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SYMPOSIUM: A DISCUSSION ON THE NONDELEGATION AND CHEVRON DEFERENCE DOCTRINES

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Editor's Note

It is my honor to introduce *Chapman Law Review's* third Issue of Volume Twenty-Four. This Issue consists of submissions for our 2021 *Chapman Law Review* Symposium: "A Discussion on the Nondelegation and Chevron Deference Doctrines." This year's Symposium was sponsored by Chapman University Dale E. Fowler School of Law's Constitutional Jurisprudence Clinic's Separation of Powers Project.

This Issue opens with an Article by Mrs. Bethany Ring, a graduate of the Chapman University Dale E. Fowler School of Law and previous member of the *Chapman Law Review*. The Article presents research Mrs. Ring conducted in an effort to fill an empirical study void of the district court applications of the *Chevron* deference doctrine. Her Article concludes that for cases which apply the *Chevron* deference two-step analysis, the levels of rigor with which each step is applied varies significantly within the district courts themselves, from no discussion to full discussion, and equally varies among the respective circuit court groupings.

The next Article in this Issue is written by Professor Anthony Caso, a Chapman University Dale E. Fowler School of Law professor. Professor Caso authored this Article to assist advocates who find themselves fighting against *Chevron* deference. After a brief discussion of how *Chevron* deference works, Professor Caso's Article examines the problem of separation of powers that is inherent in the *Chevron* deference doctrine. His Article then lays out how to attack the *Chevron* deference doctrine when it is asserted as a defense by agencies.

Esteemed constitutional law scholar, Professor Richard Epstein is the author of the next Article in this Issue. Professor Epstein's Article lays out the reasons why legislators, judges, lawyers, laypersons, and even scholars should care about the nondelegation doctrine. His Article aims to fill gaps in the current literature with a functional analysis of the nondelegation doctrine that helps explain where it should have teeth and where it should not. The Article offers a brief account of the evolution of the nondelegation doctrine, develops an analytical model to explain why and how the doctrine should be used, explains how this model works in the context of private business contexts, and circles back from the private sector to the public sector in order to apply this model to help explain a broad range of delegation cases.

The last Article in this Issue is written by Professor Kurt Eggert, a Chapman University Dale E. Fowler School of Law professor. Professor Eggert's Article uses the nondelegation debate as a lens to

see whether originalism as it is currently practiced is a useful or dangerous tool of constitutional interpretation. His Article builds on existing criticisms of originalism, recounts the origins of originalism, its initial emphasis on judicial restraint and avoidance of interfering in legislative policymaking, and examines how originalism works in practice in justifying and discussing the nondelegation doctrine.

In an effort to promote the safety of symposium participants, and follow state guidelines, the *Chapman Law Review* triumphed in successfully hosting its first virtual Symposium. We would not have been able to do so without the continued support of the members of the administration and faculty that made the publication of this Issue possible, including: Dean of Chapman University Dale E. Fowler School of Law, Matthew Parlow; our faculty advisor, Professor Celestine Richards McConville; and our faculty advisory committee members, Professor Deepa Badrinarayana, Professor Ernesto Hernandez, Professor Kenneth Stahl, Professor Richard Redding, and Professor Lan Cao. A special thank you goes to Assistant Dean of Student Affairs Nidhi Vogt, Candace Rim, Kelly Farano, and PJ Perez for their advice and guidance in planning the *Chapman Law Review* Symposium, and to Professors Kurt Eggert and Thomas Campbell for moderating the Symposium panels. The *Chapman Law Review* is grateful for the Constitutional Jurisprudence Clinic's sponsoring of the Symposium and for Professor Anthony Caso, who was instrumental in selecting the topic for this year's Symposium, acquiring exceptional speakers for our panels, and participating in the "Chevron Deference Doctrine" panel.

