them. For example, the Circuit Court for the District of Pennsylvania said that "the business directed by this act is not of a judicial nature. It forms no part of the power vested by the Constitution in the courts of the United States; the circuit court must consequently have proceeded without constitutional authority."[300]

This principle in *Hayburn's Case* did not merely concern the courts, but applied equally to all of the branches. As put by the Circuit Court for the District of North Carolina, "the legislative, executive, and judicial departments are each formed in a separate and independent manner," and "the ultimate basis of each is the Constitution only, within the limits of which each department can alone justify any act of authority."[301] So, bringing the point back to administrative agencies, the Executive cannot exercise any power that is not executive.

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The Constitution's vesting of powers reinforces what already was evident from consent, the different powers, the separation of powers, the exclusive location of the powers, and delegation theory. By saying that its powers *shall be vested*, the Constitution mandates where its powers must be located. So Congress cannot transfer its own or any other powers. Moreover, the Executive can exercise only its own power, not that of another branch.

X. NECESSARY AND PROPER?

Having examined consent, the different powers, their separation, the objections to their delegation, their external exclusivity, and that they shall be vested, this Article must now consider whether Congress can unvest what the Constitution vested on the theory that this is necessary and proper.[302] The Constitution gives Congress the power to legislate what is necessary and proper for carrying out other governmental powers.[303] Might this power allow Congress to shift the vested powers from one branch to another?

The question is momentous. It asks whether, under the Necessary and Proper Clause, a statute can undo the Constitution's structure? The question very nearly answers itself. But two textual responses are worth spelling out.

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[299] Hayburn's Case, 2 U.S. 409 (1792).
[300] Id, at 411 (1792) (CC for Dist. Pa.).
[301] Id., at 412 (CC for Dist. NC).
[302] U.S. Const., art. I, §8.
[303] U.S. Const., art. I, §8.

First, a congressional shift of legislative or judicial powers is not *proper*. Many judges have blurred the words *necessary* and *proper* together. But necessity was the old measure of absolute power, which Americans had just recently rejected in both king and Parliament.[304] So it is improbable that the Constitution would have empowered Congress to act merely of necessity. Indeed, such a standard would have eviscerated the Constitution's limits on federal power. The word *proper* was therefore surely understood as an independent requirement.[305]

The text itself reinforces the significance of the word *proper*. The power of Congress to enact what is "necessary and proper" stands in contrast to what is "necessary and expedient."[306] The President can propose to Congress what he judges "necessary and expedient," but Congress is confined to legislating what is "necessary and proper."[307] The requirement that legislation under this power be "proper" must therefore be taken seriously. And it surely is improper to relocate the powers that the Constitution says *shall be vested* in their distinct branches.[308]

Second, rearranging such powers is not only improper; it also conflicts with the limitation of the Necessary and Proper Clause to *vested* powers. That clause could have authorized Congress to carry out legislative or judicial power in the abstract. Instead, it only allows Congress to carry out the government's other powers as they are "vested" by the Constitution in the government and its departments and officers.[309]

If the Constitution had empowered Congress to make laws necessary and proper to carry into execution the legislative power in the abstract, or the judicial power in the abstract, then it could have been understood to authorize Congress so shift these powers out of the bodies in which the Constitution vests them. But the Constitution empowers Congress to make laws necessary and proper to carry into execution "the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[310] Congress is thus confined to enacting what is necessary and proper for carrying out the powers *vested* variously in the government, its departments, and its officers. As explained by Judge Nathaniel Chipman in 1793, Congress is "empowered, to make all laws necessary and proper for carrying into effect, in the government, or any department, or office of the United States, all the powers, which they are invested, by

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[304] James Iredell wrote in 1786 that Americans "were not ignorant of the theory, of the necessity of the legislature being absolute in all cases, because it was the great ground of the British pretensions." "An Elector" [James Iredell], "To the Public," *North Carolina Gazette* (Newbern) (Aug. 17, 1786). For necessity and absolutism, see Hamburger, Is Administrative Law Unlawful? 423-24.

[305] Gary Lawson & Patricia G. Granger, The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause, 43 Duke L. Rev. 267, 297 (1993) ("under a jurisdictional construction of the Sweeping Clause, executory laws must be consistent with principles of separation of powers, principles of federalism, and individual rights").

[306] U.S. Const, art. I, §8 & art. II, §3.

[307] U.S. Const, art. I, §8 & art. II, §3.

[308] Lawson, The Rise and Rise of the Administrative State, supra note ___ , 107 Harv. L. Rev. at 1238-39.

[309] U.S. Const., art. I, §8 ("To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). For a similar interpretation, even if not with so much emphasis on vested powers, see Lawson & Granger, supra note ___ , at 297.

[310] U.S. Const., art. I, §8.

the constitution."[311] This restriction of the Necessary and Proper Clause to vested powers precludes Congress from using the clause to rearrange or otherwise divest any such powers.

The words *proper* and *vesting* are revealing. They prevent Congress from using the Necessary and Proper Clause to rearrange the vested powers.

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The Necessary and Proper Clause is no excuse for unvesting what the Constitution says *shall be vested*. Such shifting around of power is not proper. In any case, the clause empowers Congress to do what is necessary and proper only in pursuit of vested powers. The Necessary and Proper Clause thus does not undermine but actually reinforces the conclusions drawn from the Constitution's vesting clauses.

XI. VOTING RIGHTS, PREJUDICE, AND DISCRIMINATION

Constitutional questions are often understood narrowly in terms of the artificial contours of Supreme Court doctrines. Transfers of power, for example, tend to be discussed in terms of the court's nondelegation doctrine. In contrast, this Article frames the problem more broadly in terms of a wider range of relevant concepts, primarily consent, different powers, separation of powers, exclusivity, delegation, and vesting. But that is not all. Transfers of power also need to be evaluated in light of their consequences for more visceral constitutional values.

The obligation of law rests on consent—the consent secured by having laws made by an elected Congress. This was (as seen in Parts III and IV.B) a key principle underlying the formation of the United States and its different powers. No longer.

Part XI makes the sobering observation that the delegation of legislative power dilutes voting rights. Indeed, it developed in the federal government in the late nineteenth century as a prejudiced response to the expansion of suffrage, and it remains a mechanism for class discrimination and disenfranchisement.

A. Diluting Voting Rights

Delegation derogates from representative government. It undermines consensual elective lawmaking and even meaningful voting rights.

The obligation of law rests on consent. Without the consent of the governed, law is without obligation or legitimacy.[312] It therefore is important that binding laws be made by the elected representative legislature.

[311] Nathaniel Chipman, Sketches of the Principles of Government, 263 (Rutland 1793).
[312] See supra Part III.

But the president, although elected, is not a representative body. Nor is any agency, whether executive or independent. In contrast, Congress is a representative body, consisting of elected representatives of different parts of the country. So when a statute permits an executive officer or an agency to make binding rules—those with the obligation of law—it does more than defeat the Constitution's vesting of legislative powers in Congress. It also defeats the consensual and representative character of American law.

Put another way, the transfer of legislative power to agencies dilutes the value of voting rights. The delegation of legislative power does not threaten anyone's right to cast a ballot, but in removing legislative power out of the elected legislature, delegation sharply reduces the value of suffrage. The form remains, but much of the reality gets drained out and transferred to unelected bureaucrats.

Violations of voting rights justly elicit great concern, even at a retail level. There should be at least as much disquiet about the wholesale assault on voting rights resulting from delegation.

