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Delegation at the Founding: A Response to Critics

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ESSAY

DELEGATION AT THE FOUNDING: A RESPONSE TO THE CRITICS

*Julian Davis Mortenson & Nicholas Bagley**

This Essay responds to the wide range of commentary on Delegation at the Founding, published previously in the Columbia Law Review. The critics' arguments deserve thoughtful consideration and a careful response. We're happy to supply both. As a matter of eighteenth-century legal and political theory, "rulemaking" could not be neatly described as either legislative or executive based on analysis of its scope, subject, or substantive effect. To the contrary: Depending on the relationships you chose to emphasize, a given act could properly be classified as both legislative (from the perspective of the immediate actor) and also executive (from the perspective of the authorizing principal) at the same time. As a formal matter, the separation-of-powers objection is thus evanescent—subject to trivial reframing. In making rules pursuant to congressional instruction, administrative agencies are simultaneously exercising both legislative power (by promulgating authoritative legal commands) and also executive power (by implementing Congress's authoritative instructions). This is not a functionalist argument. It is an insistent demand to take formalism seriously: The same government action was understood as both executive and legislative in a strict conceptual sense. The originalist argument for nondelegation doctrine fails on its own terms.

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INTRODUCTION

We seem to have touched a nerve. Even before it was published, *Delegation at the Founding*¹ drew a number of responses from originalists aiming to refute our historical claim that there was no nondelegation doctrine at the Founding.² The speed of the responses—and their sharp

1. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 *Colum. L. Rev.* 277, 332–49 (2021) [hereinafter Mortenson & Bagley, *Delegation*]. A rash of recent scholarship has similarly questioned the historical basis for the doctrine. See Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 *Notre Dame L. Rev.* 243, 248 (2021); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 *Ga. L. Rev.* 81, 87–88 (2021); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s*, 130 *Yale L.J.* 1288, 1302 (2021) [hereinafter Parrillo, *Critical Assessment*]; John Vlahoplus, *Early Delegations of Federal Powers*, 89 *Geo. Wash. L. Rev. Arguendo* 55, 56–57 (2021); Nicholas R. Parrillo, *Supplemental Paper to: “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence From the Federal Tax on Private Real Estate in the 1790s”* 3 (May 14, 2021) (unpublished manuscript), <https://ssrn.com/abstract=3696902> [https://perma.cc/MMA7-9EF9] [hereinafter Parrillo, *Supplemental Paper*].

2. See, e.g., Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 *Chap. L. Rev.* 659, 663 (2021); Aaron Gordon, *Nondelegation Misinformation: A Rebuttal to “Delegation at the Founding” and Its Progeny*, 75 *Baylor L. Rev.* (forthcoming 2023) (manuscript at 2), <https://ssrn.com/abstract=3561062> [https://perma.cc/RQF6-ZXW7]; Philip Hamburger, *Delegating or Divesting?*, 115 *Nw. U. L. Rev. Online* 88, 90 (2020) [hereinafter Hamburger, *Delegating or Divesting*]; Philip Hamburger, *Nondelegation Blues*, 91 *Geo. Wash. L. Rev.* (forthcoming 2023) (manuscript at 61), <https://ssrn.com/abstract=3990247> [https://perma.cc/DLG4-NW53] [hereinafter Hamburger, *Nondelegation Blues*]; Chad Squitieri, *Towards Nondelegation Doctrines*, 86 *Mo. L. Rev.* 1239, 1272–73 (2021); Ilan Wurman, *Nondelegation at the Founding*, 130 *Yale L.J.* 1490, 1493–94 (2021); Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, 1 & n.1 (Bos. Univ. Sch. of L., Pub. L. & Legal Theory Working Paper No. 20-16, 2020), https://scholarship.law.bu.edu/cgi/viewcontent.cgi?article=1906&context=faculty_scholarship [https://perma.cc/HF4Q-QDTZ]; Chris Green, *Delegation, Wilson, and Madison*, *The Originalism Blog* (Jan. 14, 2020), <https://originalismblog.typepad.com/the-originalism-blog/2020/01/delegation-wilson-and-madison.html> [https://perma.cc/8M4F-XQMR]; Rob Natelson, *How to Correct the Context of the “Non-Delegation” Debate*, *The Originalism Blog* (Jan. 20, 2020), <https://>

tone—may reflect the extent to which the nondelegation doctrine has become the pole star of the conservative legal movement’s project.

The critics’ arguments deserve thoughtful consideration and a careful response. We’re happy to supply both. To set the stage, recall that originalism entails a commitment to the principle that the Constitution’s meaning was fixed at ratification.³ Though the Constitution’s text does not directly address legislative delegations, supporters of the nondelegation doctrine generally claim that the Vesting Clause of Article I—“All legislative powers herein granted shall be vested in a Congress of the United States”⁴—prohibits Congress from passing laws that delegate too much power or power of the wrong kind.⁵

Article I does not actually say that, of course. The nondelegation doctrine is an inference from the text and structure of the Constitution, and not a necessary one.⁶ That’s why our critics lean so hard on history: To

originalismblog.typepad.com/the-originalism-blog/2020/01/how-to-correct-the-context-of-the-non-delegation-debaterob-natelson.html [https://perma.cc/RAQ2-EWWL]; Peter J. Wallison, An Empty Attack on the Nondelegation Doctrine, *The Federalist Soc’y* (Apr. 22, 2021), <https://fedsoc.org/commentary/fedsoc-blog/an-empty-attack-on-the-nondelegation-doctrine> [https://perma.cc/DZ8N-Z5D3]; cf. John Kerkhoff, Sources & Subdelegation, *Yale J. on Regul.: Notice & Comment* (Feb. 14, 2022), <https://www.yalejreg.com/nc/sources-and-subdelegation-by-john-kerkhoff/> [https://perma.cc/628J-ADT8] (questioning our reading of James Wilson’s views on subdelegation). Though not directly a response, Professor Jennifer Mascott recently published an article arguing that close examination of customs legislation in the First Congress indicates the existence of the nondelegation doctrine. See Jennifer Mascott, *Early Customs Laws and Delegation*, 87 *Geo. Wash. L. Rev.* 1388, 1396 (2019). Professor Michael Rappaport has also added new arguments for a two-tier nondelegation doctrine on originalist grounds, though his article does not directly challenge our historical claims. See Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, in *The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine 195, 195* (Peter J. Wallison & John Yoo eds., 2022) [hereinafter *Administrative State Before the Supreme Court*]. And Professor Jed Shugerman has argued that historical evidence about usage of the word “vesting” “lend[s] support to both sides” of the nondelegation debate. Jed Handelsman Shugerman, *Vesting*, 74 *Stan. L. Rev.* (forthcoming 2022) (manuscript at 72), <https://ssrn.com/abstract=3793213> [https://perma.cc/6UFF-7WKF].

3. See Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *Fordham L. Rev.* 453, 456 (2013) [hereinafter *Solum, Originalism and Constitutional Construction*]. Some originalists believe that accepting the possibility of early Republic liquidation—the proposition that acts of constitutional creativity in the early Republic can authoritatively resolve the best reading of a contested provision—does not conflict with the fixation thesis. See William Baude, *Constitutional Liquidation*, 71 *Stan. L. Rev.* 1, 4 (2019).

4. U.S. Const. art. I, § 1.

5. See Mortenson & Bagley, *Delegation*, *supra* note 1, at 280 nn.8–11 & 13, 290 nn.70–71 (citing arguments by nondelegation advocates).

6. See John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 *Harv. L. Rev.* 1939, 1919 (2011) (arguing that the Constitution allows for the executive and legislative branches to enact “very nearly” the same rules using different procedures); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 *U. Chi. L. Rev.* 1721, 1762 (2002) [hereinafter *Posner & Vermeule, Interring the Nondelegation Doctrine*] (arguing that “nothing in the language or structure of the Constitution supports” the nondelegation doctrine).

build a convincing case, they must show that the Founders collectively read that implication into the Constitution. More than that, they have to demonstrate that there was broad agreement, at least in principle, on the line that divided permissible from impermissible delegations, even in the absence of textual guidance.

If the Founders did hold such views, it shouldn't be hard to show. The era is rich in primary sources: political tracts, polemical pamphlets, newspaper battles, correspondence, records of state ratifying conventions, and reports of congressional debates. Those sources contain tens of thousands of pages of sophisticated constitutional debates on issues ranging from implied powers to presidential removal to the scope of the commerce power.⁷ In the originalist telling, the nondelegation doctrine was understood to be an indispensable feature of the separation of powers.⁸ The historical record should be littered with evidence of a shared commitment to something so foundational.

Yet the sources tell a different story. As we detailed in our article, late eighteenth-century Anglo-American law was awash in legislative delegations. Parliament delegated legislative powers to ministers, colonies, corporations, and the King; colonial legislatures delegated legislative powers to governors, municipalities, boards, and other state officials; the states delegated legislative powers to the Continental Congress; and the Continental Congress delegated legislative powers to territorial administrators.⁹

Some of our critics believe that the new Constitution broke with this established practice.¹⁰ But if it did, it's odd that its text does not specify new limits on delegation; that no one in the ratification process suggested it might be read to do so; and that vesting clauses in state constitutions with identically tripartite structures (and explicit separation-of-powers clauses) were understood to permit broad delegations.¹¹ This evidentiary gap can't be filled by invoking the Founders' oft-repeated concerns about the consolidation of governmental power in one pair of hands. It simply does not follow that they believed that legal restraints on defeasible delegations were a necessary implication of the constitutional design.¹²

Early federal practice, in fact, suggests the Founders harbored no such belief. The First Congress passed dozens of laws delegating wide discretion to the President, cabinet secretaries, federal judges, territorial governors,

7. See Julian Davis Mortenson, *The Executive Power Clause*, 168 U. Pa. L. Rev. 1269, 1278–79 (noting that “three major collections” of Founding-era materials alone contain “millions of words”).

8. See *supra* note 5 and accompanying text.

9. See Mortenson & Bagley, *Delegation*, *supra* note 1, at 293–313.

10. See *infra* Part III.

11. See *infra* notes 81–84 and accompanying text.

12. Cf. *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987) (“[N]o legislation pursues its purposes at all costs.”).

and tax officials.¹³ No meaningful nondelegation objection was raised to any of these laws¹⁴—and this at a time when legislators were inventing dubious constitutional arguments at the drop of a hat.¹⁵

Our critics dismiss these laws for various reasons: This law was about foreign affairs or the territories,¹⁶ that law wasn't important enough,¹⁷ this other law didn't involve private rights.¹⁸ But the question is not whether

13. See Chabot, *supra* note 1, at 112–53 (discussing the First Congress's delegation of important questions).

14. Mortenson & Bagley, *Delegation*, *supra* note 1, at 332–49. Professor Christine Chabot identifies one possible exception, suggesting that William Loughton Smith raised “a constitutional objection” to a motion by James Madison proposing the unbridled delegation of borrowing power—the quintessential “power of the purse” authority of the legislative branch—to George Washington. Chabot, *supra* note 1, at 116–17; see also David P. Currie, *The Constitution in Congress: The Federalist Period 1789–1801*, at 73 n.143 (1999) [hereinafter Currie, *The Constitution in Congress*] (noting that, in a “debate barely hinted at in the *Annals*” of Congress, “Smith doubted whether Congress could delegate its power to the President at all”). We read stenographer Thomas Lloyd's notes of the speech differently; in Lloyd's shorthand, Smith appears to describe Smith as raising a question for discussion rather than taking a position on the ultimate conclusion. Lloyd's Notes, 19 May 1790, *Debates in the House of Representatives*, in 13 *Documentary History of the First Federal Congress of the United States of America 1343, 1349* (Helen E. Veit, Charlene Bangs Bickford, Kenneth R. Bowling & William Charles diGiacomantonio eds., 1994) (“Congress vested with the power of borrowing money. The question is whether can delegate that power to President The words in the Constitution are express. The question, then, whether authorized to delegate such important power The question very important as constitutional point.”). Smith does suggest that the same uncertainty had affected the drafting of a post office bill earlier in the First Congress, but no one else in the discussion seems to agree—and Smith for his part appears never to have mentioned his question again over dozens of pages of ensuing discussion about whether the bill was wise policy. See *id.* at 1349–55. It's fair to read Smith as evidence for the possibility that someone could reason their way toward a nondelegation limitation in the Constitution. But as discussed in the main text, the contemporaneous profusion of inventive and ungrounded arguments about what the Constitution “meant” is a wonder to behold.

15. Cf. 8 *Annals of Cong.* 1732 (1798) (statement of Rep. Otis) (“The Constitution of this country . . . is upon all occasions introduced as a stumbling-block in the discussions of this House, and instead of forming any safe rule of conduct, it proves a mere cobweb—a mere jargon of political maxims, and is the foundation of sophisms in almost every debate.”); see also Currie, *The Constitution in Congress*, *supra* note 14, at 296 (“Congress and the executive resolved a breathtaking variety of constitutional issues After the relative honeymoon of the First Congress, debates became more partisan; one is less confident that many of the participants were dispassionately seeking to determine what the Constitution meant.”); Jonathan Gienapp, *The Second Creation: Fixing the American Constitution in the Founding Era* 8 (2018) (“[T]here was, in all manner of disputes, cause to press the Constitution into greater and greater politics, to constitutionalize politics ever more deeply.”); Jud Campbell, *The Invention of First Amendment Federalism*, 97 *Tex. L. Rev.* 517, 522 (2018) (noting that “[p]artisan political objectives” and “the evolutionary culture of English customary constitutionalism, where time and again new constitutional principles had emerged from prominent public controversies[,] . . . made it second nature for the Founders to argue for new constitutional rules”); *infra* note 159.

16. See *infra* section VI.A.2.

17. See *infra* section VI.A.3.

18. See *infra* section VI.A.1.

creative twenty-first-century scholars can contrive distinctions that explain away the broad delegations in the record. It is whether they can supply evidence showing that the *Founders* thought these distinctions were relevant to a live constitutional question. On this front, our critics fall short: None of the delegations we identify were discussed, let alone defended, with reference to the distinctions that our critics now claim were widely understood to be constitutive features of the nondelegation doctrine.

As the 1790s wore on, a few Republicans—most prominently, James Madison and Albert Gallatin—on a few occasions voiced something sounding like the nondelegation doctrine.¹⁹ But their objections never carried the day and were derided as having been manufactured to bolster their opposition to Federalist legislation.²⁰ The debates betray no shared commitment to the principle that some category of laws were beyond the constitutional pale. Even Madison's rejected arguments suggest, at most, a nondelegation doctrine that was suspicious of delegations involving the siting of post roads and the raising of volunteer armies.²¹ But such delegations would not run afoul of any of the various versions of the nondelegation doctrine that modern originalists espouse.