I want to also express my sincerest gratitude to our Senior Symposium Editor, Collin Craig, who deserves applause for his work and dedication to this incredibly successful Symposium. Mr. Craig displayed great commitment, efficiency, and resourcefulness in moving toward non-traditional, virtual Symposium events when faced with the restrictions of COVID-19 and ensured the success of this year's Symposium. Last but certainly not least, I thank the staff of the 2020–2021 *Chapman Law Review*. Your remarkable, committed, and tireless work was paramount to the publication of this Volume.

As this Issue closes out *Chapman Law Review's* Volume Twenty-Four, I want to convey a final thank you to those who supported me and the staff of the *Chapman Law Review* during this difficult and unconventional year. To Ariel Romero, our brilliant Managing Editor, I would not have been able to do anything without you. You are truly the embodiment of perseverance, steadfastness, and grace—and it has truly been an honor working alongside you.

Sirine Maria Yared
Editor-in-Chief

***Chevron* Deference: An Empirical Review of Rigor of Application at the District Court Level**

*Bethany Ring**

I. INTRODUCTION

During the trial which culminated in his death sentence, Socrates argued “the unexamined life is not worth living.”¹ Perhaps a parallel wisdom can be derived for judicial realms—perhaps an unexamined legal doctrine is not worth applying. Just as our vast body of law has continually transmogrified over time, it may be that our legal doctrines should be constantly reassessed and adjusted when and where appropriate. *Chevron* deference is one such doctrine worthy of re-evaluation.

The literature is replete with academic examinations of both *Chevron*’s supposed wisdom and folly.² But such speculations remain simply that: academic. Without actual, empirical evidence of how the doctrine is being applied by the courts, it is impossible to know if arguments on either side have been persuasive to the judges daily called upon to decide when and how to apply *Chevron* deference in a case at hand. Having reviewed and appreciated the several empirical studies conducted in this area, this Article seeks to expand the investigation and presents similar findings with respect to *Chevron* deference application at the federal district courts—an unexamined judicial level until this study. This Article takes a slightly different approach than previous studies as it attempts

* J.D. 2020, Chapman University Dale E. Fowler School of Law. My deepest appreciation goes out to my faculty advisors, Professor Anthony Caso and Professor John Eastman, for their dedication to the Constitutional Jurisprudence Clinic at the Fowler School of Law. This Article is a by-product of the Clinic as the idea for the research germinated while drafting several amicus curiae briefs on *Chevron*-related issues during my work in the Clinic. I am sincerely grateful for their support and encouragement. Additionally, I wish to thank my sons, Austin, Zac, and Darren, for their continued support, as well as my husband Rev. Dr. Robb C. Ring.

¹ Socrates, *Apology*, in ANCIENT PHILOSOPHY 88, 102 (Forrest E. Baird & Walter Kaufman eds., 2003).

² Throughout this Article, the doctrine of *Chevron* deference will be repeatedly referred to simply by the moniker “*Chevron*.” The underlying case is at times referred to as “*Chevron USA*.”

to examine the rigor with which the courts apply the deference doctrine—not simply whether the agency prevails under the application.

A brief account of *Chevron*'s emergence and rise first serves to ground the reader in particulars of the doctrine under scrutiny, including several Athena-istic deference doctrines that subsequently sprung forth fully-formed from the Zeus-like *Chevron* head. Part II recounts various prior empirical studies of court applications and overlays the accumulated results on current data to underline the need for a district court level examination. Part III describes the current study, both in methodology and result, and finds that at the district court level there is ample room for improvement in the rigor applied to a *Chevron* analysis. Part IV summarizes the research and offers further possible inquiries in this realm that would serve to augment not only this current undertaking, but the body of empirical *Chevron* studies in general.