B. Prejudice

The consequences for representative government and voting rights were a feature, not a bug. The democratization of politics in the United States centered on the extension of voting rights—first to unpropertied White men, then to Black men, and eventually to women.[313] But while the ideal of equal voting rights attracted many progressives, the reality prompted misgivings. Many progressives worried about the rough-and-tumble character of egalitarian politics and about the tendency of newly enfranchised groups to reject progressive reforms. So, many of these enlightened Americans sought what they considered a more elevated mode of governance.[314]

Some were quite candid. Woodrow Wilson—the grandfather of the American administrative state—complained that "the reformer is bewildered" by the need to persuade "a voting majority of several million."[315] Wilson specifically feared the diversity of the nation, which meant that the reformer needed to influence "the mind, not of Americans of the older stocks only, but also of Irishmen, of Germans, [and] of Negroes."[316] He added: "The bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes."[317] And "where is this unphilosophical bulk of mankind more multifarious in its composition than in the United States?" So, "in order to get a footing for new doctrine, one must influence minds cast in every mold of race, minds inheriting every bias of environment, warped by the histories of a score of different nations, warmed or chilled, closed or expanded, by almost every climate of the globe."[318]

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313 For Black men and for women, see U.S. Const., amends. XIII, XIX.

314 Ronald J. Pestritto, The Progressive Origins of the Administrative State: Wilson, Goodnow, and Landis, 24 Social Philosophy and Policy, 16, 20-26 (2007) (regarding Wilson and Goodnow's support for administrative power); Joseph Postell, Bureaucracy in America: The Administrative State's Challenge to Constitutional Government, 167 (Univ. Missouri Press, 2017) (regarding progressive support for administrative power).

315 Woodrow Wilson, "The Study of Administration," 2 Political Science Quarterly, 197, 208 (1887).

316 Id, 209.

317 Id.

318 Id.

Instead of trying to persuade such persons, Wilson welcomed the transfer of legislative power. The people could still have their republic and still could vote, but much legislative power would be shifted out of an elected body and into the hands of the right sort of people.

Unfortunately, scholars of administrative power have long refused to confront its prejudiced origins.[319] They prefer to discuss it as if it were merely a matter of doctrine, unconnected to larger questions of expanded suffrage and untainted by unwholesome racial and ethnic animosities.[320] The result is a vast body of administrative scholarship that parses justificatory doctrines with scholastic intensity while ignoring the grim social and political realities that drove the formation of this sort of power.

C. Class Discrimination and Disenfranchisement

The shift of lawmaking power out of the elected legislature was not simply racist. Although Wilson's racism was overt, his attitudes arose more generally from class disdain—a sort of prejudice that persists. And even if one were to assume that all the prejudice has dissipated, the shift of legislative power has discriminatory consequences. As I have explained elsewhere:

> Far from being narrowly a matter of racism, this has been a transfer of legislative power to the knowledge class—meaning not a class defined in Marxist terms, but those persons whose identity or sense of self-worth centers on their knowledge. More than merely the intelligentsia, this class includes all who are more attached to the authority of knowledge than to the authority of local political communities. This is not to say that such people have been particularly knowledgeable, but rather that their sense of affinity with cosmopolitan knowledge, rather than local connectedness, has been the

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[319] The traditional attitude is captured by Kathryn Kovacs' comment: "I've often thought of administrative law as being structural and procedural, not substantive. Racism has been someone else's topic, not mine." Kathryn E. Kovacs, Introduction to Symposium on Racism in Administrative Law, Yale Journal on Regulation, Notice & Comment (July 13, 2020), https://www.yalejreg.com/nc/introduction-to-symposium-on-racism-in-administrative-law-by-kathryn-e-kovacs/. Fortunately, the Symposium marks a shift toward recognizing the role of prejudice in the administrative realm. See Symposium on Racism in Administrative Law, Yale Journal on Regulation, Notice & Comment, at https://www.yalejreg.com/topic/racism-in-administrative-law-symposium/. As explained in my own contribution:

> Questions of prejudice and discrimination have long been left at the margins of the academic study of such power, and the symposium is a gratifying signal that such concerns are at last being accepted as more central.
>
> Of course, some of us have been discussing these questions for years—indeed, from an angle that has sometimes been condemned as too critical. So, it seems important to point out just how much administrative power deserves to be condemned as an instrument of prejudice.

Philip Hamburger, Administrative Discrimination, Yale Journal on Regulation, Notice and Comment (Sept. 13, 2020), at https://www.yalejreg.com/nc/administrative-discrimination-by-philip-hamburger/. For a more detailed account of the problem, see Philip Hamburger, Administrative Discrimination, The American Mind (Sept. 11, 2020), at https://americanmind.org/memo/administrative-discrimination/.

[320] For example, see Cass Sunstein and Adrian Vermeule, Law and Leviathan: Redeeming the Administrative State (Belknap Press 2020).

foundation of their influence and identity. And appreciating the authority they have attributed to their knowledge, and distrusting the tumultuous politics of a diverse people, they have gradually moved legislative power out of Congress and into administrative agencies, where it can be exercised in more genteel ways by persons like themselves.

In short, the enfranchised masses have disappointed those who think they know better.

Of course, the removal of legislative power from the representatives of a diverse people has implications for minorities. Leaving aside Wilson's overt racism, the problem is the relocation of lawmaking power a further step away from the people and into the hands of a relatively homogenized class. Even when exercised with solicitude for minorities, it is a sort of power exercised from above—and those who dominate the administrative state have always been, if not white men, then at least members of the knowledge class.

It therefore should be no surprise that administrative power comes with costs for the classes and attachments that are more apt to find expression through representative government. In contrast to the power exercised by elected members of Congress, administrative power comes with little accountability to (let alone sympathy for) local, regional, religious, and other distinctive communities. Individually, administrators may be concerned about all Americans, but their power is structured in a way designed to cut off the political demands with which, in a representative system of government, local and other distinctive communities can protect themselves.

Administrative power thus cannot be understood apart from equal voting rights. The gain in popular suffrage has been accompanied by disdain for the choices made through a representative system and a corresponding shift of legislative power out of Congress.

Although the redistribution of legislative power has gratified the knowledge class, it makes a mockery of the struggle for equal voting rights. It reduces equal voting rights to a sort of bait and switch . . .[321]

After a century of treating delegation as an elevated intellectual exercise in doctrine-crunching, it is time to recognize its societal realities. Delegation is an instrument for discrimination and disenfranchisement.

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The reduction of administrative rulemaking to an anodyne question about delegation disguises the extent to which the delegation of legislative power is an mechanism of class prejudice. Delegation is never just about delegation. It also is about rendering legislation unrepresentative, diluting the value of equal suffrage, and disenfranchising mere *hoi polloi*.

XII. THREATS TO RATIONAL DECISIONMAKING

[321] Philip Hamburger, The Administrative Threat to Civil Liberties, 2017-18 Cato Supr. Ct. Rev., 15, 25-26 (2018).