Originalism is not a forgiving discipline. “[I]t requires immersing oneself in the political and intellectual atmosphere of the time—somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.”²² In our view, our critics ought to be more cautious in assigning controversial political beliefs about the need for constitutional limits on legislative delegations onto a Founding generation that, at the moment of fixation, had yet to discern such a need. The originalist argument for nondelegation doctrine fails on its own terms.

I. A REFRESHER

Let's begin with a recap. What is the nondelegation doctrine, and why is it such a big deal? Well, most government activity in the United States rests on a simple idea: that it's okay for the legislature to authorize the executive branch to regulate basically anything the legislature itself could reach—working conditions, pollution, elections, financial products, mask wearing, you name it.²³ That idea is now under attack. Relying on a so-

19. See Mortenson & Bagley, *Delegation*, supra note 1, at 349–65.

20. See *id.* at 362 (noting Gallatin's objection to a law passed by Congress).

21. See *id.* at 349–56, 361–63.

22. Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. Cin. L. Rev. 849, 856–57 (1989).

23. See *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (noting that Congress may authorize other branches to “fill up the details”). The first four paragraphs of this Part condense and revise material by the authors of this Essay. Julian Davis Mortenson & Nicholas Bagley, *There's No Historical Justification for One of the Most Dangerous Ideas in American Law*, Atlantic (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-originalism/612013/> [https://perma.cc/N92E-YPAV].

called nondelegation doctrine, conservative originalists insist that the Founders never intended for government to work this way.²⁴ They call for courts to strike down any laws that delegate too much power—and much of the federal bureaucracy along with them.

The potential consequences are enormous. Legislative delegations pervade just about every area of policy: air quality, drug testing, business regulation, health care, education, and so on. Legislatures have neither the bandwidth nor the expertise to write every detail of complex government programs, least of all when those programs need to adapt nimbly to technological changes, economic disruptions, and new information about the world. So instead, Congress instructs the Environmental Protection Agency to set pollution standards that are “requisite to protect the public health,”²⁵ the Federal Communications Commission to regulate the airwaves “in the public interest,”²⁶ and the Justice Department to classify a drug as a controlled substance where “necessary to avoid an imminent hazard to the public safety.”²⁷ The delegation of regulatory power to federal agencies is thus the indispensable foundation of modern American governance.

The threat to responsible government is hard to overstate. If open-ended delegations are unconstitutional, Justice Elena Kagan observed, “then most of Government is unconstitutional—dependent as Congress is on the need to give discretion to executive officials to implement its programs.”²⁸

Formally speaking, the originalist challenge to responsible modern governance reduces to two claims—both grounded in the constitutional Vesting Clauses.²⁹ First, originalists argue that rulemaking (of at least certain kinds) cannot be understood as an exercise of Article II “executive power.”³⁰ Second, originalists claim that rulemaking (of at least certain kinds) cannot be authorized by Congress because such authorization would constitute an impermissible evasion of Article I’s vesting of “all legislative powers herein granted” in Congress.³¹ At bottom, both claims are thoroughly formalist: It violates a *category* of constitutional enumeration

24. *Gundy*, 139 S. Ct. at 2133–34 (Gorsuch, J., dissenting) (“The framers understood, too, that it would frustrate ‘the system of government ordained by the Constitution’ if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.” (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (Lamar, J., dissenting))).

25. 42 U.S.C. § 7409 (2018).

26. 47 U.S.C. § 201(b) (2018).

27. 21 U.S.C. § 811(h)(1) (2018).

28. *Gundy*, 139 S. Ct. at 2130.

29. U.S. Const. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”); id. art. II, § 1, cl. 1 (“The executive Power shall be vested in a President of the United States of America.”).

30. See Mortenson & Bagley, *Delegation*, supra note 1, at 280–81, 290, 292–93.

31. *Id.*

for administrative agencies to exercise (at least certain kinds of) rulemaking authority, and that *categorical* violation of constitutional structure poisons the resulting structure regardless of its utility.

We mean to respond to these claims where they live: The authority amassed in this Essay meets these challenges, not on a field of functionalism, but in full formalist regalia. There is no formal tension—zero—between the Constitution’s formal vesting of legislative and executive power on the one hand and the central place of administrative rulemaking in our modern democratic settlement on the other. The Founders regularly used the formal vocabulary of the constitutional Vesting Clauses to describe executive branch rulemaking, without the faintest shadow of a hint that such government administration might violate the constitutional separation of powers.

To understand this, it’s useful to revert to our discussion of *legislative* authority as an exercise of the *executive* power at the Founding.³² Sit with it for a minute. As a formal matter, there are two key points:

- (1) “[T]he *legislative* power” was “no more than the general will of the state,”³³ expressed via authoritative edict to either prohibit, authorize, or require various actions;³⁴ and
- (2) “[T]he *executive* power” had “an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.”³⁵

On this background,

executive authority served as the culminating element of an uncomplicated tripartite scheme in which each of the “three grand immutable principles in good government” was enmeshed with the others as interlocking pieces of “complete” or “perfect” governance. The full three-part sequence notionally comprised successive exercises of what the Founders called “legislative, judicial, and executive power.” First you issued instructions. Then you adjudicated the application of those instructions. Then you executed those instructions. It was really that simple.³⁶

32. The legislative practice we canvas is key evidence for our formal claim—but as a conceptual matter, our article’s core point is that the formalist objections are analytically misguided.

33. Mortenson & Bagley, *Delegation*, *supra* note 1, at 294 (quoting 1 M. de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XI, ch. VI, at 201 (London, 1777)).

34. *Id.*

35. *Id.* at 313–14; see also Posner & Vermeule, *Interring the Nondelegation Doctrine*, *supra* note 6, at 1724 (“On the naïve view, . . . any authority that the executive enjoys pursuant to the terms of a duly enacted federal statute is simply executive authority in an unproblematic sense.”).

36. Mortenson & Bagley, *Delegation*, *supra* note 1, at 314.

The key point—as evidenced in painstaking detail by our discussion of how the Founders conceived of treaty making and legislative enactments in separation of powers terms³⁷—is that an agent’s exercise of lawful authority to participate in the promulgation of obligatory rules was repeatedly described as “executive” with respect to the legislative principal’s instructions. As the Founders understood it, there was no tension between these two different ways of describing the same action in separation of powers terms: “When taken as an authoritative source of legally binding instructions, the Continental Congress was indeed acting in a legislative capacity. And when taken as the agent of the authorizations and instructions issued by its electoral principal, the Continental Congress was indeed acting in an executive capacity.”³⁸

Those descriptions squarely refute originalist claims that government action must be neatly slotted under a single font of government authority—or, in other words, that “rulemaking” could be described neatly as *only* legislative *or* executive based on conclusive ex ante analysis. To the contrary: Depending on the relationships you focused on, a given act could properly be classified simultaneously as both legislative (from the perspective of the immediate actor) and executive (from the perspective of the authorizing principal) at the same time.

As a formal matter, the separation-of-powers-objection is thus evanescent—subject to trivial reframing. In making rules pursuant to congressional instruction, administrative agencies are simultaneously exercising both legislative power (by promulgating authoritative legal commands) *and also* executive power (by implementing Congress’s authoritative instructions). This is not a functionalist argument; it is an insistent demand to take formalism seriously: The same government action is *both* executive *and* legislative—and always was.

II. BURDENS OF HISTORICAL PROOF

Perhaps the most indignant criticism of our article arises in response to its most arresting claim: that there was no nondelegation doctrine at the Founding. Maybe we successfully showed that the contours of the nondelegation doctrine were contested and uncertain; maybe we even showed that any such doctrine was narrower than some originalists like to claim. But have we ruled out the possibility that, if prompted with sufficiently outrageous hypotheticals, the Founders might have reasoned their way to a conclusion that at least some delegations might be unconstitutional? And if we can’t rule that out, how can we claim that the nondelegation doctrine did not exist?³⁹

37. Id. at 313–31.

38. Id. at 324.

39. See, e.g., Wurman, *supra* note 2, at 1522 (“[T]here is no direct support for the proposition that there was no nondelegation doctrine at the Founding.”).

These criticisms reduce to a reallocation of the burden of proof away from those who seek to *establish* a nontextual constitutional limitation and onto those who are *criticizing* such efforts—a reallocation that seems hard to reconcile with the stated methodological commitments of the current Supreme Court majority.⁴⁰ Our claim is not that large numbers of the Founders paused, asked themselves whether all legislative powers could be delegated, and then expressly embraced the proposition that they could. We actually doubt that any of them had well-developed views on the matter until late in the 1790s, if then. However odd it may seem to modern eyes, concerns about delegation weren't salient at ratification. Instead of being attuned to the risk that a new national legislature might be complicit in its own marginalization, the Founders counted on its centrality: "In republican government," Madison explained in Federalist No. 51, "the legislative authority necessarily predominates."⁴¹ At ratification, the Founders saw no reason to assume that Congress would be unwilling or unable to protect its prerogatives. Legislative abuse, not legislative abdication, was top of mind.⁴²

Our claim, instead, is a negative one: that in 1789, the Founders didn't share even an inchoate affirmative belief that congressional delegations of legislative authority were limited by identifiable principles, categories, or impulses. We don't mean to deny the possibility that an extravagant delegation—even more extravagant than the very broad delegations canvassed

40. *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 13 (U.S. June 24, 2022) (explaining that any specific implication said to be protected by a Fourteenth Amendment "liberty" must be "objectively, deeply rooted in this Nation's history and tradition," and that "[h]istorical inquiries of this nature are essential" because "the term 'liberty' alone" is "a capacious term" and "provides little guidance" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997))).

41. *The Federalist* No. 51, at 257 (James Madison) (Lawrence Goldman ed., 2008).

42. Madison noted in a letter to Thomas Jefferson in 1787 that the constitutional convention was partly called in response to growing concerns among the political elite that state legislatures in the 1780s were abusing their legislative powers:

The mutability of the laws of the States is found to be a serious evil. The injustice of them has been so frequent and so flagrant as to alarm the most steadfast friends of Republicanism. I am persuaded I do not err in saying that the evils issuing from these sources contributed more to that uneasiness which produced the Convention, and prepared the public mind for a general reform, than those which accrued to our national character and interest from the inadequacy of the Confederation to its immediate objects.

Letter from James Madison to Thomas Jefferson: New York (excerpts) (Oct. 24 & Nov. 1, 1787), in *Documentary History of the Ratification of the Constitution* 442, 447 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber & Margaret A. Hogans eds., digital ed. 2009); see also Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, at 393–463 (2011) (summarizing the challenges of the Critical Period); accord Nicholas Parrillo, *Supplemental Paper*, supra note 1, at 7–8 ("Legislative delegation was not an object of sustained constitutional discussion. That is unsurprising, as the main controversy in the years leading up to 1787–1788 was legislative self-aggrandizement, not legislative abdication." (footnote omitted)).

in our article⁴³—might eventually have provoked a majority of the Founding generation’s political elite to frame their opposition to the delegation in constitutional terms.⁴⁴ That’s exactly how the willed creation of new constitutional principles often works.⁴⁵ It’s not hard to imagine taking a broadly shared abstract impulse (“powers should be separated”) and spinning off a set of subsidiary rules (“delegating powers is unconstitutional under some circumstances”). James Madison’s failed efforts to create such a principle, starting in the Second Congress and finding its first full articulation in his 1800 report on the Virginia Resolution, worked very much like this.⁴⁶

But that’s a hypothetical reconstruction of the counterfactual possibility that urgent political imperatives might have prompted an act of constitutional creativity. It’s not a demonstration of an actual historical doctrine at ratification. Scour the sources as you will; they reveal no collective agreement on even a high-level principle that some delegations were impermissible. Incipient attempts to invoke such a principle were not met with nods of recognition; instead, they left members of Congress baffled, confused, and angry. (More on this in Parts III and IV.) Still less does the historical record demonstrate that the Founders collectively agreed, even at a high level of generality, on the categories of delegations that were supposedly unconstitutional. At most, there are flashes of evidence that some contemporary political theorists might have balked at the complete, irrevocable transfer of legislative authority—“Congress hereby irrevocably transfers its legislative powers in perpetuity to the President.”⁴⁷ We’ve

43. See Northwest Ordinance of 1789, ch. 8, 1 Stat. 50, 50–51 (authorizing the Northwest Territory government to adopt laws for the entire region “as may be necessary, and best suited to the circumstances of the district”).

44. Mortenson & Bagley, *Delegation*, supra note 1, at 332 (“[I]t doesn’t take a radical legal realist to recognize that sufficiently virulent policy objections to a sufficiently awful proposal can sometimes find a legal vessel through which to express themselves.”).

45. Jack M. Balkin, *Constitutional Redemption: Political Faith in an Unjust World 179–85* (2011) (sketching a model by which “off-the-wall” constitutional claims become “on-the-wall” in part by a process of (descriptively false) insistences that they are valid). Compare this with customary international law, which requires the first adopters to be *wrongly* asserting that a given rule is law. See Shabtai Rosenne, *Practices and Methods of International Law 55* (1984) (explaining that customary international law “consists of rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way”).

46. For more on Madison’s efforts in the Second Congress, see Mortenson & Bagley, *Delegation*, supra note 1, at 349–56 (“Some modern commentators have cited Madison’s and Page’s arguments, together with the defeat of Sedgwick’s motion, as decisive evidence of a Founding Era nondelegation commitment that was both broadly shared and fundamental. Close attention to the debate, however, reveals that the opposite was true.”). For more on the Report of 1800, see *id.* at 364–66 (“Contrary to the assumption of some commentators, Madison’s nondelegation challenge to the Alien and Sedition Acts was unusual to the point of idiosyncrasy.”).

47. E.g., Henry St. John, Viscount Bolingbroke, *A Dissertation Upon Parties*, in *Several Letters to Caleb D’Anvers, esq.* 209 (London, 5th ed. 1739) (“[T]he People of Great Britain

called that the anti-alienation principle, but that's just a label. You can call it the nondelegation doctrine if you'd like. But if that's the version of nondelegation doctrine in currency at ratification, it's a version that would bless all contemporary delegations.