A. *Chevron*'s Appearance

Chevron deference entered the scene via *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, a decision penned by Justice Stevens in June 1984.³ The case dealt with interpretations of EPA emissions standards and whether the standards should be construed narrowly, to every individual building within a refinery complex, or broadly, such that the emissions should be measured across the entire complex as a whole.⁴ Thomas Merrill summed it up well in his 2014 article, *The Story of Chevron: The Making of an Accidental Landmark*, when he wrote, “Most landmark decisions are born great—they are understood to be of special significance from the moment they are decided. But *Chevron* was little noticed when it was decided, and came to be regarded as a landmark case only some years later.”⁵ This Supreme Court decision, introduced without great fanfare or full understanding of its future application, indeed came through the Court quietly without ruffling any feathers or creating much stir, even in academia. In the year following its publication, twenty-six law review articles cited the *Chevron* case.

³ 467 U.S. 837.

⁴ *Id.* at 840.

⁵ Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV. 253, 257 (2014). See also FedSoc Films, *Chevron: Accidental Landmark*, FEDERALIST SOC'Y (Dec. 19, 2018), <http://fedsoc.org/commentary/videos/chevron-accidental-landmark> [<http://perma.cc/B68U-MNVQ>] (discussing the origins of the *Chevron* doctrine and how it rose to become an “accidental landmark”).

Of these, seventeen referred to the holding only in footnotes,⁶ four gave it a passing mention,⁷ and one simply compared it to prior court findings.⁸ The six remaining articles voiced cautious opinions, hedged with words such as “may,” “perhaps,” “if,” and “suggests.”⁹ Nonetheless, the *Chevron* decision has left a deep and lasting impression known as *Chevron* deference—today a well-established and widely relied upon doctrine.¹⁰

Chevron deference, according to the Court, is a two-step process for judicial review of statutory interpretation by a federal agency, where the agency is acting within a specified congressional delegation.¹¹ In Step One, a court determines if “Congress has directly spoken to the precise question at issue” in its authorization of the agency to promulgate the statute.¹² If Congress has been clear, “that is the end of the matter” as “the court . . . must give effect to the unambiguously expressed intent of Congress.”¹³ This investigation of meaning is to be done by “employing traditional tools of statutory construction.”¹⁴ If ambiguity is found, deference is given to an agency’s reasonable interpretation at Step Two.¹⁵ The interpretation need not be the best possible reading, or even one well-thought out in light of the statute’s surrounding wording or legislative purpose, it need only be reasonable. This deference doctrine has come to be called an “icon of administrative law.”¹⁶

⁶ See, e.g., Michael Asimow, *Nonlegislative Rulemaking and Regulatory Reform*, 1985 DUKE L.J. 381, 385 n.27 (1985); Colin S. Diver, *Statutory Interpretation in the Administrative State*, 133 U. PA. L. REV. 549, 596 n.250 (1985).

⁷ See, e.g., Michael Fix & George C. Eads, *The Prospects for Regulatory Reform: The Legacy of Reagan’s First Term*, 2 YALE J. ON REGUL. 293, 306–07 (1985); Andrew Joseph Siegel, *The U.S.-Japanese Whaling Accord: A Result of the Discretionary Loophole in the Packwood-Magnuson Amendment*, 19 GEO. WASH. J. INT’L L. & ECON. 577, 600 (1985).

⁸ Merrick B. Garland, *Deregulation and Judicial Review*, 98 HARV. L. REV. 505, 549–53 (1985).

⁹ See, e.g., Stephen M. Lynch, *A Framework for Judicial Review of an Agency’s Statutory Interpretation: Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 1985 DUKE L.J. 469, 470 (1985) (“In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, the Supreme Court may have forged the analytic framework for assessing the validity of an administrative agency’s construction of the statute that it is charged with administering.”); Eric Redman, *Statutory Construction in the Supreme Court: A Northwest Power Act Example*, 15 ENV’T. L. 353, 354 (1985) (“Thus, *Chevron* is perhaps more likely than *ALCOA* to have a lasting impact . . .”).

¹⁰ See Kristin E. Hickman, *The Need for Mead: Rejecting Tax Exceptionalism in Judicial Deference*, 90 MINN. L. REV. 1537, 1579 (2006).