Even if courts lack the stomach to recognize the visceral social and political dangers, they should at least acknowledge the costs for rational decisionmaking. The administrative displacement of political decisionmaking has long been justified as a shift toward rationality.[322] The theory is that experts, being knowledgeable and secluded from politics, can displace corrupt political lawmaking with scientifically based expert lawmaking. Yet far from clearly improving matters, the shift of legislative power introduces a host of serious risks, including decision-making biases, irresponsibility, alienation, and political conflict

A. Confidence Bias

Administrative expertise is widely assumed to be scientific. And science is widely assumed to be a reliable basis for regulation.[323] The identification of expertise with science is therefore one of the main justifications for letting congressional regulation be displaced by administrative regulation. But expertise is not science, and bureaucratic expertise is especially distant from cutting-edge science, which necessarily is uncertain. So agency expertise tends to be exercised with the confidence we place in long-settled science, even though such expertise is not science, and even though pioneering science is necessarily somewhat speculative.

Science is the exploration of what is unknown, and it rests on epistemological modesty. It consists of questioning and testing existing theories, to figure out if they can be shown to be in error. When proved erroneous, they are modified or displaced with alternative theories or "hypotheses," which in turn are questioned, and so forth. This is an unending pursuit of truth by showing error. The only solid truth to be discerned in this system of inquiry is the proof of error. On this account, science can be considered a giant error-producing machine.

Scientific inquiry is thus an evolving process, and at the cutting edge, little is stable. What is suggested in one theory is apt to be upended by the next. And as science develops at ever-greater speed, the alleged solidities of scientific knowledge are apt to look ever more tentative. Scientific truths no longer evolve from one century to another, nor even from one generation to another, but often change more rapidly, from decade to decade, sometimes from year to year. Science is usually in flux.

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[322] Jerry Mashaw writes: "This connection between administration and reason is a familiar theme in the social and political theory of modernity. Max Weber famously explained the legitimacy of bureaucratic activity as its promise to exercise power on the basis of knowledge." Jerry L. Mashaw, Small Things Like Reasons Are Put in a Jar: Reason and Legitimacy in the Administrative State," 70 Fordh. L. Rev. 17, 23-24 (2001). For a modern American iteration of the theme, see Harold H. Bruff, Legislative Formality, Administrative Rationality, 63 Tex. L. Rev. 207 (1984).

[323] Baltimore Gas & Electric Co. v. Natural Resources Defense Council, Inc., 462 U.S. at 87, 97 (quoting Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc., 435 U.S. 519, 558 (1978) ("a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science"). See also Jacob Gersen & Adrian Vermeule, Thin Rationality Review, Michigan Law Review, Vol. 114 (2016) (arguing that "a reviewing court must remember that the Commission is making predictions, within its area of special expertise, at the frontiers of science").

In contrast, expertise is all about knowledge that is stable enough to be known with confidence. Expert rulemakers enjoy a sense of authority precisely because of their confidence, and ours, in what they apparently know. And what they claim to know is that which seems established by past scientific inquiry. They sometimes recognize the tentative quality of scientific knowledge. But to acknowledge the distance of their expertise from science, let alone from what is unknown at the boundaries of science, they would have to question the basis of their authority. Whether to preserve their power or their confidence in themselves, they tend to emphasize their confidence in their knowledge.

This bias towards confidence is dangerous. It can lead to overly ambitious regulation, which rearranges American business and society without sufficiently recognizing the risk of error. The danger can be illustrated by the recent Covid-19 regulations on masks, quarantines, and shutdowns. Overconfidence in allegedly scientific knowledge about the virus led to policies that destroyed local face-to-face businesses, empowered massive online corporations, and left innumerable individuals unnecessarily hampered and confined.

Experts can have valuable knowledge. But confidence in expert knowledge stands in contrast to the modesty of scientific inquiry. Expertise therefore should not be confused with science; the two are very different. So, when experts are given lawmaking power, there is a danger that their over confidence in their scientific knowledge will take them beyond what is really scientifically justified.

B. Specialization Bias

Expert lawmaking is specialized lawmaking. This specialization is advantageous, but it typically distracts experts from the breadth of the public interest.

Experts, unsurprisingly, tend to focus on their own spheres of knowledge. This specialization is one of their virtues, for it enables them to understand a particular field in depth. At the same time, specialization can divert experts from other considerations, including the host of other specialized considerations that need to be evaluated to understand the interests of society as a whole. Even if one is skeptical about the possibility of identifying the public interest, and even if one discounts considerations that are not reducible to specialized knowledge, there is little doubt that, for a host of decisions, many different specialized considerations need to be taken into account.

The danger of specialized decisionmaking is apparent throughout the administrative state. Dental experts recognized the value of fluoridation for preserving teeth, but they never bothered to weigh its consequences for the mental development of children exposed to fluoride in utero.[324] Bureaucrats with expertise in fire hazards insisted on flame retardants in children's pajamas, without

[324] Rivka Green, Bruce Lanphear, Richard Hornung, et al, Association Between Maternal Fluoride Exposure During Pregnancy and IQ Scores in Offspring in Canada, JAMA Pediatrics (Aug. 19, 2019), (finding that "fluoride exposure during pregnancy was associated with lower IQ scores in children aged 3 to 4 years").

pausing to ask whether the chemicals might be toxic to children.[325] Government immunologists focused on the measures necessary to limit the transmission of Covid-19, without adequately taking into account the costs of confining children and shutting down much of economy. Such considerations might not have dramatically changed the government's regulatory conclusions, but might have moderated them. When experts in bio-medical ethics secured prior licensing for human-subjects research and its publication, even for obviously harmless research, they deliberately shut their eyes to the predictably death toll from restricting medical, let alone public policy knowledge.[326] Although they ostentatiously aimed to protect minorities from the burdens of such research, they thereby discouraged research on the distinctive medical problems of minorities, depriving them of the lifesaving benefits.[327] The specialization bias is dangerous, even lethal.

Of course, nothing here disputes the value of having federal agencies staffed by experts to analyze the need for regulation and even to draft regulations. Such specialized knowledge can be very useful. But although it can be useful for experts to share their specialized knowledge with legislators, it is very dangerous to leave the lawmaking decisions to experts, as they almost never can adequately overcome their specialization bias. That is, they will tend to focus so much on the concerns relating to their own area of expertise that they will not adequately take other areas of concern into account.

It even is dangerous to leave the enactment of regulations to the heads of specialized agencies. Agency heads who are not experts in their agency's field of regulation may be especially capable of rising above their agency's narrow regulatory mission to recognize broader considerations. But even when they are not experts, the heads of specialized agencies are apt to become attached to their agency's specialized mission and to echo the specialization bias of the agency's experts.

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[325] Clyde Haberman, A Flame Retardant That Came with Its Own Threat to Health, N.Y.T. (May 3, 2015), at https://www.nytimes.com/2015/05/04/us/a-flame-retardant-that-came-with-its-own-threat-to-health.html.

[326] 45 CFR §46.111 ("Risks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result. . . . The IRB should not consider possible long-range effects of applying knowledge gained in the research (*e.g.,* the possible effects of the research on public policy) as among those research risks that fall within the purview of its responsibility.")

The IRB body count is suggested by Peter Pronovost's study of catheter-related bloodstream infections. Peter Pronovost, Dale Needham, Sean Berenholz, et al., "An Intervention to Decrease Catheter-Related Bloodstream Infections in the ICU," New England Journal of Medicine 2725: 355 (2006). HHS shut down this study out of concerns that there had not been sufficient IRB approval, stopping further collection of data. But it was published in 2006 with the effect of saving at least 17,000 lives per annum in the United States alone. Kevin B. O'Reilly, O'Reilly, "Effort Cuts Down Catheter-Related Infections," Amednews.com, January 22, 2007; Allison Lipitz-Snyderman, Dale M. Needham, Elizabeth Colantuoni, et al., "The Ability of Intensive Care Units to Maintain Zero Central Line–Associated Bloodstream Infections," Journal of the American Medical Association 171 (2011). To date, that means over 250,000 lives (again, just counting the United States). And that was just one study. If one very conservatively supposes that the IRB system impedes only a few profoundly lifesaving studies each year, the lost lives since the imposition of IRBs in 1972 runs into the millions.