Still, the Founders' deafening silence about constitutional limits on delegation can't definitively rule out the possibility that they might have collectively bristled at some massive power transfer, much as their silence on the subject of Atlantis can't definitively rule out the possibility that they shared a secret commitment to the existence of mermen.⁴⁸ But any common impulse that some delegations were unconstitutional would have been wildly indeterminate, highly permissive, and riddled with exceptions.⁴⁹

For originalists of a traditional bent, that ought to be sufficient to doom the doctrine. Justice Antonin Scalia, for example, excoriated courts for extrapolating restrictions on the democratic process from ambiguous first principles. "[The] practice of constitutional revision by an unelected committee of nine, always accompanied . . . by extravagant praise of liberty, robs the People of the most important liberty they asserted in the

delegate, but do not give up, trust, but do not alienate their Right and their Power . . ." (emphasis altered)).

48. We think it telling, however, that as soon as something resembling the nondelegation doctrine made an appearance, some members of the Founding generation *did* reject it. In the 1792 debate over the post roads, for example, Representative Benjamin Bourne said that "[t]he Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing." 3 Annals of Cong. 232 (1791) (statement of Rep. Bourne); see also Wurman, *supra* note 2, at 1532 (conceding the point). Similar statements abound in the record. In the 1798 debate over the provisional army, Representative Samuel Dana snorted that an argument about the unconstitutionality of delegating powers "proves too much, and is perfectly ridiculous": If it were true, "Congress must turn tax-gatherers, borrowers of money or money brokers, apprehenders of coiners, and recruiting sergeants." 8 Annals of Cong. 1637 (1798) (statement of Rep. Dana). Speaker of the House Jonathan Dayton characterized the supposed doctrine as being "truly remarkable for the novelty of the discovery, which was now, for the first time, made by the enlightened members of the 5th Congress." *Id.* at 1678 (statement of Rep. Dayton). Representative Lewis Sewall added that he believed

every gentleman who attended to the Constitution, and to the manner in which it had been acted upon, could have no doubt upon the subject. In a variety of cases, Congress did not exercise their Constitutional powers themselves; they were frequently obliged to authorize the President to act for them.

Id. at 1635 (statement of Rep. Sewall).

49. In his article examining the 1798 direct tax, Professor Nicholas Parrillo assumes for the sake of argument that the Founders believed "in *some* abstract, unspecified limit on delegation," but argues that the sources "give no useful specifics for what the content or the stringency of that limit might be." Parrillo, *Critical Assessment*, *supra* note 1, at 1299; cf. Chabot, *supra* note 1, at 159 ("[T]here is no occasion to abandon precedent, as a more accommodating nondelegation doctrine has been with us from the start."). Parrillo contrasts that with our view "that the Constitution originally imposed *no* limit on delegation." Parrillo, *Critical Assessment*, *supra* note 1, at 1299 n.43. As we discuss later, however, the contrast may be more apparent than real. If our claim is not identical to Parrillo's, it is very close.

Declaration of Independence and won in the Revolution of 1776: the freedom to govern themselves.”⁵⁰ On this score, Justice Hugo Black’s meticulous dissection of the majority opinion in *Griswold* established the script that originalists would follow for decades, insisting above all else on the difference between constitutional *values* and constitutional *rules*:

The Court talks about a constitutional “right of privacy” as though there is some constitutional provision or provisions forbidding any law ever to be passed which might abridge the “privacy” of individuals. But there is not. There are, of course, guarantees in certain specific constitutional provisions which are designed in part to protect privacy at certain times and places with respect to certain activities. Such, for example, is the Fourth Amendment’s guarantee against “unreasonable searches and seizures.”⁵¹

Justice Potter Stewart’s dissent extended the point, ticking off all the ways that Connecticut’s contraceptive ban did *not* violate anything in the Constitution’s actual text.⁵² He asked:

What provision of the Constitution, then, does make this state law invalid? The Court says it is the right of privacy “created by several fundamental constitutional guarantees.” With all deference, I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case ever before decided by this Court.⁵³

If *Griswold* has traditionally been anathema to principled originalism, *Washington v. Glucksberg*⁵⁴ has supplied the corrective. The antithesis of *Griswold*’s freewheeling inferential thinking, *Glucksberg* distilled what has ever since been originalist canon for ascertaining nontextual restrictions

50. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2627 (2015) (Scalia, J., dissenting). Arguments like these have persuaded even many liberals—if rumors can be credited—to center the countermajoritarian difficulty as a central theme of first year constitutional law classes. Please don’t tell our colleagues.

51. *Griswold v. Connecticut*, 381 U.S. 479, 508–09 (1965) (Black, J., dissenting).

52. *Id.* at 527–31 (Stewart, J., dissenting).

53. *Id.* at 530 (quoting *id.* at 479 (majority opinion)). Professor John Manning has spelled out the implications for arguments like those our critics offer:

[T]he Constitution adopts *no freestanding principle of separation of powers*. The idea of separated powers unmistakably lies behind the Constitution, but it was not adopted wholesale. The Constitution contains no Separation of Powers Clause By invalidating schemes on the ground that they offend a freestanding norm of strict separation, formalists undervalue the *indeterminacy* of the Vesting Clauses relative to Congress’s authority to shape government under the Necessary and Proper Clause. In so doing, formalists attribute to parts of the document a specificity of purpose that the text may not support.

Manning, *supra* note 6, at 1944–45.

54. 521 U.S. 702 (1997).

on government power. Refusing to “deduce[] [rights] from abstract concepts,”⁵⁵ the *Glucksberg* majority demanded instead “a ‘careful description’ of the asserted fundamental liberty interest,”⁵⁶ followed by a showing of “concrete examples”⁵⁷ that the precise restriction has been so widely implemented as to be indisputably foundational to our tradition.

For originalists like Justice Scalia—and seemingly Justice Neil Gorsuch as well⁵⁸—it won’t do to reason from historical silence on some matter to a conclusion that the matter must have been viewed as constitutionally sacrosanct.⁵⁹ That misallocates the relevant burden of proof: It’s not on those who would deny the existence of a constitutional prohibition, but on those who would defend it.⁶⁰ Nor is it enough to identify vague statements about some principle and infer from those the existence of a judicially enforceable limit on legislative authority.⁶¹ Yet this is precisely the proposition our critics have endorsed.⁶²

Not all originalists today are committed to Scalia’s stringent view of originalism, which aims to restrain judges from stitching their political

55. *Id.* at 725.

56. *Id.* at 721 (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993)).

57. *Id.* at 722.

58. Neil Gorsuch, *A Republic, If You Can Keep It* 110 (2019) (“In an originalist’s view, it is not for judges to decide how to balance the competing interests of efficient law enforcement . . . [with] accurate criminal convictions The people themselves decided . . . when they adopted the Sixth Amendment and agreed on an unequivocal right to confrontation.”).

59. Wurman finds it relevant that, with one exception, “not a single member of Congress or person engaged in the public debate ever stated that there were no limits to what Congress could delegate.” Wurman, *supra* note 2, at 1503; see also Epstein, *supra* note 2, at 663 (“[S]ome version of a nondelegation norm is so central to the constitutional structure that no commentator thought fit to deny it in theory”); Gordon, *supra* note 2 (manuscript at 3) (“[T]he authors[] fail[] to identify a single antebellum source endorsing their claims that Congress may delegate its legislative power, or that officials acting pursuant to statutory grants of authority are always exercising executive power.”); Hamburger, *Delegating or Divesting*, *supra* note 2, at 92 (noting that the article offers “curiously few statements from the framing and ratification of the Constitution” directly stating its thesis).

60. “Surely [the] lack of evidence” of sodomy prosecutions, Scalia once urged, “would not sustain the proposition that consensual sodomy on private premises with the doors closed and windows covered was regarded as a ‘fundamental right’” immune from legislative interference. *Lawrence v. Texas*, 539 U.S. 558, 597 (2003) (Scalia, J., dissenting).

61. *Michael H. v. Gerald D.*, 491 U.S. 110, 127 n.6 (1989) (plurality opinion) (“Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); see also *id.* (“Justice Brennan would choose to focus . . . upon ‘parenthood.’ Why should the relevant category not be even more general—perhaps ‘family relationships’; or ‘personal relationships’; or even ‘emotional attachments in general?’”).

62. See, e.g., Wurman, *supra* note 2, at 1495–96 (claiming that “innumerable statements from the Founding period . . . implicitly endorse a nondelegation doctrine,” such as “statements . . . that each department was structured . . . [to] exercise its particular function well” and statements “advocating a separation of powers generally and opposing a combination of powers”).

preferences into the Constitution.⁶³ Some modern originalists have instead endorsed approaches that tolerate, to varying degrees, the construction of restrictive constitutional meaning from indeterminate text.⁶⁴ A few even call for infusing the methodology with controversial normative commitments.⁶⁵

We have no desire to police who calls themselves an originalist. But if the methodology is so flexible that it allows for the crafting of doctrine from inchoate constitutional impulses, originalism entails no distinctive commitment either to constitutional text or to original meaning. It instead resembles a pluralistic version of common law constitutionalism, albeit with more citations to James Madison.⁶⁶ Such a loose approach drains originalism of much of what makes the discipline attractive to legal elites and the broader public: its grounding in text and history, its fealty to the actual beliefs of the generation that ratified the Constitution, and its promise to restrain activist judges.⁶⁷ It suggests, too, that even cases like *Griswold*⁶⁸ and *Roe*⁶⁹ are defensible on originalist grounds: Because the Founders understood the Constitution to protect personal privacy, the federal courts can construct constitutional doctrine that protects certain forms of privacy. That's not a bullet that most originalists are willing to bite.

63. See Jeremy Kessler & David Pozen, *Working Themselves Impure: A Life Cycle Theory of Legal Theories*, 83 U. Chi. L. Rev. 1819, 1844–54 (2016) (“Constraining judges through text and history was held out to be [originalism’s] central virtue and objective.”); Lawrence B. Solum, *The New Originalism*, *Legal Theory Lexicon* (Feb. 24, 2013), https://lsolum.typepad.com/legal_theory_lexicon/2013/02/legal-theory-lexicon-071-the-new-originalism.html [<https://perma.cc/BKZ6-ML2W>] (last updated June 5, 2022) (“The Old Originalism is associated with an antipathy to judicial discretion in constitutional interpretation and construction.”).

64. E.g., Solum, *Originalism and Constitutional Construction*, *supra* note 3, at 458, 537 (discussing “construction zones” in which constitutional construction is required to fill in the content of provisions that are “vague,” “open textured,” or irreducibly ambiguous); see also Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* 167 (1999) (noting that “[o]riginalism has been associated with judicial restraint in the modern context,” an “identification” that is not “wholly accurate”).

65. See, e.g., Jack M. Balkin, *Living Originalism* 229 (2011) (“Constitutional construction is inevitably a presentist endeavor, drawing on the resources of the entire constitutional tradition . . .”); Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* 244 (2004) (“[B]oth the plain and original meanings of the Ninth Amendment require the strict construction of any power that restricts the exercise of individual liberty, whether that liberty is enumerated or unenumerated.”).

66. See David A. Strauss, *The Living Constitution* 3 (2010) (explaining that common law constitutionalism draws from “precedent and past practices” at large whereas originalism is “the view that constitutional provisions mean what the people who adopted them . . . understood them to mean”).

67. Jamal Greene, *Selling Originalism*, 97 *Geo. L.J.* 657, 708–14 (2009); Kessler & Pozen, *supra* note 63, at 1845.

68. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

69. *Roe v. Wade*, 410 U.S. 113 (1973).

We do not mean, in short, to mount a historical objection to an “originalist” version of the nondelegation doctrine that meanders through mysteries and plashes in penumbras. What we object to, instead, is the claim that the nondelegation doctrine rests on solid historical evidence that some category of legislative delegations were widely understood to be beyond Congress’s power to adopt.

III. THE EIGHTEENTH-CENTURY BASELINE

Some of our critics, Professor Philip Hamburger in particular, appreciate that our argument is partly grounded on the claim that broad delegations of legislative power were a common feature of eighteenth-century Anglo-American governance.⁷⁰ If we’re right about that, the case for the nondelegation doctrine stumbles before it even gets off the ground. Originalists would have to show not that the Constitution carried forward a longstanding rule against legislative delegations, but that its ratification broke with generations of the historical practice. That’s a heavy burden, given that the document itself says nothing about delegation.

The critics’ first line of attack is thus to argue that pre-ratification evidence is mostly or even entirely irrelevant. Hamburger discounts our “menagerie” of eighteenth-century sources,⁷¹ asserting in particular that our effort to understand what a broad array of Europeans thought about delegation shines at best a dim light on what the Founders believed.⁷² Professor Ilan Wurman dismisses seemingly all pre-ratification evidence drawn from England with the bland assertion that “[t]he British constitutional system was very different from the subsequent American constitutions in that it was an unwritten system.”⁷³

But no one is claiming a straight, unbending line from European political theory to the American Constitution. As with any intellectual history, the point is an immersion in the background understandings and foundational texts that gave rise to the terms of a particular community’s discourse. As Professor Jack Rakove explains:

70. Hamburger, *Delegating or Divesting*, *supra* note 2, at 92–103.

71. *Id.* at 90. We are mystified by Hamburger’s suggestion that our “central evidence consists of two quotations from the framing and ratification.” *Id.* at 93 (“Really, that’s all there is.”). Even a quick scan of our footnotes shows extensive engagement with many scores of sources from the relevant time period—and there are at least as many on the cutting room floor. Unless the word “central” is performing all twelve labors of Hercules, Hamburger’s description is a troubling mischaracterization.

72. *Id.* at 93.

73. Wurman, *supra* note 2, at 1527; see also Gordon, *supra* note 2 (manuscript at 3) (“Mortenson and Bagley . . . forget a piece of time-honored wisdom [from Ron Swanson]: ‘History began July 4th, 1776. Anything before that was a mistake.’”). As further explained in the main text, whether the eighteenth-century British constitution was written or not is irrelevant to its use for legal, political, and intellectual context when exploring the substantive legal baselines against which North Americans were legislating.

There is no question that politically articulate eighteenth-century Americans—and certainly members of the political elite—were eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone. They were also well-versed in the richly polemical literature of seventeenth- and eighteenth-century English politics; the moral philosophy and faculty psychology of the Scottish enlightenment; the disquisitions on public law of such European authorities as Grotius, Pufendorf, and Delolme; and, one might add *en passant*, the inheritance of English jurisprudence. American thinking about politics was no doubt also shaped by reading in the classics, the legacy of Newtonian science, and even the emphasis on sympathy in eighteenth-century philosophy and literature (which resonates strongly in their notions of representation). All of these writings shaped the intellectual context in which the Framers and Ratifiers acted.⁷⁴

A failure to grasp that broader intellectual context can contribute to basic errors about the separation of powers—like our critics’ claims that the Continental Congress had only executive and judicial powers,⁷⁵ that its laws had no binding legal force,⁷⁶ that relevant state constitutions lacked separation of powers provisions,⁷⁷ that the *only* powers held by Congress were legislative,⁷⁸ or that legislative power extended only to the regulation of private acts.⁷⁹

74. Jack N. Rakove, *Fidelity Through History (or to It)*, 65 *Fordham L. Rev.* 1587, 1598–99 (1997) (footnotes omitted).