¹¹ The requirement that the agency’s actions fall within a scope delineated by Congress is sometimes referred to as *Chevron* Step Zero.

¹² *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

¹³ *Id.* at 842–43.

¹⁴ *Id.* at 843 n.9.

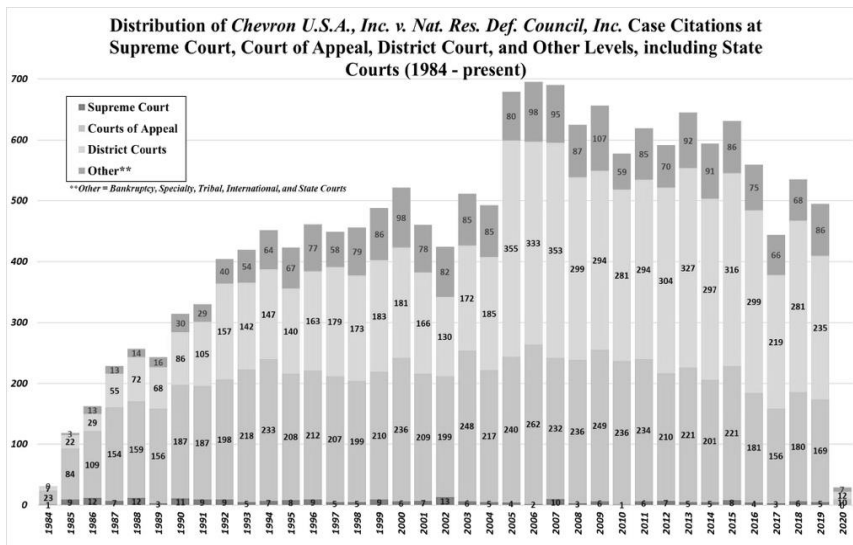
¹⁵ *Id.* at 842–44.

¹⁶ Jonathan R. Siegel, *The Constitutional Case for Chevron Deference*, 71 VAND. L. REV. 937, 938 (2018).

B. *Chevron*'s Expansion

The distribution of *Chevron* references, as documented in Westlaw, is instructive. Figure 1 below summarizes the number of *Chevron USA* citations, across all jurisdictions, for each year from 1984 through 2019.

Figure 1



It is clear from the trend lines on the graph above that a steep rate of increase in citation occurred between 1984 and 1992.¹⁷ Between 1993 and 2004, the same rise was present, but less pronounced. In 2005, a 38% jump in usage occurred—mostly reflected at the district court level which experienced a 92% increase from 2004 to 2005. The overall usage trend since 2005 has been decreasing. However, the decrease has yet to reach pre-1992 levels.¹⁸

C. *Chevron*'s Offspring

The invention of *Chevron* deference opened the door to later forms of deference. The ensuing deference forms, previously thought unimaginable, each stood on *Chevron*—pushing the deference envelope a bit further. For example, if Chief Justice John Marshall had ruled on the meaning of a particular statute, and then was told

¹⁷ It is noted that the graphic in Figure 1 reflects *Chevron USA* citations only, not applications of the *Chevron* deference two-step test itself.

¹⁸ Again, this graphic reflects citations, not deference application. The trends for the data set studied herein are similar. It is hypothesized that the decreasing post-2005 trend is due in part to a corresponding increase in application of *Chevron* deference under varying pseudonyms.

that nonetheless, he must defer to a subsequent contrary interpretation of that statute, chances are he would have been greatly amused, assumed such a claim was a joke, and reminded us all of the emphatic duty of the judiciary “to say what the law is.”¹⁹ But it is this exact situation, among others, that the *Chevron* deference offspring have created. Under *Brand X* deference, an agency’s interpretation of an ambiguous statute prevails over a court’s prior contrary interpretation.²⁰ In this same vein, agency deference is given when ambiguity exists in the meaning of an agency’s own regulations under *Auer* deference.²¹ That is, the agency solely holds the power to both write and interpret regulations, directly contrary to a constitutional system which emphasizes separation of powers. In *City of Arlington v. FCC*, the Court extended *Chevron* deference to questions of agency jurisdiction, holding that, when a statute is ambiguous on whether the relevant agency has authority to interpret it, courts must defer to the agency’s determination that it has such authority.²²