[327] Philip Hamburger, "HHS's Contribution to Black Death Rates," Liberty Law Blog (Jan. 8, 2015), at https://lawliberty.org/hhss-contribution-to-black-death-rates/ (examining the possibility that IRB censorship of research on the distinctive medical difficulties faced by Black men may be partly responsible for their elevated risk of death in cardiac surgery).

Much federal regulation thus tends to be an expression of various specialized concerns, not the public interest. This distortion is the almost inevitable result of divesting of legislative power from Congress to specialized agencies. Whereas the Constitution locates legislative power in a representative body accountable to the people and their general concerns, the shift of such power to specialized agencies, filled with specialized experts, produces policies biased by specialized knowledge.

Again, it cannot be overemphasized that this is not to question the value of specialized knowledge, especially when the experts are self-aware about their bias toward overconfidence and when they present their knowledge to legislators. But when experts devoted to their specialized knowledge engage in lawmaking, there is a persistent risk of specialization bias.

C. Size Bias

Delegated lawmaking can be utterly destructive of all sorts of private enterprise, but even when it is not harsh, it tends to discriminate among different types of businesses. As put by Charles Reich, many elements of administrative process "favor larger, richer, more experienced companies or individuals over small ones."[328]

The problem is not necessarily deliberate favoring, but a structural bent, arising from delegated lawmaking. For example, the larger a firm, the more it is apt to have the resources and connectedness necessary to influence administrators. Larger companies also have advantages in lobbying members of Congress. But the sheer number of congressional legislators and their dependence on local support gives smaller companies at least a chance when lawmaking is not delegated.

The larger companies, moreover, are usually those that have the overhead to cover regulatory costs. A firm needs resources to meet new technical requirements and even simply to decipher obscure regulations and fill out forms. The regulatory costs thus give the largest companies a competitive edge.

Not merely an economic danger, the risk is also political. The administrative bias toward sizable firms tends to elevate national and international firms over local businesses. One effect is to undermine local agriculture, local manufacturing, and local services, and thereby also local communities. The administrative favoring of businesses with international reach can even undercut our national interests. National firms lack much attachment to American localities, and international firms are not even much attached to the nation.[329] It therefore is no small matter that the delegation of legislative power comes with bias toward the largest firms.

D. Political Bias

It may seem odd to speak of the political bias of delegated lawmaking. The whole point of the late-nineteenth-century civil service reforms was to end the spoils system and establish an apolitical civil service. So with merit hiring and tenure of

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[328] Charles Reich, The New Property, 73 Yale L. J. 733, 765 (1964).

[329] Although such questions are difficult to quantify, consider, for example, the old Facebook slogan, "Company over country." Sheera Frenkel & Cecilia Kang, An Ugly Truth: Inside Facebook's Battle for Domination, Chapter 7 (Harpers Collin 2021).

office, one might discount the risk of political bias. But there is a structurally imbedded political bias that is tied to class and government power.

This bias was by design, not accident. Recall that when Woodrow Wilson outlined the nascent federal administrative state, he explained his concern for "the reformer"—meaning a person with progressive leanings—saying that "the reformer is bewildered" by the need to persuade "a voting majority of several million."[330] To get past this obstacle, progressives needed to shift much regulation out of the elected legislature into the hands of persons more like themselves.

The individuals in agencies who formulate regulatory policy tend to have college degrees and even graduate degrees. This is a valuable background for policy analysis, and the prevalence of the educated in policy positions is therefore to be expected. But it also raises the risk of bias. Policy forming bureaucrats tend to have the political leanings of Americans with higher education.

By virtue of their positions, moreover, they tend to favor governmental solutions—indeed, administrative solutions. Just as a man with a hammer is more inclined than others to see it as a solution to problems, so bureaucrats are especially apt to view their delegated legislative power as a solution.

It thus is nearly inevitable that at least the policy making administrators in agencies bend toward the politics of their class and power. So when a presidential administration leans in the same direction, the administrators who matter will cooperate. And when it leans in another direction, those administrators will push back. This is built-in political bias.

E. Irresponsibility

The opportunity to devolve legislative power to administrative agencies invites congressional irresponsibility. Congress can escape accountability for regulatory policy and is therefore free to behave irresponsibly.

It is often protested that legislation cannot be left to Congress because it lacks the requisite responsibility.[331] And this danger is often attributed to political differences, "gridlock," and other political obstacles. But one must also consider the possibility that Congress is responding to judicially created circumstances. For more than a century, the Supreme Court has let Congress unload its legislative power on agencies. So Congress is free to posture without making hard decisions.

It therefore is difficult to conclude simplistically that Congress's reluctance to act responsibly is what requires a transfer of legislative power. Rather, the causation may partly run in the other direction. The opportunity to avoid taking responsibility apparently encourages Congress to sidestep the difficult decisions that should be made by the nations' representative body.

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[330] Woodrow Wilson, The Study of Administration, 2 Political Science Quarterly 197, 208–09 (1887). As put by one scholar, "Administration can remove the necessity of building a public consensus in favor of reform." Dennis J. Mahoney, Politics and Progress: The Emergence of American Political Science, 136 (Lexington Books, 2004)

[331] Ezra Klein, Congressional Dysfunction, Vox (May 15, 2015), at https://www.vox.com/2015/1/2/18089154/congressional-dysfunction ("When people talk about congressional dysfunction they usually mean that Congress, despite its vast authority, seems paralyzed in the face of the nation's toughest problems").

Put another way, the opportunity to exercise power through agencies tends to infantilize the Constitution's elements of government. Congress leaves difficult decisions to agencies, the president governs by issuing executive orders to the agencies, and the judges shut their eyes to the unconstitutionality. All three branches are thereby corrupted.

F. Alienation

The allegedly rational delegated lawmaking depends on public confidence in unelected regulators. But this is not possible over the long term precisely because such regulators are not elected.

When governance by, for, and of the people gets handed to unelected bureaucrats, many individuals are apt to feel that something is awry. Even when they do not fully understand the extent to which lawmaking has been taken from their elected representatives, they tend to feel disconnected and alienated.

Americans once were subject to only one national lawmaker, Congress. They therefore could understand their relationship to the lawmaking body and even could feel some connectedness to its members. The elected legislators could not always heed what was demanded from them, but they at least would go through the motions of listening and responding to their constituents.

Nowadays, Americans are regulated by a huge number of federal agencies. The situation is so confusing that not even the federal government, let alone ordinary Americans, can keep track of such agencies and what they do.[332] And these agencies make law without any fear of being held to account in an election. At most, they submit to notice and comment rulemaking. The vast majority of Americans do not participate in this "charade," and with good reason, for it is a poor substitute for electing their lawmakers.[333]

The transfer of legislative power to unelected bureaucrats deprives Americans of their sense of connection to government. Although designed for a sort of "rationality," it could not be better calculated to induce a sense of distance and disaffection. So, it is unsurprising that growing numbers of Americans, left and right, feel politically alienated.