75. Hamburger, *Delegating or Divesting*, supra note 2, at 95 (“Far from proving that Congress had legislative power, [this evidence] confirms the opposite conclusion.”). To the contrary, the Founding generation couldn’t stop talking about how the Continental Congress had all three powers. See Mortenson & Bagley, *Delegation*, supra note 1, at 316–18 (listing, but barely scratching the surface of, citations available to substantiate this commonplace observation).

76. Hamburger, *Delegating or Divesting*, supra note 2, at 94 (“Even formal congressional acts under the Articles did not have legal obligation.”). To the contrary, one need only look at the text of the Articles of Confederation to see that it contemplated otherwise. See, e.g., *Articles of Confederation of 1781*, art. IX, paras. 1, 4 (“[C]ongress . . . shall have the sole and exclusive right and power . . . of establishing rules for deciding, in all cases, what captures on land or water shall be legal [and] regulating the trade and managing all affairs with the Indians, not members of any of the states.”).

77. See Gordon, supra note 2 (manuscript at 26) (“[T]he pre-Ratification practices of state governments . . . are essentially worthless.”); cf. Wurman, supra note 2, at 1539–40. To the contrary, Massachusetts, New York, and Virginia all had constitutions with separation-of-powers provisions, and each state had a well-established practice of legislative delegation. See *infra* notes 81–82 and accompanying text.

78. Hamburger, *Delegating or Divesting*, supra note 2, at 95 (“Congress, in contrast, was established by the U.S. Constitution with only legislative powers.”). To the contrary, most commentators agreed that the Senate had both executive and judicial powers. See, e.g., Mortenson, supra note 7, at 1325–34 (appointments power); *id.* at 1367 (Vice President); *id.* at 1367 n.481 (impeachment).

79. E.g., *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); see also Gordon, supra note 2 (manuscript at 12–13). Legislative power certainly *included*

It is also why our critics err in dismissing the mass of delegations from before ratification on the ground that the post-ratification Congress was structurally different from the Confederation Congress. That claim misunderstands the persistence and continuity of history, especially when it comes to governance habits.⁸⁰ The new Constitution changed many things, but much was also left in place. And the claim that its Vesting Clauses minted a brand-new nondelegation doctrine collapses on even a desultory review of legislative practice under the Massachusetts, New York, and Virginia constitutions. Each of those state constitutions included either vesting clauses, separation of powers provisions, or both⁸¹—and all of them gave rise to a widespread practice of broad legislative delegation.⁸²

the power to make general rules regulating private conduct. But if that marked the *limits* of its scope, half of what the Founding generation said when they were debating the allocation of government powers, the control over funding, the management of federal lands, or the conduct of foreign affairs didn't make sense. See Mortenson & Bagley, *Delegation*, *supra* note 1, at 332–66.

80. On this point, compare mid-twentieth-century revisionist historiography of the French Revolution sparked, among others, by Alfred Cobban and Francois Furet. See generally Alfred Cobban, *The Myth of the French Revolution: An Inaugural Lecture Delivered at University College* (Univ. Coll. Press 1955) (challenging the established account of the French Revolution as a radical, social, and economic transformation); François Furet, *Interpreting the French Revolution* (Elborg Forster trans., Cambridge Univ. Press 1981) (1978) (similar).

81. Virginia's constitution required the "legislative, executive, and judiciary" departments to be "separate and distinct, so that neither exercise the powers properly belonging to the other." Va. Const. of 1776, para. 4; see also Mass. Const. of 1780, art. XXX ("[T]he legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."); N.Y. Const. of 1777, arts. II & XVII ("vest[ing]" legislative and executive powers in the legislature and governor, respectively).

82. Virginia's legislature, for example, "delegated many special powers" to the governor and Council of State, including the power to restrict counterfeiting and "maintain fair prices." Session of Virginia Council of State: Editorial Note (Jan. 14, 1778), *in* *The Papers of James Madison* 214, 214–15 (J.C.A. Stagg ed., digital ed. 2010) [hereinafter *Papers of Madison*]; see also, e.g., 1785 Va. Acts 58 (delegating the authority to restrict tavern licenses "to such as the Court shall think able to provide for the accommodation of travellers, and in such places as are most convenient for them"); 1785 Va. Acts 7 (delegating the authority over harbor regulations to local "Harbour-Masters"); 1784 Va. Acts 9 (delegating the authority to "suspend . . . [the] taking possession of those lands that lie on the north-west side of the river Ohio, or below the mouth of the river Tenisee, and which have been reserved for [military servicemembers]"). For some Massachusetts examples, see, e.g., 1786 Mass. Acts 579–86 (delegating authority over "victuallers, innholders, taverners," and "the seller[s] of wine, beer, ale cyder, brandy, rum, or any strong liquors" to municipal selectmen); 1786 Mass. Acts 440–41 (delegating authority over the allocation of fishing rights to a municipal committee, including the authority to enter private property as necessary to facilitate fishery benefit); 1785 Mass. Acts 281 (delegating zoning authority over "any of the trades or employments of killing creatures for meat, distilling of spirits, trying of tallow or oil, currying of leather, and making earthen-ware" and requiring only that any zoning regulation be judged "to be necessary"). For some New York examples, see, e.g., 1786 N.Y. Laws 285–86 (delegating unfettered authority to New York City to zone areas off-limits for "inflammable substances," with one exception for "a small quantity of pitch, tar, rosin and turpentine"

Although Justice Gorsuch argues that the Constitution's adoption of vesting clauses, bicameralism, and a veto show that "the framers went to great lengths to make lawmaking difficult" in all circumstances,⁸³ the 1787 New York State Legislature expressed a very different view: As the preamble to one broad statutory delegation observed, it often made good sense for the political process to decide "to *remove* all impediments or obstruction that may retard so necessary a work" as "regulat[ing] with uniformity" in some complicated domain.⁸⁴

The critics also assail our explanation that John Locke's much-cited passage in the Second Treatise had in mind, not administrative delegation, but the possibility that Parliament might irrevocably transfer or alienate its power to the King.⁸⁵ Wurman claims that the Founders would not have read Locke in that manner. Why? Because "it is quite impossible for Congress to 'alienate' its power in this sense. One Congress cannot bind a future Congress, and so there would be no way to alienate power."⁸⁶ But the impossibility of binding future Congresses arises *because* one Congress cannot irrevocably transfer authorities that should properly be exercised by later Congresses. The anti-alienation principle that Wurman criticizes as nonexistent therefore supplies the basis for the anti-binding principle that he takes as a given. They are flip sides of the same coin.

A number of the critics also claim that members of the Founding generation "interchangeably used the terms delegate, transfer, and alienate" in various debates over delegating authority.⁸⁷ Wurman, for example, argues that, for the Founders, "a 'delegation' of power to the Executive

kept by ship chandlers "near their doors in the open street"); 1785 N.Y. Laws 102 (delegating authority to the Continental Congress "to prohibit any goods wares or merchandize from being imported into or exported from any of the United States, in vessels belonging to or navigated by the subjects of any power with whom these States shall not have formed treaties of commerce"); 1784 N.Y. Laws 706 (emphasis added) (delegating authority to quarantine "all vessels of whatever kind they may be, . . . coming from any place infected with . . . contagious distemper," for "such Time and in such Manner as the Governor [or other executive actor] shall think proper to direct").

83. *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

84. 1787 N.Y. Laws 543 (delegating authority to New York City to enact laws "for the better regulating" of "new buildings" both residential and commercial, and also "for regulating and altering the streets, wharfs, and slips in such manner as shall be most commodious for shipping and transportation").

85. Mortenson & Bagley, *Delegation*, supra note 1, at 307–09; see also John Locke, *The Second Treatise: An Essay Concerning the True Original, Extent, and End of Civil Government* (1690), reprinted in *Two Treatises of Government and a Letter Concerning Toleration*, ch. XII, § 143, at 164 (Ian Shapiro ed., Yale Univ. Press 2003).

86. Wurman, supra note 2, at 1519. For a criticism of the principle, see Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 *Yale L.J.* 1665, 1666 (2002).

87. Wurman, supra note 2, at 1520–21; see also Gordon, supra note 2 (manuscript at 15–16) (arguing that some Founding Era commentators did not distinguish between alienation and delegation). Hamburger says that we claimed that "words such as 'alienate' and 'transfer'" had a "fixed technical meaning" among European theorists at the time of ratification. Hamburger, *Delegating or Divesting*, supra note 2, at 96. This is perplexing. We highlighted the distinction between "delegate" and "transfer" as a subsidiary part of our

would be an alienation.”⁸⁸ But that does not follow. In political debate, it would have been perfectly natural for opponents of a particular delegation to characterize it, somewhat polemically, as a “transfer” or “alienation” of power. It highlights the political stakes. But the word choice doesn’t suggest that the Founders saw no constitutionally significant difference between a routine provisional delegation and an everlasting, irretrievable transfer of power.

All of this, too, misses the broader point. Our claim is *not* that the Founders collectively embraced an anti-alienation principle of the sort that Locke was driving at in his Second Treatise. For all the attention John Locke gets from originalists, his name was never mentioned in any of the early, recorded debates over the propriety of congressional delegations.⁸⁹ Our point, instead, is that Locke wasn’t talking about administrative delegation, needn’t be read as having done so; wasn’t read by seventeenth-century contemporaries to do so, wasn’t read by eighteenth-century theorists to do so; and that there is no basis for assuming, without evidence, that the Founders as a group read him to do so.⁹⁰

Finally, our principal critics continue to say that “the nondelegation doctrine has its origins in Roman law” and in particular “with a rigid general principle, *delegatus non potest delegare*—the delegatee is not able to

effort to understand what Locke was getting at in a specific passage that explicitly contrasted the two terms. Mortenson & Bagley, *Delegation*, supra note 1, at 307–08. We then observed that hints of the same distinction can be seen in stray comments from late eighteenth-century sources. *Id.* at 308. But we argued that any such hints were not in wide circulation among the Founders; most of them surely never gave the distinction any thought, much less collectively agreed on a “fixed technical meaning.” *Id.* at 312 (“Scattered references to a Lockean anti-alienation view can also be found in the colonial, framing, and ratification records In practice, even those few Founding Era commentators who gestured at it could scarcely have imagined that the anti-alienation principle would ever do any limiting work in the real world.”).

88. Wurman, supra note 2, at 1521.

89. It appears that in the first decade of recorded debates in Congress, Locke’s name was uttered once—in March 1792—and only then because his views on evidence were discussed in an English treatise. 3 *Annals of Cong.* 468 (1792). Parrillo has noted:

[T]he secondary literature turns up only one instance of an American from 1765 through 1788 citing [the portion of the Second Treatise in question], in an anonymous newspaper essay criticizing a proposal that the state legislatures amend the Articles of Confederation to grant transformative new powers to the superordinate Continental Congress, which seems categorically different from post-1787 congressional delegation to agencies.

Parrillo, *Supplemental Paper*, supra note 1, at 6 n.11. See generally Kurt Eggert, *Originalism Isn’t What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 *Chap. L. Rev.* 707, 735–44 (2021) (summarizing the case that “Locke’s influence on politics had already declined dramatically in America” by the 1780s).

90. Mortenson & Bagley, *Delegation*, supra note 1, at 310–13.

delegate to a subdelegatee.”⁹¹ Set aside the fact that the affirmative evidence for this claim even as to *private* law in the eighteenth century appears to rest on five sources.⁹² More to the point, as discussed at some length in our original article, nondelegation advocates have identified no contemporary evidence applying the principle to any sort of constitutional interpretation, much less to legislative delegations.⁹³ For our part,

In the tens of thousands of pages of searchable archival material from the Continental Congress, from the drafting and ratification of the Constitution, and from the records of the first ten years of Congress, we have not been able to find a single appearance of the phrase “*delegata potestas non potest delegari*” or any variant thereof.⁹⁴

Our critics have not challenged us on that, nor have they identified any additional evidence connecting what they describe as a hoary private law principle to the constitutional nondelegation doctrine.⁹⁵

IV. THE MEANING OF “VESTING” AND “EXERCISE”—BEGGING THE QUESTION

Maybe the Constitution changed everything, though. Hamburger says, for example, that we fail to appreciate how the Constitution marked a new approach to the legislature’s powers to assign certain types of powers to the President.⁹⁶ His primary support for the claim is that the Constitution uses the word “vest” in Article I’s Vesting Clause.⁹⁷ The word choice matters, he claims, because “vesting” such powers in Congress “thereby precluded Congress from vesting in others, or divesting itself of,

91. Epstein, *supra* note 2, at 664; see also Gordon, *supra* note 2 (manuscript at 13) (“Innumerable sources from the early Republic applied this tenet of agency law to the constitutional distribution of powers, and derived therefrom a nondelegation rule.”); Hamburger, *Nondelegation Blues*, *supra* note 2 (manuscript at 55–57) (arguing that the Roman maxim against subdelegation extended beyond private law); Natelson, *supra* note 2 (arguing that this maxim limits Congress’s power to delegate the power entrusted to it by the Constitution).

92. Mortenson & Bagley, *Delegation*, *supra* note 1, at 297 & n.104 (identifying the private-law sources predating the Founding that allegedly support the claim).

93. See *id.* at 296–300.

94. *Id.* See generally Richard Primus, *The Elephant Problem*, 17 *Geo. J.L. & Pub. Pol’y* 373 (2019) (exploding the argument that the Founders conceived of the Constitution on a power-of-attorney model).

95. See, e.g., Gordon, *supra* note 2 (manuscript at 12–14) (citing to numerous nineteenth-century state court cases and treatises but offering no rebuttal to our Founding Era constitutional analysis); Hamburger, *Nondelegation Blues*, *supra* note 2 (manuscript at 55–57) (describing the Roman maxim’s relevance in private law but identifying no sources that rebut our constitutional analysis).