D. Recent Rumbblings in the Court

The discussion surrounding the prudence of *Chevron* deference application has been ongoing for several years, if not decades. And, in a sort of parallel percolation among academia, the discussion appears to have risen to a sufficient level to catch the eye of the Supreme Court. The current conservative makeup of the Court has helped ripen such notice into comment.

In the Court’s 2019 *Kisor v. Wilkie* decision, the Court addressed *Auer* deference—one of the aforementioned kin of *Chevron*.²³ The Court in *Kisor* encouraged a “cabined” approach to judicial acquiescence, warning that “deference is not the answer to every question of interpreting an agency’s rules.”²⁴ This warning by the Court should trigger careful investigation into all judicial deference.

The Court instructed in *Kisor* that “[f]irst and foremost,” deference should only be granted when “the regulation is genuinely ambiguous.”²⁵ And before determining genuine ambiguity exists, courts “must exhaust all the ‘traditional tools’ of construction.”²⁶ Accordingly, under *Kisor*, all tools of statutory

¹⁹ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁰ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 982–83 (2005).

²¹ *Auer v. Robbins*, 519 U.S. 452, 462–63 (1997).

²² 569 U.S. 290, 296–97 (2013).

²³ 139 S.Ct. 2400, 2408 (2019) (addressing the scope of *Auer* deference).

²⁴ *Id.* at 2408, 2414.

²⁵ *Id.* at 2415.

²⁶ *Id.*

interpretation must be utilized when courts attempt to discern the meaning of an agency's regulation. The Court thus narrowed the scope of *Auer* deference by instructing that courts "must 'carefully consider[]' the text, structure, history, and purpose" of an agency's regulations since "[d]oing so will resolve many seeming ambiguities out of the box" ²⁷ This "all tools exhausted" standard is not a novel concept. ²⁸ The Court's call for such a standard is appropriately extended to *Chevron* deference as well, ²⁹ especially since it is reflected in the original wording of the *Chevron USA* decision itself. ³⁰

II. PREVIOUS STUDIES

Chevron deference has been in place for just over thirty-five years and the underlying case has been cited in over 17,000 decisions subsequently, according to the Westlaw database. ³¹ Figure 2 below depicts the yearly distribution of *Chevron* case citations for the main three federal court levels. A complete evaluation of how and when *Chevron* deference has been applied to these thousands of cases would be daunting, to say the least.

²⁷ *Id.*

²⁸ See, e.g., *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1303 (Fed. Cir. 2017) ("In considering [the statutory] language, we must assure ourselves that we have employed all 'traditional tools of statutory construction'") (citation omitted); *Delek Refin. v. Occupational Safety & Health Rev. Comm'n*, 845 F.3d 170, 175 (5th Cir. 2016) ("We will consider all the 'traditional tools of statutory construction' before concluding that a statute is ambiguous.") (citation omitted); *Adams v. Holder*, 692 F.3d 91, 95 (2d Cir. 2012) (noting *Chevron* Step Two is only examined if "the statute remains ambiguous despite our use of all relevant tools of statutory construction"); *Krzalic v. Republic Title Co.*, 314 F.3d 875, 880 (7th Cir. 2002) ("[C]ourts do not consider themselves bound by 'plain meaning,' but have recourse to other interpretive tools in an effort to make sense of the statute.") (citations omitted); *Loving v. I.R.S.*, 742 F.3d 1013, 1016 (D.C. Cir. 2014) ("In determining whether a statute is ambiguous and in ultimately determining whether the agency's interpretation is permissible or instead is foreclosed by the statute, we must employ all the tools of statutory interpretation, including 'text, structure, purpose, and legislative history.'") (citations omitted).