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[332] The Sourcebook of United States Executive Agencies states:

> "[T]here is no authoritative list of government agencies. Every list of federal agencies in government publications is different. For example, FOIA.gov lists 78 independent executive agencies and 174 components of the executive departments as units that comply with the Freedom of Information Act requirements imposed on every federal agency. This appears to be on the conservative end of the range of possible agency definitions. The United States Government Manual lists 96 independent executive units and 220 components of the executive departments. An even more inclusive listing comes from USA.gov, which lists 137 independent executive agencies and 268 units in the Cabinet.

David E. Lewis & Jennifer L. Selin, Sourcebook of United States Executive Agencies *14-15* (Administrative Conference of the United States 2012). See also Clyde Wayne Crews Jr., How Many Federal Agencies Exist? We Can't Drain the Swamp until We Know, Forbes (July 5, 2017), at https://www.forbes.com/sites/waynecrews/2017/07/05/how-many-federal-agencies-exist-we-cant-drain-the-swamp-until-we-know/?sh=4cefc6051aa2.

[333] David Baron & Elena Kagan, *Chevron's* Nondelegation Doctrine, 2001 Supr. Ct. Rev. 201, 231–32 (calling the notice-and-comment process is "a charade").

G. Political Conflict

It is in politics that the transfer of legislative power to agencies has its most profound cost for rational decisionmaking. The Supreme Court has enlarged federal powers and thereby centralized a nearly general legislative power in the federal government. At the same time, the court has let Congress shift its power to executive or independent agencies. The result is not merely to displace much state politics but to elevate agency power over much of private life, giving agencies a power that is apt to be held back or unleashed as a result of each presidential election.

Congress is a representative body, and the myriad congressional elections by diverse localities avoid a single do-or-die battle for control. In contrast, when an almost general legislative power rests in bureaucrats, who can be moved or at least restrained by a president, a vast degree of legislative power becomes vulnerable to presidential contests. The election of a single person thus elicits an intensity of feeling that strains lawful, let alone civilized conduct. So much is at stake as to render politics nearly a form of warfare.

The results include heightened incentives for dishonesty, corruption, and fraud—and for intensified fears about such things. For example, when almost everything rests on a single election, election fraud inevitably moves from a localized to a national concern. Even if the amount of fraud is actually very limited, both the exaggerated motivations for it and the exaggerated fears become a threat to the government's legitimacy.

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All systems are subject to distortion, and there is no reason to think that the constitution's system of representative lawmaking is any exception. But the transfer of lawmaking to agencies invites singularly dangerous deformations of the body politic.

The nation pays a terrible price for the administrative biases toward confidence, specialization, and size, not to mention the political bias. It cannot afford the congressional irresponsibility. And it may not even survive the alienation and the invitation to political conflict.

Yet all of this is done in the name of rationality. In pursuit of rational administrative decisionmaking, the divesting of legislative powers has largely undermined political rationality.

CONCLUSION

The Nondelegation Doctrine is on its last legs. It is of dubious and disputed authority, it permits what is says it forbids, and it does not help the judges sort out their cases.

The delegation problem cannot be solved by slicing through the baby along lines of importance. This may seem a reasonable middle ground. But it conflicts with the Constitution, which draws no such distinction. It also dangerously asks the judges to deprive Americans of their freedom of self-government along an

inescapably economic or political fault-line, favoring Americans who activities seem important and largely disenfranchising the rest.

It is therefore necessary to consider the Constitution's treatment of its powers. Does the Constitution allow Congress to shift them from one branch to another? This Article approaches the question in layers of concepts and types of evidence:

- Law must rest on consent—in particular, consent through an elected representative body. Without such consent, government is not legitimate and its laws are not binding.
- The tripartite powers are different in their nature, and the Constitution allocates them to different branches of government. Whereas the legislative power centrally involves making binding laws, and the core of judicial power is to make binding judgments about binding laws, the executive power includes no power to bind. It includes authority to distribute benefits, even to impose constraint under binding laws or judgments, but not to create legal obligation.
- The Constitution carries out a separation of powers through a default allocation of powers to different branches of government. This means that even when the Constitution specifies exceptions from its distribution of powers, it avoids questioning the general or default principle of separation of powers.
- Although the Constitution's powers are not always internally exclusive, they are externally exclusive. Each power is externally exclusive to its branch.
- Even with each power exclusively in its branch, the branches sometimes enjoy overlapping or nonexclusive authority under their respective powers. For example, both Congress and courts can make rules of court while exercising different powers. And both Congress and the Executive can make rules for the distribution of benefits, even though they do so under their own powers. Their nonexclusive authority does not call into doubt their exclusive powers.
- The framers rejected any statutory delegation of any type of power—legislative, judicial, or executive—on the assumption that only the Constitution would delegate powers. From this perspective, the Constitution generically delegates its powers and bars any of its powers from being subdelegated outside of its branch.
- More specifically, the Constitution says that its powers "shall be vested," this being a mandatory disposition of the powers, which runs into the future. The Constitution thus bars any divesting of the powers or vesting of them elsewhere.
- The necessary and proper power is carefully drafted to avoid giving Congress any justification for divesting the powers vested by the Constitution.
- The shift of legislative power from Congress to administrative agencies dilutes voting rights, and developed with racial and ethnic prejudice against the expansion of suffrage. Even today, it disenfranchises vast numbers of Americans, diluting their voting rights, depriving them of political agency, and introducing class discrimination.

• More generally, delegated lawmaking introduces confidence, specialization, and size biases, political bias, congressional irresponsibility, popular alienation, and political conflict. It thereby undermines the very rationality of decisionmaking that it purportedly secures.

The argument thus rest on multiple concepts and on a range of evidence, including fundamental principles, drafting assumptions, and text. All were all aligned in barring transfers of power among the branches of government. Topping it off, the argument concludes with the contemporary dangers of discrimination, disenfranchisement, and irrational decisionmaking.

So it is time to recognize the risks of dislocating legislative or other power outside the branch in which it *shall be vested*. Regardless of whether the transfer is done under the fig-leaf of the nondelegation doctrine or in any other guise, it is unconstitutional and dangerous.[334]

The key practical implication is that although the Executive can distribute benefits and other privileges under law, it cannot make binding rules or adjudications—those that come with legal obligation.

One might protest that agencies make important contributions to government, and this would remain true. But their important work would not include anything that bound.

Agencies still could issue nonbinding rules and adjudications. These would include rules and decisions directing government officers and employees. Though not legally enforceable against those persons, such rules and decisions could be enforceable under threat of being dismissed—this being the government's standard approach at the Founding and for a long time afterward.[335] Agencies also could still, as permitted by Congress, make rules and adjudications on the allocation of benefits and other privileges. At least where such rules and adjudications did not create or adjust legally obligatory duties or rights, they generally could be made by agencies. Moreover, agencies could still make determinations of fact where these are conditions of congressionally legislated duties or rights.[336] Perhaps even more

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[334] Incidentally, it should not be assumed that this essay's arguments would regularly require judges to hold statutes void. One might fear that if Congress divests itself of legislative power and vests it in an agency, this essay's views would force a judge to reach an up-or-down decision about the statute as a whole. Certainly, when vesting problems are considered abstractly, a judge may feel that he must choose between upholding the statute or holding it void.