96. Hamburger, *Delegating or Divesting*, *supra* note 2, at 108–10.

97. *Id.* at 108 (“Though pre-constitutional European theory about delegation is important for understanding the Constitution and the dangers of permitting shifts in power, the Constitution speaks more emphatically about *vesting* its powers.”).

such powers.”⁹⁸ Hamburger then asserts that “[a] delegated power is one that can be resumed at the will or discretion of the delegator” and that Congress can’t reliably recall a delegation because “it may have to overcome a Presidential veto.”⁹⁹ As such, he claims that “congressional shifts of legislative power to the Executive cannot accurately be considered delegations” but must instead be understood as the prohibited “vesting” of legislative power.¹⁰⁰

The argument does not withstand scrutiny. First, it rests on Hamburger’s suppositions and definitions, not the Founders’. He makes no effort to link his claims to the historical record,¹⁰¹ nor could he: In the early Republic, legislators commonly referred to laws parceling out legislative power as delegations, even though legislators were fully aware that the veto might complicate future efforts to amend those laws.¹⁰² There is nothing confused or incoherent about the claim that the defeasible delegation of legislative power is compatible with a Constitution that vests legislative power in Congress.

Second, passing a law authorizing the President to exercise certain types of rulemaking power does not divest Congress of its legislative power. Even after adopting a broad delegation, Congress, with its vested powers fully intact, remains on the scene to modify or end the delegation.¹⁰³ Perhaps the Vesting Clause ought to be understood to preclude Congress from permanently transferring its authority to other actors and forever cutting itself out of the constitutional design. But if that’s what the Vesting Clause means, Hamburger’s argument against routine delegation collapses.

Third, the existence of the presidential veto does *not* “preclude” Congress from resuming its authority. Congress remains at liberty to end any delegation, either by eliciting the President’s signature or by passing a law with a two-thirds majority.¹⁰⁴ Perhaps as a matter of policy calibration, the risk of a presidential veto makes it too difficult for Congress to withdraw delegations. If so, that’s a good political argument for amending the

98. *Id.* at 109.

99. *Id.*

100. *Id.*

101. See *id.* at 108–10.

102. For example, James Madison noted:

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.

James Madison, The Report of 1800 (Jan. 7, 1800), in *Papers of Madison*, *supra* note 82, at 303, 324 (emphasis added).

103. See U.S. Const. art. I, § 7, cl. 2 (Presentment Clause).

104. See *id.*

Constitution, for adopting sunset provisions in laws that delegate power,¹⁰⁵ or for embracing living constitutionalism as a basis for something like the nondelegation doctrine. But it's not an argument about the Founders' understanding.

In trying to squeeze meaning from the word “vest,” Hamburger leaves us where we started: that what looks to some like a perfectly acceptable *exercise* of executive power looks to others like an impermissible *delegation* of its legislative counterpart.¹⁰⁶ That's why the history matters. It can teach us something about the meaning that the Founders assigned to constitutional text that does not itself speak to the question.

Consider in a related vein Wurman's claim that James Madison, in 1789, called for the adoption of “the nondelegation amendment.”¹⁰⁷ That's Wurman's label, not Madison's. The amendment itself (which—before being rejected by the Senate—was approved by the same House that voted happily in favor of all the broad delegations canvassed in our article) read as follows:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.¹⁰⁸

As with so much supposed evidence in favor of the nondelegation doctrine, the amendment said nothing about Congress's powers to pass legislation vesting discretionary authority in the executive or judicial branches. As we explained in our article, it was instead a banal restatement

105. See Jonathan H. Adler & Christopher J. Walker, Delegation and Time, 105 Iowa L. Rev. 1931, 1959–60 (2020) (arguing so).

106. See Hamburger, Delegating or Divesting, *supra* note 2, at 109.

107. Compare Wurman, *supra* note 2, at 1504–05 (discussing James Madison's proposed nondelegation amendment), with Green, *supra* note 2 (noting that a colloquy among three people at the Philadelphia Convention “suggests . . . that the convention, and especially Wilson and Madison, thought the ‘power to carry into effect the national law’ did not, and should not, include the power to receive a redelegation of legislative power” (quoting Notes of James Madison on the Convention (June 1, 1787), *in* 1 The Records of the Federal Convention of 1787, at 64, 67 (Max Farrand ed., 1911))). While Professor Christopher Green has not yet developed this argument beyond quoting and characterizing the colloquy, we take his implied reading of the materials seriously. For the moment, we offer this Twitter sketch of reasons for skepticism as exchange in kind. See Thread in Response to Tweet by Julian Davis Mortenson (@jdmortenson), Twitter (Dec. 19, 2021, 6:25 PM), <https://twitter.com/jdmortenson/status/1472709780577918978> [<https://perma.cc/M8R4-D8ED>] (agreeing that Green's reading is one of several that make grammatical sense of the words in the sentence, while also explaining several equally plausible alternative readings and emphasizing the sketchiness of the notes and the very small number of people involved).

108. 1 Annals of Cong. 435–36 (1789) (Joseph Gales ed., 1834).

of the principle that the Constitution makes a tripartite distribution of governmental powers.¹⁰⁹

Wurman assumes without argument that “the amendment would have prohibited one department from delegating to another department *any* of the powers that the Constitution has vested in the former—whether legislative, executive, or judicial in nature.”¹¹⁰ We don’t mean to be pedantic, but that’s not what the amendment says. It does not prohibit *delegations*; it prohibits the *exercise* of powers vested elsewhere. And so the judiciary could not seize the authority to try impeachments; the Speaker of the House could not declare herself to be the Commander in Chief of the Army and Navy; and the President could not assert the unilateral authority to make laws. Any of those things would straightforwardly constitute the prohibited exercise of another branch’s powers.

But when Congress passes a law delegating discretionary authority and the President exercises that authority, the President is not exercising “the powers vested in the Legislative.” The President instead is exercising “[t]he executive power” vested in him by the Constitution, as we demonstrated at length in our original piece.¹¹¹

V. THE PROTEAN SCOPE OF THE PURPORTED DOCTRINE

To sharpen the point: If the historical evidence so clearly establishes that the Founders had a common vision about the scope of the nondelegation doctrine, how can our critics harbor such radically different beliefs about what that vision was? Hamburger claims that the Founders believed that it was unconstitutional to delegate the authority to make “binding rules or adjudications that [are] national and domestic in their scope.”¹¹² Professor Michael Rappaport posits a “two-tiered nondelegation doctrine” in which the Constitution allows the delegation of policymaking discretion in certain domains, including foreign affairs and government spending, but categorically prohibits delegation in connection with “rules that regulate the private rights of individuals in the domestic sphere.”¹¹³ Wurman disagrees with both Hamburger and Rappaport, saying that the Founders objected only to laws that delegated *exclusive* legislative powers but not to

109. Mortenson & Bagley, *Delegation*, supra note 1, at 349; see also Eggert, supra note 89, at 723 (“This is not a nondelegation amendment, but rather a non-encroachment amendment . . .”).

110. Wurman, supra note 2, at 1505.

111. See Mortenson & Bagley, *Delegation*, supra note 1, at 313–32.

112. Hamburger, *Delegating or Divesting*, supra note 2, at 107. Hamburger’s views informed Justice Clarence Thomas’s approach to the nondelegation doctrine in *Department of Transportation v. Ass’n of American Railroads*. See 575 U.S. 43, 77 (2015) (Thomas, J., concurring in the judgment) (arguing for a “return to the original understanding of the federal legislative power [that would] require that the Federal Government create generally applicable rules of private conduct only through the constitutionally prescribed legislative process”).

113. Rappaport, supra note 2, at 196.

laws delegating *nonexclusive* powers.¹¹⁴ (More on this last claim in a moment.)

The supposed nondelegation doctrine of 1789 thus has a kaleidoscopic quality. How can that be, if the contours of the doctrine were supposedly so well-understood that they would have been taken as implicit in Article I's Vesting Clause? It is no answer to say that it's hard to reconstruct the worldview and legal beliefs of men who lived more than two centuries ago. However true that may be as a general matter, originalists claim that the Founders believed the nondelegation doctrine was the indispensable safeguard of a Montesquieuan republic with a tripartite division of governmental authority.¹¹⁵ And the historical record, we repeat, is rich: Both before and after ratification, the Founders debated both the separation of powers and their new charter at punishing length.

Would the universally understood contours of such an indispensable safeguard have gone unmentioned in the state ratification debates? In the Federalist Papers? In the First Congress? And if they *did* go unmentioned, how could the Founders have forged a consensus across thirteen far-flung and very different colonies about which delegations, if any, violated the Constitution? At least some of our critics insist that the Constitution broke with the colonial-era practice of delegating legislative power.¹¹⁶ But if the Founders really meant to prohibit what previously had been routine, wouldn't someone during the drafting and ratification debates have attempted at least to sketch what these new constraints on delegation actually were?

Our critics seem to think that the nondelegation doctrine was simultaneously *foundational* and *unspoken*. (The first rule of nondelegation doctrine, apparently, was don't talk about nondelegation doctrine.) The more natural inference is that it didn't exist.¹¹⁷

114. Wurman, *supra* note 2, at 1534–35.

115. See *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (arguing that the nondelegation doctrine “safeguard[s] a structure designed to protect [the people’s] liberties, minority rights, fair notice, and the rule of law”).

116. Wurman, *supra* note 2, at 1496. Wurman’s affirmative evidence for the claim relies heavily on a brief aside from James Wilson at the Pennsylvania Ratifying Convention. *Id.* at 1529–30 (block-quoting the entire passage). The need to place elaborate exegetical weight on this sentence, in our view, speaks for itself. For now, note that Wilson’s invocation of “parliament *transfer[ing]* legislative authority” is just as easily (and we think better) read to invoke the Lockean anti-alienation principle. See Mortenson & Bagley, *Delegation*, *supra* note 1, at 299, 307–08, 312 (“Locke consistently uses ‘transfer’ in the ordinary seventeenth-century property sense of permanent alienation Scattered references to a Lockean anti-alienation view can . . . be found in the colonial, framing, and ratification records.”).

117. Professor Richard Epstein suggests this conclusion constitutes “intellectual surrender” because it fails to provide tools for applying the modern “intelligible principle” standard. Epstein, *supra* note 2, at 660. We’re not sure what to make of this suggestion; our goal has been to explore materials from the late eighteenth century that shed light on the contemporaneous understanding of the validity of administrative delegations. The modern understanding is beside the point.

To overcome that inference, our critics have adopted an unusual historiographic approach: They claim to read the shape of the nondelegation doctrine from the pattern of laws that were *not* enacted in the early Republic. If Congress never delegated the authority to adopt rules governing private persons, or if it never delegated the authority to make very important decisions, then the nondelegation doctrine must have prevented Congress from making such delegations.¹¹⁸ (Congress in fact delegated both types of authority, but we will indulge the counterfactual for now.) Like the prisoners in Plato's cave, originalists claim to know the doctrine not through direct observation, but from the shadows it casts on the statute books.

Our critics, however, can't infer from the absence of certain classes of statutes that the Founders tacitly agreed about the scope of the nondelegation doctrine. The reason is simple, even banal: Early Congresses had all sorts of reasons for not adopting statutes delegating various types of discretionary authority. Maybe its members wished to exercise the discretion themselves, whether for electoral reasons or as a matter of principle. Maybe its members believed that broad delegations make for bad policy in some contexts.¹¹⁹ Maybe some members had latent constitutional scruples about delegation, others did not, and a third group (perhaps a much larger group) had no view on the matter but preferred not to delegate for different reasons.

As Professor Nicholas Parrillo's work demonstrates, early Congresses passed relatively few laws of any kind directly regulating private persons.¹²⁰ Their disinterest can't be explained with reference to a shared belief in the nondelegation doctrine, since the doctrine would have posed no obstacle to the *legislative* adoption of rules for private conduct. The disinterest, instead, may be a testament to prevailing beliefs about the proper role of the federal government in the Founding Era. Those same prevailing beliefs supply the readiest explanation for the relative dearth of laws delegating discretionary authority to regulate private conduct.¹²¹ And

118. See, e.g., Hamburger, *Delegating or Divesting*, supra note 2, at 107 ("What is missing from the Mortenson and Bagley article is what Congress did not do. To be precise, the 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."); Wurman, supra note 2, at 1556 ("To prove the proposition advanced by Mortenson and Bagley[,] . . . they would have to uncover statutes . . . more like the following . . . '[t]he President may issue regulations carrying into effect any of the powers vested in Congress in Article I, Section 8.'" (last alteration in original)).

119. At least one of the present co-authors is pretty sympathetic to that concern as a policy matter!

120. See Parrillo, *Supplemental Paper*, supra note 1, at 21–25.

121. See, e.g., *id.* at 21 ("[T]he absence of such legislation delegating power to administrators may result simply from the paucity of such legislation, not from any supposed belief that delegation was peculiarly improper when it came to such legislation.").

if the shadows in the statute books can be easily explained without reference to the nondelegation doctrine, those shadows can supply no persuasive evidence of its existence.

It's true that early Congresses often spoke with fastidious particularity, especially when it came to customs statutes. We noted as much in our article.¹²² It doesn't follow, as Professor Jennifer Mascott argues, that the Founders believed the Constitution limited Congress's power to delegate.¹²³ Even today, Congress writes highly detailed statutes governing taxing or spending. (Just spend ten minutes with the Internal Revenue Code or the Medicare statute.) That's not because the Congress has been worried about a largely defunct constitutional doctrine. It's because members of Congress, with their various political and parochial interests, prefer to keep tight control over the purse strings. The Constitution may have "carefully constructed the federal government to provide significant protection for state interests,"¹²⁴ but that does not mean—or even suggest—that Congress acts unconstitutionally when it decides in a particular case that it best protects those interests by delegating.¹²⁵

122. Mortenson & Bagley, *Delegation*, supra note 1, at 332 ("When the First Congress thought particularized guidance important, it didn't hesitate to specify statutory requirements in elaborate detail—as often happened, for example, with customs duties.").

123. Mascott, supra note 2, at 1395–96.

124. *Id.* at 1395. The same point applies with equal force to Wurman's attempt to find "implicit evidence" for the nondelegation doctrine in Federalist No. 53, which extolls the virtues of legislative responsiveness to local conditions. See Wurman, supra note 2, at 1523. Locally responsive legislators may sometimes believe that delegating authority is a bad idea, but they may sometimes conclude that it is in their constituents' interest to delegate. In such a case, far from violating the principle of local responsiveness, delegation would vindicate it. The desire to maintain accountability is thus too ambiguous, without more, to supply evidence for the collective belief in a particular legal doctrine.

125. Mascott claims that "[c]ertain statements and actions from this era" suggest that "regulation by legislation was constitutionally required." Mascott, supra note 2, at 1395. That claim is unpersuasive. Mascott notes, for example, that some legislators, including James Madison, were so worried about Secretary Alexander Hamilton's influence that they did not want to empower him even to offer legislative recommendations. See *id.* at 1442. We noted the same in our article. See Mortenson & Bagley, *Delegation*, supra note 1, at 359. But the legislators linked their objections to the Origination Clause, not to anything that resembles today's nondelegation doctrine. See *id.* at 359. Even if the episode were telling, it would suggest the unconstitutionality of laws empowering officials to draft legislative recommendations—laws that would be constitutional under any modern formulation of the nondelegation doctrine.