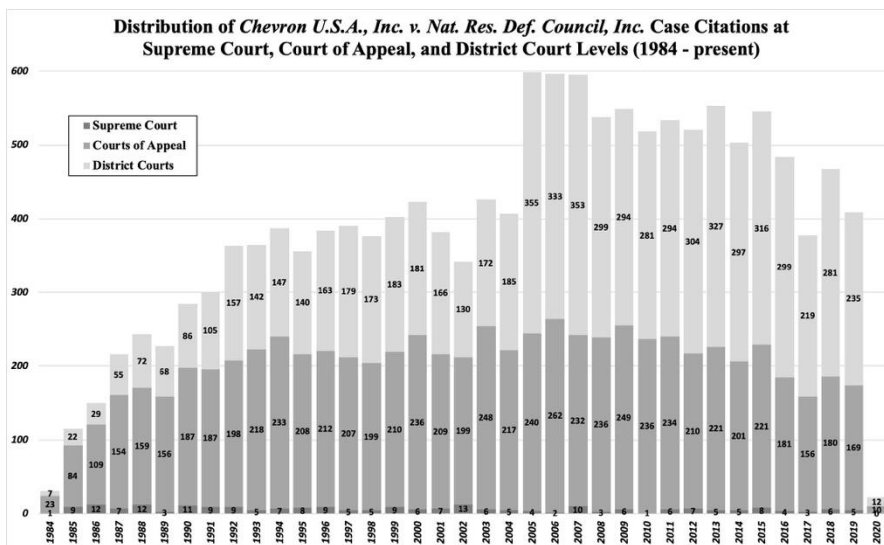
²⁹ See also *Matthews v. Barr*, 927 F.3d 606, 615 (2d Cir. 2019) ("[T]he Supreme Court's [*Esquivel-Quintana*] decision reminds courts to use all available tools of statutory construction . . . before concluding that a statutory term is ambiguous"); *King v. Burwell*, 759 F.3d 358, 367 (4th Cir. 2014) (noting "[c]ourts should employ all the traditional tools of statutory construction" at *Chevron* Step One); *Strickland v. Comm'r, Me. Dept. of Hum. Servs.*, 48 F.3d 12, 17 (1st Cir. 1995) ("[I]t is appropriate to employ all the 'traditional tools of statutory construction' in the first part of the *Chevron* analysis when the statutory language itself is not dispositive.") (citations omitted).

³⁰ See, e.g., *TransAm Trucking, Inc. v. Admin. Rev. Bd., U.S. Dep't of Lab.*, 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting) (then-Judge Gorsuch reminding the bench that simple use of a dictionary can resolve ambiguity); Kent Barnett & Christopher J. Walker, *Chevron in the Circuit Courts*, 116 MICH. L. REV. 1, 71–72 (2017) (summarizing case opinions at the court of appeals level from 2003–2013 and finding "circuit-by-circuit disparity in . . . invocation of *Chevron*"); *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

³¹ As of April 23, 2021, there were exactly 17,348 cases.

Various empirical studies of *Chevron* deference have been conducted in the past, but due to the extremely large data set encountered, each study has chosen a particular focus to produce a manageable subset. Generally, these studies have focused on Supreme Court decisions, federal courts of appeal findings, or subject-specific applications.

Figure 2



A. Supreme Court Studies

The most noteworthy Supreme Court study was done by Eskridge and Baer in 2008.³² The study examined Supreme Court decisions between 1984 and 2005 in which an agency interpretation of a statute was at issue.³³ This criterion produced a set of 1014 cases which were coded for 156 variables ranging from basic descriptive information of the key statute to the voting record for each judge.³⁴ Based on this, Eskridge and Baer developed a “Continuum of Deference” across Supreme Court decisions and showed that when *Chevron* deference was applied, the agency win rate was 76.2%.³⁵ However, they also concluded that, as of 2005, “there has not been a *Chevron* ‘revolution’ at the Supreme Court level” as *Chevron* deference had only been

³² William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083 (2008).