But it is not necessary for a challenge to a binding agency rule to approach the problem at the highest level of generality—that is, by asking whether Congress has unlawfully divested itself of legislative power or vested it elsewhere. Instead, a challenge to such a rule could focus on the more immediate and concrete problem of whether the agency is unlawfully exercising legislative power that the Constitution has not vested in it and whether it is thereby divesting Congress of that power. In other words, rather than evaluate the underlying statute, a judge often can more modestly examine the authorized agency rule and hold it void.

To be sure, the judge's reasoning in such a case might eventually reach other agency rules and even the statute. In the meantime, however, the judge would not have to address the full range of statutory authorization in the abstract.

[335] Philip Hamburger, Is Administrative Law Unlawful? 90, 93–95. For a possible minor counter-example, see supra note __ .

[336] In the past, when executive determinations still seemed to live up to their form as mere determination of fact, they did not seem to be an exercise of legislative or judicial power. But they have increasingly been abused so as to turn them into a mechanism for the Executive to make binding law or adjudications. In other words, although such determinations formally do not create legal

substantially, agencies could develop policies and formulate them into proposals for binding rules. Thus, the apparatus of agency expertise and policymaking could remain intact. But at the final stage, the agency head would have to recommend its rules to Congress, not simply adopt them by itself.[337]

This conclusion may seem unnerving because it upends what has become the status quo. But the unlawfulness and peril of the current system are profound. It cannot stand.

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Change is not always bad. There is no reason to cling to a regime of unrepresentative legislation and diluted voting rights, let alone to preserve a system of judicial power displaced out of the courts and far from their procedural rights. Instead, it is time to count the blessings of living in a constitutional republic, with laws made by elected lawmakers and adjudications made by judges in the courts. This was, is, and should be our government.

obligation, they in reality often come close, and therefore if misused and widely employed, they can substantially divest Congress of legislative power and divest the courts of judicial power. Therefore, whatever the alignment of their form and the reality in the distant past, it may be time to recognize the reality that, in many instances, they divest Congress and the courts of their powers.

[337] One might also worry that without binding agency adjudications, the courts would be swamped. But this sort of objection become less troubling when one recognizes that the administrative state relies on a relatively small number of administrative law judges for binding adjudications. There are only five at the Securities and Exchange Commission, and only 266 outside the Social Security Administration. See ALJs by the Numbers, in Administrative Law Judge, Ballotpedia, at https://ballotpedia.org/Administrative_law_judge.

APPENDIX: EARLY FEDERAL PRACTICES

Although this Article has explored the nondelegation problem with layers of constitutional *concepts*, the question can also be approached by looking at early federal *practices*. Indeed, many scholars rely on this sort of post-constitutional evidence to justify the shift of legislative power to agencies. Their claim is that such transfers were a familiar reality of the early federal government. From this, they conclude that the Constitution, as originally understood, permitted delegated agency lawmaking. But does the evidence really prove this point?

Even before evaluating the early federal instances that are said to legitimize administrative rulemaking, one must pause to recognize that such examples are not self-sorting. That is, some may be illustrations of what was permissible under original intent, and some may be examples of strained interpretation or even lawlessness. It is highly probable that the early federal government occasionally deviated from the Constitution. Amid a host of practical, personal, and ideological pressures, such deviations were inevitable. So it cannot be simply taken for granted that early federal instances of delegated rulemaking or adjudication are strong evidence of their lawfulness or of the Constitution's intent.

But there is a more important response: the alleged early federal departures from the separation of powers do not prove what is claimed for them. None of them reveal a delegation or transfer of national domestic binding rulemaking—nor of national domestic binding adjudication.[338] The evidence is thus entirely consistent with this Article's thesis.[339]

Long ago, an article by Professors Eric Posner and Adrian Vermeule listed early federal statutes that "presuppose that the executive may receive statutory grants of rulemaking discretion not constrained by any further intelligible principle or congressional direction.[340] More recently, the Mortenson-and-Bagley article offers much evidence to show that early congresses "delegated in sweeping terms."[341] But none of the examples offered show that Congress delegated binding national domestic rulemaking.

Yes, in cross-border matters, notably involving Indian traders, Congress set up a licensing system that imposed administratively stated regulatory conditions.[342] So, at least in reality, even if not in form, there was some nearly binding executive

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[338] Hamburger, Delegating or Divesting, at 107 (observing that the Mortenson-and-Bagley article " does not point to any early instance when the Executive, with or without congressional authorization, made binding rules or adjudications that were national and domestic in their scope. None. Not one." Thus, "the Article does not produce a single example of early federal executive action that falls squarely within the sort of national domestic regulation that is at the heart of the dispute over administrative power."). Similarly, see Wurman, supra note __ , at 1494, 1503, 1538-55).

[339] That early federal practices were consistent with this Article's argument is confirmed by deep dives into the workings of the Treasury Department—the most substantial and complex of early federal departments. See Hamburger, Is Administrative Law Unlawful? 87, 89-95 (explaining Treasury practices based on an examination of Treasury manuscripts from the Founding until the 1840s); Jennifer Mascott, Early Customs Law and Delegation, 87 Geo. Wash. L. Rev. 1388 (2019) (examining early federal regulation of the customs).

[340] Eric A. Posner & Adrian Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1735-36 (2002).

[341] Mortenson & Bagley, supra note ___ , at 366.

[342] Hamburger, Is Administrative Law Unlawful? 104-05.

lawmaking. So, too, as to enemy aliens.[343] And in the District of Columbia and the territories, there was not only the reality but also the form of congressionally authorized executive lawmaking.[344] And congressionally imposed duties could rest on factual determinations by the president about foreign duties.[345] But no instance has yet been shown in which Congress authorized the Executive to make binding national domestic rules. Not one.

Still, claims for early federal practices persist. A recent piece by Professor Kevin Arlyck finds congressional delegation of "policymaking" in the 1790 Remission Act, which authorized the Secretary of the Treasury to remit statutory penalties for violations of federal law.[346] Christine Chabot finds important delegated "policymaking" in legislation that authorized the President and the Sinking Fund Commission to make important financial decisions and in legislation that supposedly authorized executive officers to establish rules for grants of patents.[347]

It is telling that these articles emphasize early executive "policymaking." This term obfuscates the lack of evidence for delegated lawmaking. Unable to point to early delegated legislative power, the articles rely on other early executive policymaking, as if it were the same thing. But important federal policymaking in financial transactions and grants of privileges (whether in remitting penalties or issuing patents) is not the same as making binding rules, let alone those that are national and domestic.[348] To make binding rules was the natural core of legislative power, and the repeated efforts to show that early Congresses shifted such power to the Executive have turned up nothing.

Interestingly, although some statutes authorized executive officers to make rules instructing subordinates on the distribution of privileges, officers could make such rules without statutory authorization. The Mortenson-and-Bagley and the Arlyck articles find evidence of delegated legislative power in statutes authorizing the rules on the distribution of financial privileges.[349] But what needs to be recognized is that Congress generally did not bother to authorize the secretary of the Treasury to make rules instructing his subordinates. He was free to make such rules without congressional authorization.[350] Similarly, the Mortenson-and-Bagley and the Chabot articles rely on the rules made by the patent board as evidence of

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[343] Id, 104.
[344] Id, 210.
[345] Id, 107-10.
[346] Kevin Arlyck, Delegation, Administration, and Improvisation, 97 Notre Dame L. Rev. __ (forthcoming 2021).
[347] Christine Kexel Chabot, *The Lost History Of Delegation At The Founding*, 56 Geog. L. Rev. 81, 109-10 (2022) ("In the first Patent Act, for example, Congress delegated its Article I, section 8 power to grant exclusive patent rights to a Patent Board. This statute left many important questions unanswered, and Bagley and Mortenson recount how it required the Board to establish rules requiring inventions to be nonobvious.").
[348] For the sense in which grants of patents were understood as nonbinding, see Hamburger, Is Administrative Law Unlawful? 198-202.
[349] Mortenson and Bagley, supra note __ , at 345; Arlyck, supra note __ , at ___ .
[350] Hamburger, Is Administrative Law Unlawful? 86.

delegated legislative power.[351] But Congress never actually authorized such rulemaking.[352]

These instances of unauthorized rulemaking cannot easily be understood as examples of congressionally delegated legislative power. Instead, as noted in Part VII.E, such rulemaking was already within executive power. Rather than evidence of delegation, these instances of executive rulemaking are proof that the Executive already had sufficient authority under its own power to make rules instructing its subordinates.