Mascott also observes that Secretary Hamilton asked Congress for clarification of various matters, suggesting that the Founders "collectively believed that it was Congress's responsibility to change laws even for matters as relatively minor as slightly altering the location of the unloading of goods." Mascott, supra note 2, at 1445. But the fact that only Congress can change the law says nothing about whether a delegation of policymaking discretion is constitutional.

VI. FICTIONAL EXCEPTIONS, OVERFITTING, AND SPECIAL PLEADING

But let's join our critics in assuming that the pattern of early congressional legislation does reveal something important about the scope of the nondelegation doctrine. If so, what does it reveal?

A. *No Evidence for Categorical Exceptions*

Our critics claim to discern in the pattern an implicit constitutional ban on the delegation of authority to regulate private rights, to supervise military and foreign affairs, or to resolve important matters. The difficulty with these formulations, as we explained in our article, is that a number of delegations in the early Republic clearly violate them.¹²⁶ While we won't recapitulate our lengthy discussion of the point, consider just a few major obstacles of each of the major three claimed exceptions to nondelegation.

1. *Private Rights and Conduct.* — Some have argued that delegation is prohibited only where it implicates private rights and conduct. Text and history foreclose that notion—decisively. To begin, this artificial limitation cannot be reconciled with the text of Article I. The “legislative Powers” it confers include all forms of sovereign authority, affecting both public and private rights and drawing no distinction between them.¹²⁷ So too for the Constitution's express limitations on Congress's legislative powers.¹²⁸ It is simply not true, therefore, that “[w]hen it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons.”¹²⁹ To the contrary, nearly all references to “legislative power” in these sources merely say that it “is the power to make laws, or something to that effect,” without discussing (much less questioning) the legitimacy of rulemaking discretion under a duly enacted law.¹³⁰ More to the point, proponents of nondelegation have been unable to identify a single statement from the Founding Era that suggests any distinction in delegation limits between

126. See Mortenson & Bagley, *Delegation*, supra note 1, at 357–61 (discussing a bill that passed and drew criticism because it allowed the President to “raise a professional army of up to 20,000 troops”).

127. U.S. Const. art. I, §§ 1, 8 (granting regulatory authority over private-rights questions like commerce regulation and bankruptcy law as well as over public-law questions like the establishment of post offices and the declaration of war).

128. See *id.* § 9 (limiting regulatory authority over private-rights questions like habeas corpus and bills of attainder as well as over public-rights questions like port preferences and the appropriations process).

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

130. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 *Colum. L. Rev.* 2097, 2124 (2004); see also, e.g., *Legislative*, 2 Samuel Johnson's *Dictionary of the English Language* (6th ed. 1785) (defining the adjective solely as “[g]iving laws; lawgiving”); Parrillo, *Supplemental Paper*, supra note 1, at 5 n.7 (dissecting each citation offered for this definition in the *Gundy* dissent).

legislation that regulates private conduct and legislation that does not.¹³¹ We are certainly unaware of any such evidence.

Worse still, the historical record refutes claims that any such distinction mattered to the Founders. The most substantial debate over delegation occurred in the Second Congress, in response to a proposal to allow the President to decide the routes of federal post roads.¹³² That proposal involved government operations and benefits—not “rules of conduct governing future actions by private persons.”¹³³ As Professor Kevin Arlyck explains, “If there had been a consensus view that Congress could broadly delegate legislative authority to the executive when ‘benefits’ were at issue,” the objections raised to the proposal “would have been pointless.”¹³⁴ Additionally, “the proposal’s supporters would likely have invoked the exception, instead of defending the proposal on the ground they actually did.”¹³⁵ Meanwhile, Congress repeatedly delegated broad authority to fashion rules governing private conduct.¹³⁶ Yet these bills prompted few (or no) constitutional concerns, and none on the ground that authority over “private rights” could not be delegated.¹³⁷

2. *Military and Foreign Affairs.* — Another effort to reconcile early legislation with a nondelegation rule rests on the idea that Congress may delegate discretion “over matters already within the scope of executive power.”¹³⁸ Once again, no one articulated such a distinction in the Founding Era.¹³⁹ The concept is instead a modern creation, tracing its roots to a twentieth-century decision which does not actually support it.¹⁴⁰ Perhaps more important, the historical evidence that does exist shows that the Founding generation did not recognize any such distinction. Nearly all of the early objections to presidential delegations were made precisely *in* the context of bills implicating the military or foreign relations: a 1794 bill allowing the President to raise troops,¹⁴¹ a 1798 statute empowering

131. See Arlyck, *supra* note 1, at 289–90 (disputing “nondelegationist[.]” arguments and the sources cited to support such conclusions).

132. See 3 *Annals of Cong.* 229–30 (1791).

133. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

134. Arlyck, *supra* note 1, at 294.

135. *Id.*

136. See *supra* section VI.A.

137. See *supra* notes 127–129 and accompanying text.

138. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 *Mich. L. Rev.* 1223, 1260 (1985); see also *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (“Congress may assign the executive and judicial branches certain non-legislative responsibilities.”).

139. See Arlyck, *supra* note 1, at 289–90 (debunking the few citations that have been suggested as indicating such a belief).

140. *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 315 (1936) (upholding a delegation concerning trade with foreign nations but expressly not addressing whether a comparable domestic delegation would be invalid).

141. See *Mortenson & Bagley, Delegation*, *supra* note 1, at 361 n.471.

the President to raise a provisional army,¹⁴² and the notorious Alien Act.¹⁴³ But the bills' defenders never sought to rebut these claims by resorting to anything like the modern critics' "Article II-adjacent" exception.¹⁴⁴ In other words, the only affirmative evidence of politicians making nondelegation arguments in the early Republic contradicts the existence of this purported exception.

3. *"Important Subjects"*. — Other have claimed that the Constitution distinguishes between "important policy decisions," which Congress must resolve itself, and "filling up details and finding facts," which Congress may delegate.¹⁴⁵ This too lacks any basis in original meaning. Even as Congress enacted statute after statute granting immense discretion on crucial issues of national policy—and even as some lawmakers voiced reservations about certain delegations—no evidence has ever been unearthed to support a Founding Era commitment to an "important subjects" theory.¹⁴⁶ There is no record of anyone discussing delegation limits in terms of the subjective importance of the matters delegated. Indeed, efforts to turn up evidence of an "important subjects" doctrine at the Founding backfire. Wurman, for example, cites a single remark made in the Second Congress during the post-roads debate, which seemed to suggest that the routes of the roads were more "important" than the locations of the post offices along those roads.¹⁴⁷ But in the same breath, this speaker *foreclosed* any constitutional distinction based on importance: "[T]he Legislative body being empowered by the Constitution 'to establish post offices and post roads,' it is as clearly their duty to designate the roads as to establish the offices."¹⁴⁸ More broadly, as recapitulated below, the First Congress delegated major policy questions concerning the nation's most pressing issues, such as patent rights and the national debt, with little or no controlling guidance.¹⁴⁹ So a rule against delegating "important subjects" cannot stand alone; it works only in tandem with other artificial limiting principles like those discussed above.¹⁵⁰

142. *Id.* at 360–63.

143. *Id.* at 364–66.

144. See Arlyck, *supra* note 1, at 291 ("[P]roponents of this proposed legislation did not defend it on grounds of a delegation exception for military and foreign affairs."); Parrillo, Supplemental Paper, *supra* note 1, at 13 ("[A]ll known articulations of the non-delegation principle by federal lawmakers in the 1790s occurred in foreign, military, or non-coercive areas that today's nondelegation proponents consider exceptions to the doctrine.").

145. *Gundy v. United States*, 139 S. Ct. 2116, 2145, 2148 (2019) (Gorsuch, J., dissenting).

146. *Id.* at 2136 (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)).

147. See Wurman, *supra* note 2, at 1511 (quoting 3 *Annals of Cong.* 230 (1791) (statement of Rep. Livermore)).

148. 3 *Annals of Cong.* 229 (1791) (statement of Rep. Livermore).

149. See *infra* notes 150–152 and accompanying text.

150. E.g., Wurman, *supra* note 2, at 1538 (suggesting that "rules of private conduct" are inherently nondelegable "[i]mportant subjects").

Wurman's claim that Congress could delegate nonexclusive legislative powers, but not exclusive legislative powers—a line that (in his telling) tracks the distinction between “important subjects” and those “of less interest”—fares no better.¹⁵¹ To our knowledge, the terms “exclusive legislative power” and “nonexclusive legislative power” appear not once in the many thousands of pages recording the drafting of the Constitution, the ratification process, or the congressional debates in the country's first decade.¹⁵² And none of the few nondelegation objections actually raised

151. *Id.* at 1516–17, 1533–36.

152. A different term, “exclusive legislation,” was sometimes used to refer to Congress's constitutionally assigned power to exercise exclusive legislation over the capital district. See, e.g., 9 *Annals of Cong.* 2671 (1799) (statement of Rep. Baldwin); 1 *Annals of Cong.* 878 (1789) (Joseph Gales ed., 1834) (statement of Rep. Lawrence). The term was also used in the Fifth Congress when a delegate objected to efforts to defund the U.S. Mint, arguing that refusing to fund “a permanent organ in the Government” contravened the House's duty: “[T]hough it cannot repeal, it may do what shall amount to a repeal, which is the assumption of a power almost equal to that of *exclusive legislation*.” 5 *Annals of Cong.* 258 (1796) (statement of Rep. Murray) (emphasis added).

In the first few Congresses, the term “exclusive power” cropped up from time to time with reference to the House's authority under the Origination Clause. See 3 *Annals of Cong.* 447 (1792) (statement of Rep. Findley) (“[T]he House of Representatives, whose duty it is exclusively to prepare or originate revenue laws.”); 1 *Annals of Cong.* 517 (1789) (Joseph Gales ed., 1834) (statement of Rep. White) (“[T]his House has the exclusive power of originating money bills . . .”). “Exclusive power” was used again in the Fifth and Sixth Congresses in connection with funding disputes at the intersection of the treaty power and the appropriations power. In those debates, delegates referred to various “exclusive powers” that the Constitution assigned either to Congress or to the President. During the Sixth Congress, for example, Representative Gallatin said that “[i]t was true that [the President] had the general power of appointing ambassadors, but it was not less true that the Legislature had the sole and exclusive power to provide for all the expenses of the Union.” 7 *Annals of Cong.* 885 (1798) (statement of Rep. Gallatin); see also *id.* at 1120 (noting that “the Constitution has expressly and exclusively vested in Congress the power of raising, granting, and directing the application of money”). Representative Gallatin and others were arguing over whether Congress was “bound” to appropriate money to support offices that it had created, “without having a right to exercise their own discretion.” *Id.* at 1120 (statement of Rep. Livingston). The discussion never touched on which powers could be delegated and which could not.

Other scattered uses of “exclusive power” similarly refer to the Constitution's assignment of authority but include no discussion of which of those powers could be delegated. See 8 *Annals of Cong.* 1221 (1798) (statement of Rep. Bayard) (saying that the “exclusive power to declare war is vested in Congress”); *id.* at 2159 (“[A]s they had the exclusive power to establish post roads, they had made it penal to rob the mail . . .”); *id.* at 2262 (“[T]here is no court of common law which can give judgment of disqualification [in cases of impeachment], which power exclusively belongs to this honorable body . . .”); 5 *Annals of Cong.* 490 (1796) (statement of Rep. Hartley) (noting that “the power of war was exclusively vested in Congress” but that it did not “seem possible[] to draw any line between that and other enumerated powers”).

In 1799, Representative Gallatin objected to a section of a bill that would have allowed the President, “if he shall judge it expedient and for the interest of the United States,” to issue a proclamation suspending all commercial intercourse with the West Indies or anywhere else French ships might be built or repaired. 9 *Annals of Cong.* 2780 (1799). Did Congress mean, Gallatin asked, “to place an unlimited confidence in the President on the

in the early Republic rested on the supposed distinction between exclusive and nonexclusive powers. The contemporaneous debates were not structured as lawyerly arguments about whether bills governing the postal roads¹⁵³ or the provisional army touched on “exclusive legislative powers” (or about “important subjects” or any other similar formulation). Instead, a small minority of opponents made opportunistic invocations of some sort of nondelegation instinct that were met with spluttering disbelief by the bill’s proponents. That’s not evidence of a shared agreement, even at a high level of generality, that some important powers were exclusively legislative.

B. *Overfitting and Special Pleading*

Beyond phantom exceptions at a category level, the critics also resort to remarkably candid special pleading on a statute-by-statute basis. To make the debate concrete, consider four examples:

- The First Congress readopted the Northwest Ordinance, which gave to the appointed governor of the Northwest Territory and three federal judges the power to issue the territory’s *entire* civil and criminal code “as may be necessary, and best suited to the

subject of commerce, which the Constitution has *exclusively placed* in our hands?” *Id.* at 2783 (emphasis added). “If so,” he said “Congress might as well pass a law for the President to do whatever he thinks proper with respect to our commerce.” *Id.* at 2784. Gallatin was mainly pressing a policy objection:

Could it be supposed that members on this floor who represent the western counties of Pennsylvania, Virginia, and the States of Kentucky and Tennessee, should be silent when a provision is proposed to the House which might go to prevent those parts of the country from exporting a bushel of wheat or a barrel of flour?

Id. at 2783; see also *id.* at 2788 (statement of Rep. Claiborne) (saying he “saw no necessity for ceding to the President such general powers; on the contrary, the cession appeared to him highly improper”). Gallatin’s only legal objection was rooted not in the nondelegation doctrine but in “the law of nations”: If the President restricted trade with Dutch possessions in the West Indies, Gallatin argued, it would violate a most-favored-nations treaty with Holland. *Id.* at 2784 (statement of Rep. Gallatin). Congress as a whole voted down Gallatin’s motion to strike the offending portion of the law. *Id.* at 2785–86, 2789.

153. In his discussion of the post-roads debate, Wurman characterizes statements that Congress shouldn’t delegate the power to designate post roads as claims about the unconstitutionality of doing so. See Wurman, *supra* note 2, at 1507–12. Consider a statement from Representative Thomas Hartley, for example: “We represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to delegate the power to any other person.” 3 *Annals of Cong.* 231 (1791) (statement of Rep. Hartley). Wurman acknowledges that it would be nonsense to read Hartley as making a legal claim that the Constitution requires Congress to decide every question it is capable of resolving—“[t]hat is not a plausible test for the non-delegation doctrine.” Wurman, *supra* note 2, at 1509. But he still insists that “Hartley believed that as a constitutional matter there was some limit to what Congress could delegate.” *Id.* Why? The better reading is that Hartley meant what he said—that Congress “ought not to delegate” in this context. 3 *Annals of Cong.* 231 (1791) (statement of Rep. Hartley).

circumstances of the district,” with no other guidance whatsoever.¹⁵⁴

- To foster industrial innovation, the First Congress adopted a patent law giving the secretary of state, the secretary of war, and the attorney general the power to grant patents to new inventions whenever they “deem the invention or discovery sufficiently useful or important.”¹⁵⁵
- The First Congress forbade trade or intercourse with American Indian tribes without a license—and required all licensees to be “governed . . . by such rules and regulations as the President shall prescribe.”¹⁵⁶
- To finance possible war with France, the Fifth Congress adopted a direct tax on all real estate in the United States and created a federal board of tax commissioners with authority to adjust local valuations “as shall appear to be just and equitable.”¹⁵⁷

None of these broad delegations, as well as others we describe, can be squared with the various verbal formulations of the nondelegation doctrine on offer.¹⁵⁸ Yet they occasioned not a whisper of a nondelegation-related objection in the recorded debates over their adoption—and this at a time when it took almost nothing to elicit a flood of constitutional arguments that might kindly be called “inventive.”¹⁵⁹

154. Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51.

155. Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (repealed 1793). For more on the Act, see also, e.g., Chabot, *supra* note 1, at 136–42.

156. Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

157. Act of July 9, 1798, ch. 70, § 22, 1 Stat. 580, 589.

158. Hamburger claims that we do “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.” Hamburger, *Delegating or Divesting*, *supra* note 2, at 107. This is false. As we discussed at length in our article, each of the four laws listed above applied within the nation’s borders, governed domestic affairs, and entailed the adoption of binding rules or adjudications. Mortenson & Bagley, *Delegation*, *supra* note 1, at 334–42, 358. Hamburger dismisses these laws as irrelevant for various reasons that, as we will discuss below, are either inaccurate or not rooted in the historical record.

159. These straight-faced gems dot the record. Professor Richard Primus takes evident pleasure in describing James Madison’s journey from arguing in 1789 that designating the capital district by statute would violate the Constitution to arguing in 1790 that the Constitution *required* that the capital district be designated by statute. Richard Primus, “The Essential Characteristic”: Enumerated Powers and the Bank of the United States, 117 *Mich. L. Rev.* 415, 481–84 (2018). As he explains, “Madison was deeply invested . . . in securing a location in or near Virginia for the permanent seat of government,” and so “[w]hen confronted with legislation that threatened the outcome he sought, he marshaled as many arguments as time and effort permitted.” *Id.* at 483. At first, “none of those arguments rested on the text of the Constitution, probably because nothing in the text of the Constitution seemed to speak to the issue.” *Id.* Unfortunately for Madison, “none of his arguments worked. So in due course, he came forth with a different kind of argument—an argument involving a reading of the Constitution’s text—that he probably thought up in the meantime.” *Id.* at 483–84. As Primus concludes: “It was a clever argument. But it was also a tendentious argument, and Madison’s fellow representatives didn’t buy it.” *Id.* at 484.

Undeterred, our originalist critics add provisos and exceptions to their theories that serve to distinguish these examples away, in at least one case urging that “the single nondelegation doctrine should be replaced with a series of nondelegation doctrines, each applying to a different congressional power.”¹⁶⁰ But it’s not sufficient for our critics to articulate a nondelegation doctrine (or doctrines?) that can accommodate all the relevant data. That’s a trivial exercise. For any delegation that seems to run counter to your preferred theory, you can simply add another proviso or exception. The obvious risk is what statisticians call overfitting—creating a complex model that perfectly explains the existing data while failing to capture the simpler dynamic that is driving the underlying phenomenon. It’s the same problem that early astronomers encountered when they devised ever more elaborate theories in their zeal to defend the view that the sun revolved around the earth.¹⁶¹

To avoid falling into that trap, our critics must do more than show that *they* can distinguish away each of the delegations we identify. They must demonstrate that *the Founders* believed the nondelegation doctrine had the shape they claim it did. That requires evidence, and our critics have none.

Take the First Congress’s delegation to the governor and judges of the Northwest Territory to craft the civil and criminal law for the territory—a delegation that was repeated numerous times in the following decades. Wurman claims that territorial delegations, as well as similarly broad delegations to the government of the District of Columbia, were permissible because the territories and the District of Columbia “do not exercise the judicial power ‘of the United States,’ nor the legislative or executive power of the United States.”¹⁶² That is a counterintuitive and very specific claim about the Founders’ beliefs: that various exercises of federal power were, for some reason, not exercises of the power of the United States. But Wurman offers no statement from any Founder suggesting that he believed such a thing, much less that the distinction served to justify a delegation that would otherwise have been impermissible.¹⁶³

Hamburger says something similar: “[F]ar from revealing that Congress may delegate its power to the national Executive, the treatment of these places merely shows that Congress could recognize the power of

160. Squitieri, *supra* note 2, at 1243; see also Natelson, *supra* note 2 (“[T]he search for a single ‘non-delegation’ principle applicable to all congressional powers is a futile one. Instead, the scope of permissible delegation of any particular congressional power must be sought in the meaning of the words describing that power.”).

161. Thomas Kuhn, *The Structure of Scientific Revolutions* 67–68 (2d ed. 1962).

162. Wurman, *supra* note 2, at 1543–44 (quoting William Baude, *Adjudication Outside of Article III*, 133 *Harv. L. Rev.* 1511, 1523 (2020)).

163. *Id.* at 1543. The Supreme Court has recently offered a similarly evidence-free claim about the irrelevance of American tradition outside of the states. See *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, No. 20-843, slip op. at 58 (U.S. June 23, 2022) (dismissing evidence undercutting the court’s factual claim because it came from “the Western Territories”).

the people in these localities to govern themselves through local bodies.”¹⁶⁴ But Hamburger identifies no contemporary statement that territorial and municipal delegations were thought to be constitutionally distinct from more conventional delegations to the executive branch.

Now consider the first patent law. Hamburger claims that patents, “at least formally, were privileges, not binding regulations.”¹⁶⁵ Wurman admits that the law left “a lot of discretion” to a group of three cabinet officials to craft general rules but muses that the extent of their discretion was permissible: “Congress cannot delegate to the President the decision whether to establish a patent system—that is too important—but some additional leeway might be permissible with respect to public privileges because they are *less* important than private rights.”¹⁶⁶ These arguments ignore the fact that issuing a patent does not merely confer a public privilege on a patent holder, but also prohibits infringement by private parties—a clear infringement on private rights.

More to the point, neither Hamburger nor Wurman cites any evidence that the Founders thought that the distinction between public privileges and private rights mattered to the question of delegation, either with regard to the patent laws or in general. We have looked in vain to find such evidence. The term “public privilege” was apparently *never* used in the many thousands of pages of early congressional debates. Scattered references to “private rights” appear but, at least that we have seen, never in connection with delegation.¹⁶⁷ For what is supposed to be a central organizing principle of the Constitution, the phrase “private right” is most notable for how rarely it shows up.

Or take the law prohibiting trade with Native American tribes except as the President allowed. Hamburger accuses us of “tak[ing] an exceptional situation involving cross-border conduct to be suggestive of what was normal in national regulation of domestic matters,” a claim he says “is

164. Hamburger, *Delegating or Divesting*, supra note 2, at 105 n.75.

165. *Id.* at 105 n.76.

166. Wurman, supra note 2, at 1548–49.

167. See, e.g., 7 *Annals of Cong.* 1183 (1798) (statement of Rep. Harper) (objecting to the House’s use of its appropriation power to undermine the authority of the President and the Senate in its relations with France, creating a situation where “principles are set at naught, caprice is law, and the whim of the moment disposes of all public and private rights”); 3 *Annals of Cong.* 459 (1792) (distinguishing between the “private right” to vindicate a “private injury” to a “private man” and the “public and indispensable duty” to vindicate the same injury to a “public man”); 3 *Annals of Cong.* 304 (1792) (reporting an objection to a bill allowing stages to carry passengers because “it would be unjust, as it would interfere with the private rights of individuals, who . . . enjoy the exclusive privilege of driving stages”); 2 *Annals of Cong.* 1252 (1790) (statement of Rep. Boudinot) (objecting to a proposal to reduce the amount paid on the United States’ debts and noting that that “the division of Congress into two branches” was meant to “secure personal property and private rights; but only while it does this shall we acquire and possess the public confidence”); 1 *Annals of Cong.* 752 (1789) (Joseph Gales ed., 1834) (statement of Rep. Sherman) (referring to England as a country “where they paid considerable attention to private rights” in objecting to what became the Third Amendment).

simply false.”¹⁶⁸ Unfortunately, it’s Hamburger’s characterization of the law as regulating “cross-border conduct” that is false. As we pointed out, the rules adopted by President George Washington to implement the law explicitly applied to *non*-Native people “within the limits of the U. States” and restricted trade with tribes fully within state borders.¹⁶⁹ Nor does Hamburger supply evidence—either in his book or in his responses to us—suggesting that anyone at the Founding agreed with his (incorrect) categorization of the law, much less that the cross-border label had anything to do with the propriety of the delegation. The invented category allows Hamburger to wave the example away, but it’s not grounded in history.

For his part, Wurman acknowledges that “[t]his was indeed a broad statute to regulate private conduct,” but he says that “the special context of this delegation militates against drawing any general conclusion from it.”¹⁷⁰ Again, no one at the time said that the “special context” of the delegation was what made it permissible. Nor is Wurman correct about the ways in which the delegation was supposedly special. He claims that the delegation involved “the President’s Treaty or Commander-in-Chief Powers,”¹⁷¹ but it didn’t. It was a regulation of private commercial activity. Though the trade restriction served to reduce friction with the Indian tribes, the law in question had nothing to say about treaty making or military conduct.¹⁷² Wurman cites no contemporary who characterized the law that way.

Finally, consider the direct tax of 1798. Wurman says that the delegation to make “just and equitable” adjustments to the assessed value of houses wasn’t very important.¹⁷³ In his view, Congress itself still made the most significant decisions—the overall amount that the tax would bring in; that the tax would be assessed against slaves first, then houses, then

168. Hamburger, *Delegating or Divesting*, *supra* note 2, at 105 n.77.

169. Mortenson & Bagley, *Delegation*, *supra* note 1, at 341. The law explicitly allowed the President, “if he may deem it proper,” to permit “intercourse without a license” with “tribes surrounded in their settlements by the citizens of the United States.” Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137.

170. Wurman, *supra* note 2, at 1543. John Harrison argues that the Indian Commerce Act can be “readily characterized as government administration of a public right—a commons,” which he then argues fits within a distinctive category of “executive decisions in which officials exercise rights of the government that are the kind of rights that both private people and governments can have.” John Harrison, *Executive Administration of the Government’s Resources and the Delegation Problem*, *in* *Administrative State Before the Supreme Court*, *supra* note 2, at 232, 234. He concedes that “as far as I know, no one at the time said that delegation was permissible in a licensing system because licensing resembles public ownership.” *Id.* at 234.

171. Wurman, *supra* note 2, at 1543.

172. See § 1, 1 Stat. at 137. The law uses the word “treaty” just once, but not in connection with the delegated licensing authority. Instead, the law invalidated any sales of land from Indians “unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.” *Id.* § 4, 1 Stat. at 138.

173. Wurman, *supra* note 2, at 1550.

land; and that houses would be taxed separately from land.¹⁷⁴ Parrillo has written at length about how the law nonetheless left tax officials with wide, policy-laden discretion of a type that is difficult to reconcile with meaningful limits on the ability of a legislature to delegate.¹⁷⁵ We won't rehearse Parrillo's arguments here, except to note that nowhere in the extensive debates over the tax did any contemporary suggest that Congress was constitutionally compelled to resolve the important decisions (or the policy decisions, or decisions involving private rights, or decisions that were exclusively legislative), much less probe where the line between important and unimportant decisions might actually lie.¹⁷⁶

Again and again, our critics speculate about what Congress might have believed to dismiss evidence about what it actually did. At least some of the distinctions they draw appear to have been manufactured to align the evidence with a pre-established premise that the nondelegation doctrine both existed and did important work. And while our discussion in this Essay focuses only on four especially broad delegations, the point generalizes to other delegations that we discussed in our earlier article but that our critics dismiss as uninformative. It's a textbook case of overfitting.

VII. *WAYMAN V. SOUTHARD*

Against all of this, some of our critics hold fast to two paragraphs of Chief Justice John Marshall's opinion in the 1825 case of *Wayman v. Southard*.¹⁷⁷ They're right that, shorn of context, one sentence of dictum from the case sounds like pretty good support for some kind of constitutional limit on delegation. In the course of holding that Kentucky could not dictate rules of procedure to the federal courts, Marshall discussed the Judiciary Act's authorization of federal courts to create rules of civil procedure.¹⁷⁸ It was that point that he observed, as an aside: "It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative."¹⁷⁹

That dog won't hunt. In the first place, originalists ought to be ginger about placing much weight on a Delphic decision issued thirty-six years after ratification.¹⁸⁰ A lot happened in the United States in three decades, including the rise of political parties, the Jeffersonian Revolution, the Louisiana Purchase, and the War of 1812. A lot happened in constitutional

174. *Id.*

175. Parrillo, Critical Assessment, *supra* note 1, at 1345–90.

176. *Id.* at 1312.

177. 23 U.S. (10 Wheat.) 1, 42–43 (1825); Epstein, *supra* note 2, at 669; Gordon, *supra* note 2 (manuscript at 4); Wurman, *supra* note 2, at 1516–17.

178. Judiciary Act of 1789, Pub. L. No. 1-20, § 17, 1 Stat. 73, 83.

179. *Wayman*, 23 U.S. (10 Wheat.) at 42–43.

180. Rappaport is alone among the originalist defenders of the nondelegation doctrine in sounding a note of caution: Because *Wayman* came so late, "[i]t cannot be viewed as a contemporary exposition of the Constitution." Rappaport, *supra* note 2, at 207.

law as well, including pitched battles over implied powers, judicial review, and internal improvements.¹⁸¹ As evidence of a universally held belief in 1789, *Wayman* leaves much to be desired.¹⁸²

Even if we ignore the anachronism, Marshall's opinion is most telling in how it casually explodes the argument—embraced by the current Supreme Court¹⁸³ and made the cornerstone of at least some of our critics' arguments¹⁸⁴—that Congress's legislative powers can never be delegated. Marshall didn't see it that way. To the contrary, he characterized the Judiciary Act's delegation of certain authority to the federal courts—specifically, the power to alter “the modes of proceeding in suits at common law”—as “*this delegation of legislative power.*”¹⁸⁵ Marshall wasn't making any grand point here; it was an offhand observation. He saw nothing noteworthy in the fact that Congress had delegated legislative power because there was nothing noteworthy about it. Congress did it all the time.