The most detailed attempt to point to early federal practices comes from Nicholas Parrillo.[353] His article focuses on the 1798 valuation statute in which the Fifth Congress a valuation of real estate and slaves to lay the foundation for a federal tax on such property.[354] Under section 22 of the statute, assessors and principal assessors were to make the initial valuations, and then commissioners could revise valuations for purposes of equalization.[355] Parrillo's article says that these revisions by commissioners were early examples of delegated domestic rulemaking and suggests that they are precedents for contemporary administrative regulation.[356]

His treatment of the historical evidence is as interesting as tax history can be. But does his evidence really support his claims about delegated legislative power?[357]

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[351] Mortenson and Bagley, supra note __ , at 339 (sidestepping the absence of congressional authorization by claiming that the rules were "the creations of a patent board that crafted general rules in response to a broad congressional delegation."); Chabot, supra note __ , at ___ ("Bagley and Mortenson offer examples that do not present this concern. In the first Patent Act, for example, Congress delegated its Article I, section 8 power to grant exclusive patent rights to a Patent Board. This statute left many important questions unanswered, and Bagley and Mortenson recount how it required the Board to establish rules requiring inventions to be nonobvious.").

[352] For the underlying patent statutes, see supra note __ .

[353] Nicholas R. Parrillo, A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s, 130 Yale L. J. 1288, (2021).

[354] Although the 1798 statute was merely a valuation statute and merely established commissioners with powers of valuation, the Parrillo article calls them "tax commissioners." Id, 1304, 1313, 1327, 1354, 1356, 1421-23 ("tax commissioners"). For the relevant taxing officials, one must consult a statute adopted five days later, not the statute relied upon by the Parrillo article. An Act to Lay and Collect a Direct Tax within the United States, 1 Stat. 597.

[355] Parrillo, supra note __ , at 1314, relying on An Act to provide for the valuation of Lands and Dwelling-Houses, and the enumeration of Slaves within the United States, §22 (July 9, 1798), 1 Stat. 580, 589.

[356] Parrillo, supra note __ , at 1455 ("The willingness of the Constitution's earliest lawmakers to rely upon administrators for rulemaking encompassed not only the international and military realm but also the domestic one—not only the realm of benefits and privileges, but also the realm of private rights. Foreign or domestic, public or private, rulemaking has been with us since the beginning.").

[357] The Parrillo article carefully speaks about the commissioners' decisions as examples of early coercive domestic rules that made "policy" rather than as binding lawmaking. Id, 1314-15, n. 102. This is very nearly an admission that the article's evidence doesn't directly engage with the debate over delegated legislative power. Nonetheless, the article claims that the commissioners' decisions offer a "major counterexample missed by the literature on nondelegation." Id, 1302. So, the article ultimately claims that its evidence suggests the constitutionality of delegated legislative power.

The article tries to bridge the gap between determinations of fact and delegated binding lawmaking by strangely relying on twentieth-century caselaw. It argues that the valuation decision in *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), "has long been administrative law's touchstone for defining rulemaking. Thus, the 1798 direct tax provides a clear Founding-era example of congressional delegation of rulemaking authority in a context that was both

An initial reason for skepticism is that when the 1798 statute authorized regulations, it did so expressly. Section 8 authorized the commissioners to issue "regulations."[358] These regulations were to be "binding" on the commissioners themselves and on the assessors, not the public.[359]

When a statute in one section so expressly authorizes commissioners to make "regulations" (even specifying who will be bound) and in another section authorizes the commissioners to "revise" assessments, does it really make sense to say that the commissioners' revisions of assessments amounted to delegated rulemaking? Possibly. But not obviously. The statute's distinction between the authority to make "regulations" and the authority to "revise" suggests that the revisions were not regulations.

Second, as a matter of common law, assessments were not considered legislative. Determinations of facts, including assessments, were understood at common law to be judicial in nature, not legislative.[360] Although not actually exercises of judicial power, they were expected to mimic judicial decisions at least in being exercises of judgment—this being how they avoided any exercise of legislative power.[361] Parrillo would have been entirely correct if he had said that assessments

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coercive and domestic." Id, 1304-05. Well, not so fast. Sure, twentieth-century court cases relied upon determinations of facts to justify what in reality is delegated legislative power. But that doesn't mean eighteenth-century tax valuations were examples of delegated legislative power or that they could justify it, whether then or now.

[358] An Act to provide for the valuation of Lands and Dwelling-Houses, §8, 1 Stat. 580, 585 ("the commissioners for each state . . . shall be, and hereby are authorized and required to establish all such regulations as . . . shall appear suitable and necessary, for carrying this act into effect, which regulations shall be binding on each commissioner and assessor, in the performance of the duties enjoined by, or under this act; and also to frame instructions for the said assessors, informing them, and each of them, of the duties to be by them respectively performed under this act").

[359] Id. Even merely in making the commissioners' regulations could legally binding on the commissioners and the assessors, the 1798 statute seems to have been an outlier. That was not the standard approach. Hamburger, Is Administrative Law Unlawful? 87-88, 93-95. Alexander Hamilton had an expansive view of executive power, but as even he pointed out when serving as Secretary of the Treasury, the remedy for a subordinate's disobedience was the threat of dismissal. Id, 90. This assumption persisted until at least the middle of the nineteenth-century.

As I have noted elsewhere, Congress around 1842 moved toward making some Treasury decisions binding on Treasury officers in the performance of their duties. Id, 96; see also id, 94. But removal remained the conventional response to noncompliance. See Circular to Registers and Receivers of the Public Money from R. J. Walker (June 17, 1847), Circular Letters of the Secretary of the Treasury (T Series) 1789–1878, National Archives Microfilm No. 735, Reel 3, Vol. 3, pp. 306–07 ("Any omission on the part of the officers before referred to comply strictly with the above instructions, and not satisfactorily explained, will be made the ground of a report to the President for the removal of the delinquent.").

Clearer examples of binding executive rules are apparent in the last half of the century—as when the 1864 Internal Revenue Act provided that the Internal Revenue Commissioner's instructions, regulations, and directions "shall be binding" on revenue officers "in the performance of the duties enjoined by or under this act." Internal Revenue Law, §22, in A Compendium of Internal Revenue Laws, with Decisions, Rulings, Instructions, Regulations, and Forms, 13, by J. B. F. Davidge & I. G. Kimball (W. H. & O. H. Morrison, 1871); see also Hamburger, Is Administrative Law Unlawful? 96. For a judicial opinion recognizing the binding effect of such regulations on officers, see *In re Huttman*, 70 Fed. Rep., 699, 701 (D.Ct. D.Kan. 1895). But these clear and judicially accepted examples are very late.

[360] Hamburger, Is Administrative Law Unlawful? 97-100.

[361] Id.

and other determinations of fact have often been misused to exercise a disguised legislative power. My scholarship has repeatedly made that point.[362] But as matter of long-standing common law doctrine, such determinations were expected to be done in a judicial rather than a legislative spirit precisely to avoid having them become illicit delegated legislation.[363]

Third, the text of the 1798 statute expressly recognized the judicial nature of what it authorized, for it required the commissioners to act "as shall appear to be just and equitable."[364] The Parrillo article preserves its claim about delegated legislative power by suggesting (on the basis of a word search) that this phrase merely "connoted discretion" and lacked a "more specific meaning"—indeed, that it was a "broad power" of "rulemaking."[365] But this clearly is mistaken. Although the phrase *just and equitable* was widely familiar in many contexts as a generic measure of justice, the authorization to officers to act *as shall appear to be just and equitable*—the statute's phrase—was a familiar measure of the conduct of government officials making judicial or judicial-like determinations, including assessments.[366]

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362 Id, 101 (regarding "the tension between American constitutional principles and the local determinations that easily could wander into legislative territory"); id, 203-03; Philp Hamburger, Early Prerogative and Administrative Power: A Response to Paul Craig, 81 Missouri L. Rev. 939, 963-65 (2016).

363 The statute did not tell the commissioners how to define the value of real estate or what method to use in evaluating it. On this basis, the Parrillo article claims that the statute thus asked them not merely to make factual determinations, but more broadly to make policy decisions of a sort that serve as a precedent for contemporary delegated lawmaking. Parrillo, supra note ___ , at 1314, note 102. But most eighteenth-century valuations by assessors were done without direction about definition or method and still were considered determinations rather than exercises of legislative power. And in any case, although decisions about defining value and about methods of valuation can be affected by political preferences, this is not to say that they were legislative decisions or that they are persuasive early precedents for overtly regulatory rulemaking by contemporary agencies.

364 An Act to provide for the valuation of Lands and Dwelling-Houses, §22, 1 Stat. 589.

365 Parrillo, supra note __ , at 1309, 1339, 1455. Parrillo reports: "I examined all uses of 'just and equitable' in Westlaw searches of the English Reports for the period 1740-1816 and of all U.S. federal and state cases through 1816 and found nothing to suggest the phrase was a term of art implying any specific definition or method that would be applicable to valuation or taxation." Id, 1369.

366 For the use of the phrase as to assessments, see, for example, An Act for Dividing, Allotting, Inclosing, Draining, and Improving the Commons and Waste Grounds, within the several Parishes of Epworth, Haxey, Belton, and Owston, in the Ilse of Axholme, in the County of Lincoln . . . 18, 81 (1795) (authorizing the making of "such rates and assessments to be paid by all persons have right of common upon the said commons and waste grounds, in such sums as the said general commissioners shall think most just and equitable"); An Act for preventing an illicit Trade and Intercourse between the Subjects of this State and the Enemy, §30 (1782), in Acts of the Council and General Assembly of the State of New-Jersey, 297, ed. Peter Wilson (Trenton: 1784) (authorizing a justice of the peace to "make such allowance to the re-captors, not exceeding one half the value of such re-captured property as he shall in his discretion think just and equitable"). This was discretion in the sense of discernment, as laid out in the old cases. See Hamburger, Is Administrative Law Unlawful? 97-100.

The standard probably had been drawn long before from Continental civil law, including the law merchant. See, for example, Nicholas Magens, An Essay on Insurances, Explaining the Nature of the Various Kinds of Insurance Practised by the Different Commercial States of Europe, 3 (1755) (regarding the duty of Florentine deputies in the early sixteenth century to give their sentence "according to what they shall think just and equitable in such cases").

Note that the phrase was sometimes used in relation to rulemaking—for example, in connection with inclosures. See, for example, An Act in Addition to an Act Intituled An Act for Regulating of Fences, Cattle &c., in Temporary Acts and Laws of His Majesty's Province of the Massachusetts-Bay in New-England, 118 (1763) (rules for inclosing land to be made as "as they shall

This limited meaning is clear even from the text of the 1798 statute. The act provided for appeals from assessors to the principal assessor in each assessment district, who was to "re-examine and equalize the valuations as shall appear just and equitable"—this being equalization within the district.[367] Afterward, the commissioners were to adjust valuations in any district by adding or deducting "such a rate per centum as shall appear to be just and equitable"—this being equalization across districts.[368] The statute thus applied the phrase "as shall appear to be just and equitable" both to the principal assessors and the commissioners. It is improbable enough that valuation commissioners exercised something akin to legislative power, but it is even more improbable that mere assessors enjoyed such a power. The statute itself thus shows that the phrase could not have had the legislative-like meaning that the Parrillo article attributes to it.

Fourth, and more generally, it is difficult to accept Parrillo's conclusion that the tax imposed by the Fifth Congress is evidence of what was constitutional in the eyes of "the Constitution's earliest lawmakers."[369] The earliest lawmakers were in the First Congress. And they took the opposite approach to taxation than that chosen by the Fifth Congress. As explained long ago by Leonard White, the First Congress carefully set up "a revenue system which for some years avoided the necessity of discretionary valuation of property."[370] So, given the different approach taken by the First Congress, how can one rely on the Fifth Congress to show the Constitution's meaning? Perhaps the Fifth Congress offers a better understanding of the Constitution than the First, but that is not intuitive.

So, there are at least four reasons to question the claims made by Parrillo's article for the 1798 tax statute. By the statute's own terms, the commissioner's revisions were not regulations. In common law, assessments were to be done in imitation of judging precisely to avoid coming close to legislating. This tradition was reinforced by the statute's express standard for the commissioner's revisions. And the practices authorized by the Fifth Congress don't reveal much when the First Congress adopted very different practices.

In short, none of the early federal practices touted by advocates of delegation reveal a congressional transfer of binding national domestic rulemaking. Nor a

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think just and equitable"). But even rules adopted by commissioners were to be made in a way that avoided legislative will—this being the lesson of the old precedents developed earlier in connection with commissioners of sewers. Hamburger, Is Administrative Law Unlawful? 99 (regarding rules made by commissioners of sewers).

[367] An Act to provide for the valuation of Lands and Dwelling-Houses, §20, 1 Stat. 588.

[368] Id, §22, 1 Stat. 589. That this was equalization across districts is clear from the proviso that "the relative valuations of the different lots or tracts of land, or dwelling houses, in the same assessment district, shall not be changed or affected." Id.

Incidentally, the judicial character of assessments was probably why the commissioners in most states did not issue rules prior to the assessments. Parrillo observes that when commissioners in one state, South Carolina, jumped the gun by issuing rules setting standards prior to the assessments, the rules carefully stated that they were merely what the commissioners "recommend," not what they required. Parrillo, supra note ___ , at 1373. Although Parrillo does not recognize as much, this is exactly what one would expect from commissioners whose determinations were meant to be made in a judicial rather than legislative spirit.

[369] Parrillo, supra note ___, at 1455.

[370] Leonard D. White, The Federalists: A Study in Administrative History, 451 (Macmillan Co. 1961). See also, id 452. Of course, this is not to suggest that tax assessments were unconstitutional at the local level.

congressional transfer of binding national domestic adjudication. Such evidence may exist, but thus far it seems elusive.