At any rate, *Wayman* cannot bear the weight our critics place upon it. It is not correct that *Wayman* “upheld the statute before it because Congress had announced the controlling general policy when it ordered federal courts to follow state procedures, and the residual authority to make ‘alterations and additions’ did no more than permit courts to fill up

181. See generally Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815–1848* (2007) (discussing judicial review, implied powers of the government, and internal improvements within the United States); Gordon S. Wood, *Empire of Liberty: A History of the Early Republic, 1789–1815* (2009) (discussing implied powers of the government and judicial review).

182. The use of nineteenth-century material to substantiate claims about eighteenth-century beliefs is especially characteristic of Aaron Gordon's approach to originalism. In responding to the broad delegations concerning the District of Columbia, for example, Gordon notes that several mid-nineteenth-century sources “essentially conclud[ed] (correctly, if unsatisfyingly) that delegations of authority to local governments were validated by antiquity.” Gordon, *supra* note 2 (manuscript at 30–31) (citing an 1833 case from the Circuit Court for the District of Columbia; various state court cases from 1828, 1853, and 1855; and an 1868 treatise). Two other cases conclude that territorial governments aren't subject to the full run of constitutional rules, though neither case addresses territorial delegations. See Gordon, *supra* note 2 (manuscript at 30) (citing cases from 1828 and 1850). But none of this speaks to the Founders' views in 1789. Cf. Parrillo, *Critical Assessment*, *supra* note 1, at 1298 (observing that “the Supreme Court's original-meaning case law . . . has often assigned much weight to statutes enacted in the period from Congress's first session in 1789 through the very early 1800s”). Indeed, it is telling that no one present in the immediate aftermath of ratification felt the need to offer any distinctions, “unsatisfying” or otherwise, to justify territorial or municipal delegations. Only once the nondelegation doctrine became an established (albeit recessive) part of state constitutional law does it seem that the doctrinal tension needed to be explained away.

183. See *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 472 (2001) (stating that the Vesting Clause “permits no delegation of [legislative] powers”).

184. See, e.g., Gordon, *supra* note 2 (manuscript at 3); Hamburger, *Delegating or Divesting*, *supra* note 2, at 91–92 (arguing that “the historical evidence” does not support the conclusion that “the Constitution really permit[s] congressional delegation of legislative powers”).

185. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 47–48 (1825) (emphasis added).

the details.”¹⁸⁶ *Wayman* explained, rather, that “the right of the Courts to alter the[ir] modes of proceeding . . . *does not arise* in this case,” because “[t]he question really adjourned” was whether newly enacted state laws could indirectly dictate those procedures.¹⁸⁷

The point of contention in the case, in other words, was not whether Congress could delegate legislative power as a general matter, but whether the Judiciary Act should be read to require state law to govern the execution of judgments in federal courts.¹⁸⁸ To this, Marshall offered a categorical no: “The State assemblies do not constitute a legislative body for the Union. They possess no portion of that legislative power which the constitution vests in Congress, and cannot receive it by delegation.”¹⁸⁹ Indeed, Marshall seemed to have understood *Wayman* chiefly to be a case about federalism, not the separation of powers.¹⁹⁰ Justice Joseph Story, who joined the opinion, read *Wayman* the same way: It established the principle that Congress “cannot delegate to any state authority any control over the national courts.”¹⁹¹

186. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. (10 Wheat.) at 31).

187. *Wayman*, 23 U.S. (10 Wheat.) at 48 (emphasis added).

188. *Id.* at 21 (framing the case as involving the claims “that Congress has no power over executions issued on judgments obtained by individuals; and that the authority of the States, on this subject, remains unaffected by the constitution”).

189. *Id.* at 48. Compare this 1820s hesitation about delegating federal authority to states with the traces of Founding generation hesitancy about delegating federal authority to private actors. See Richard Primus & Roderick M. Hills, Jr., *Suspect Spheres, Not Enumerated Powers: A Guide for Leaving the Lamppost*, 119 *Mich. L. Rev.* 1431, 1470–86 (2021) (tracing the historical evolution of the corporate nondelegation doctrine from the Founding and the Jacksonian era to the post-Civil War era); see also *Case of Proclamations* (1610) 77 Eng. Rep. 1352, 1353–54; 12 *Co. Rep.* 74, 75–76 (ruling that the King’s Proclamation on regulating private merchants was “against the law”); Swati Srivastava, *Corporate Sovereign Awakening and the Making of Modern State Sovereignty: New Archival Evidence From the English East India Company*, 76 *Int’l Org.* 690, 691–93 (2022) (explaining that the British East India Company’s sovereign governance authority shifted from a privilege delegated by the Crown to a self-possessed right). There’s a lot more to say about the political theory arguably underlying these hesitations, but it is something quite distinct from hesitations about delegating authority from the legislature to the executive within the same government.

190. *Wayman*, 23 U.S. (10 Wheat.) at 50 (“The right of Congress to delegate to the Courts the power of altering the modes (established by the Process Act) of proceedings in suits, has been already stated; *but, were it otherwise, we are well satisfied that the State legislatures do not possess that power.*” (emphasis added)).

191. 2 Joseph Story, *Commentaries on the Constitution of the United States*, ch. XXXVIII, § 1759, at 539 (Melville M. Bigelow ed., 5th ed. 1891). Gordon reads two opinions from Story in the 1830s as supporting the nondelegation doctrine. See Gordon, *supra* note 2 (manuscript at 5) (discussing *United States v. Knight*, 26 F. Cas. 793 (Me. 1838) and *Hobart v. Drogan*, 35 U.S. (10 Pet.) 108 (1836)). As in *Wayman*, however, the cases involved federal legislation that arguably incorporated features of state law. It was the purported delegation to *states* that worried Story. *Knight*, 26 F. Cas. at 797 (“I entertain very serious doubts, whether congress does possess a constitutional authority *to adopt prospectively state legislation*

Elsewhere in his opinion, Marshall wrote that Congress has wide authority to delegate to the judiciary “powers which the legislature may rightfully exercise itself.”¹⁹² It’s in that section that he announced, without citation, that Congress cannot delegate “powers that are strictly and exclusively legislative.”¹⁹³ Marshall then suggested that the line between the two may lie between “those important subjects”¹⁹⁴ and “those of less interest”¹⁹⁵—offering no citation, no examples of what those might be, or even any indication of what qualities are relevant. Read in context, Marshall may have meant nothing more than that Congress cannot grant to the states the “exclusive” or “important” power to superintend the federal courts. Or maybe he meant to go further; it’s hard to say, since he offered no authority for the claim and instead “laid down [these] constitutional principles of first importance as a matter of mere fiat,” as Professor David Currie tartly puts it.¹⁹⁶ At the same time, Marshall openly admitted that any such line between powers that Congress could and couldn’t rightfully delegate “has not been exactly drawn,” which only reinforces the point that the Founders lacked a common vocabulary about which delegations, if any, were beyond the constitutional pale.¹⁹⁷

Undeveloped, ambiguous dicta in a case about federalism delivered almost four decades after the Founding does not provide a strong foundation for originalist claims about the nondelegation doctrine. But set all that aside. If close examination of cases from the 1820s teaches us something important about the nondelegation doctrine in 1789, our critics overlook a more significant piece of evidence: Justice Story’s opinion for a unanimous court in *Martin v. Mott*,¹⁹⁸ issued just two years after *Wayman v. Southard*.

Some background is in order. As we discussed in our original article, the most extensive nondelegation debate in Congress’s first decade arose in connection with a law authorizing the President to raise a provisional army in preparation for possible war with France. Republican opponents of the legislation, Albert Gallatin chief among them, raised constitutional objections to the delegation. Unimpressed, Congress passed a law empowering the President to raise an army whenever he was of the “opinion”

on any given subject; for that, it seems to me, would amount to a delegation of its own legislative power.” (emphasis added)); *Hobart*, 35 U.S. (10 Pet.) at 120 (declining to decide whether “the act of Congress, so far as it adopts the future laws to be passed by the states on the subject of pilotage, is unconstitutional and void; for Congress cannot delegate their powers of legislation to the states” (emphasis added)).

192. *Wayman*, 23 U.S. (10 Wheat.) at 43.

193. *Id.* at 42–43.

194. *Id.* at 43.

195. *Id.*

196. David P. Currie, *The Constitution in the Supreme Court*, 49 U. Chi. L. Rev. 646, 715 (1982).

197. *Wayman*, 23 U.S. (10 Wheat.) at 43.

198. 25 U.S. (12 Wheat.) 19 (1827).

that there was “imminent danger of . . . invasion.”¹⁹⁹ Gallatin grouched that the “imminent danger” language was unconstitutional in that “it left it to the opinion of the President to decide the proper time of raising an army.”²⁰⁰

Thirty years later, a nearly identically worded delegation came before the Supreme Court.²⁰¹ A New Yorker named Jacob Mott had been called up for militia service pursuant to a 1795 statute authorizing the President to call forth the militia whenever the United States “shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe.”²⁰² After refusing to serve, Mott was court-martialed and fined. Upon his failure to pay, his goods were forfeited. Mott sued to recover his goods, arguing that, because no invasion was imminent, he should never have been called up.²⁰³

To our knowledge, *Martin v. Mott* is the only U.S. Supreme Court case involving statutory language from the 1790s that was criticized at the time of its adoption as a violation of the nondelegation doctrine. The case raised especially salient constitutional fears given the Founders’ general abhorrence of standing armies. Yet Justice Story, writing for a unanimous Court, found “no ground for a doubt on this point,” summarily rejecting the claim that Congress could not delegate the authority to the President to raise the militia.²⁰⁴ For starters, Congress plainly had the power to do so in its own right: “It has not been denied here, that the act of 1795 is within the constitutional authority of Congress, or that Congress may not lawfully provide for cases of imminent danger of invasion.”²⁰⁵ Indeed, the Court observed, “One of the best means to repel invasion is to provide the requisite force for action before the invader himself has reached the soil.”²⁰⁶ The Court then acknowledged the (obvious) fact that should have been fatal to the delegation on many modern nondelegation theorists’ account of constitutional constraint:

*The power thus confided by Congress to the President, is, doubtless, of a very high and delicate nature. A free people are naturally jealous of the exercise of military power; and the power to call the militia into actual service is certainly felt to be one of no ordinary magnitude.*²⁰⁷

But the Court didn’t even pause on the constitutional question of whether delegating such a critical authority was permissible:

199. Act of May 28, 1798, ch. 47, § 1, 1 Stat. 558, 558.

200. 8 Annals of Cong. 1632 (1798) (statement of Rep. Gallatin).

201. See *Martin v. Mott*, 25 U.S. (12 Wheat.) 19, 32 (1827) (“[T]he same principles are sought to be applied to the delegation and exercise of this power . . .”).

202. Act of Feb. 28, 1795, ch. 36, § 1, 1 Stat. 424, 424.

203. *Martin*, 25 U.S. (12 Wheat.) at 28.

204. *Id.* at 29.

205. *Id.*

206. *Id.*

207. *Id.* (emphasis added).

It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the constitution itself. In a free government, the danger must be remote, since . . . the frequency of elections, and the watchfulness of the representatives of the nation, carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.²⁰⁸

In weighing the historical evidence, Marshall's musings about "important subjects" must be weighed against Story's conviction that "there is no ground for a doubt" about Congress's power to delegate powers "of a very high and delicate nature" and "of no ordinary magnitude"—even when traditional fears of executive power were at their apex, and even when there actually *had* been contemporaneous constitutional objections to the delegation in question. It must be weighed, too, against Story's view that the proper remedy for the risk that the President might abuse his delegated powers is *political* in nature—"the frequency of elections" and the "watchfulness of the representatives of the nation"—not *judicial*.

The two passages could perhaps be reconciled. Maybe calling up the militia in response to an imminent invasion was not an "important subject" within the meaning of *Wayman*, despite Story's description of the power as "doubtless, of a very high and delicate nature." Maybe the delegation was sufficiently cabined to pass muster. What is certain is that Story did not reference *Wayman* or otherwise signal that the line *Wayman* drew between "important subjects" and "those of less interest" was of any doctrinal significance.²⁰⁹ That's probably because Story, like Marshall, saw *Wayman* as a case about federalism, not delegation.²¹⁰ But whatever the reason, Story's approach to the constitutional question in *Martin* undermines our critics' assumption that *Wayman* drew on a shared, recognized framework for evaluating claims about the unconstitutionality of legislative delegations.

CONCLUSION

We end where we began: There was no nondelegation doctrine at the Founding, and the question isn't close.

What that implies about the doctrine today will depend on your methodological commitments. Originalists generally believe that the Constitution's public meaning at the time of ratification ought to bind modern jurists and other constitutional actors. On that view, it would seem that the invention of nondelegation doctrine in the nineteenth century is

208. *Id.* at 32.

209. See Parrillo, *Critical Assessment*, *supra* note 1, at 1345–90.

210. *Id.*

every bit as unjustified as the invention of substantive due process in the twentieth.²¹¹

For those with different methodological commitments, the history we've canvassed may not be dispositive. Perhaps you're persuaded that the nondelegation doctrine ought to be read into the Constitution, particularly given the size and power of the modern administrative state. Perhaps you think that Congress has fobbed off too much responsibility for making the hard choices onto relatively unaccountable administrators and that the courts ought to do something about it.

We have no quarrel with that here. What we object to, instead, is the ahistorical attempt to link the nondelegation doctrine to the hallowed narrative of the Constitution's creation. Doing so enables the Supreme Court to assume a false guise of judicial modesty: The Founders made us do it. But there's nothing modest about what at least some members of the Supreme Court seem poised to do. Invigorating the nondelegation doctrine would arm the courts with the poorly defined power to strike down laws that, in their judgment, delegate too much power or power of the wrong kind. Whether that's a positive development will depend on your views about democracy, administrative power, and judicial review. But the original public meaning of the Constitution has nothing to do with it.

211. See *Dobbs v. Jackson Women's Health Org.*, No. 19-1392, slip op. at 13 (U.S. June 24, 2022) ("[W]hen the Court has ignored the 'appropriate limits' imposed by 'respect for the teachings of history,' it has fallen into the freewheeling judicial policymaking that characterized discredited decisions such as *Lochner v. New York*." (citations omitted) (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion))).