³³ *Id.* at 1094.

³⁴ *Id.*

³⁵ *Id.* at 1100.

applied 8.3% of the time in Supreme Court cases involving statutory interpretation.³⁶

In an earlier study, Thomas Merrill found it to be “clear that *Chevron* is often ignored by the Supreme Court. . . . [as] the two-step framework has been used . . . only about one-third of the [time].”³⁷ Merrill’s study compared Supreme Court agency win rates for the three years before *Chevron* to those in the six years after the *Chevron* decision was handed down.³⁸

B. Appellate Courts Studies

An outstanding 2017 empirical study by Barnett and Walker examined circuit court opinions from 2003 to 2013 and found inconsistencies in the circuit courts’ application of *Chevron* in general.³⁹ Starting with a data set of 2,272 cases, the study culled the decisions pulled down to 1,327 relevant opinions.⁴⁰ Reviewing these relevant opinions, they discovered circuits differed significantly in agency-win rates when *Chevron* was applied, from 88.2% in the Sixth Circuit, to 72.3% in the Ninth Circuit.⁴¹ That is, Barnett and Walker observed that some circuits are simply more deferential. The study concluded: “The circuit-by-circuit disparity in the circuit courts’ invocation of *Chevron* and agency-win rates reveals that *Chevron* may not be operating uniformly among the circuits.”⁴²

Other studies examining circuit court applications have been done by Kerr⁴³ as well as Schuck and Elliott.⁴⁴ Kerr looked at circuit court opinions in 1995–96,⁴⁵ whereas Schuck and Elliott focused on D.C. Circuit application for select periods (“1965, 1975, 1984–85, and 1988”).⁴⁶

C. Subject-Specific Studies

Some studies only reviewed topic-specific cases. For example, Miles and Sunstein looked at appellate court decisions from 1990

³⁶ *Id.* at 1090.

³⁷ Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 YALE L.J. 969, 982 (1992).

³⁸ *Id.* at 980–82.

³⁹ Barnett & Walker, *supra* note 30, at 1.

⁴⁰ *Id.* at 5.

⁴¹ *Id.* at 49.

⁴² *Id.* at 71–72.

⁴³ Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Regul. 1 (1998).

⁴⁴ Peter H. Schuck & E. Donald Elliott, *To the Chevron Station: An Empirical Study of Federal Administrative Law*, 1990 Duke L.J. 984 (1990).

⁴⁵ Kerr, *supra* note 43 at 1.

⁴⁶ Schuck & Elliott, *supra* note 44, at 988.

through 2004 that involved EPA and NLRB interpretations.⁴⁷ They also included a parallel examination of sixty-nine Supreme Court cases.⁴⁸ In a study by Revesz, D.C. Circuit cases from 1970 to 1994 were investigated for cases concerning health-and-safety decisions.⁴⁹ Along this same line, a 2008 study by Czarnezki examined environmental law cases in circuit courts over the three-year period from 2003 to 2005.⁵⁰

D. Summary of Studies Over Time

In Figure 3 below, the years examined by these past empirical studies have been overlaid on a graphical depiction of yearly *Chevron USA* citations for each judicial level, as originally shown in Figure 2. Red bars denote examined Supreme Court cases, dark pink bars indicate years where all circuit court cases were examined, and light pink bars show time frames during which a subset of all available cases were investigated. The individual studies themselves are reflected on Figure 3 as either solid lines (indicating all cases were examined), or as dashed lines (indicating a subset of cases were looked at). Figure 3 highlights the lack of investigation done at the district court level, as well as the limits of studies done at the circuit court level. The study undertaken herein is depicted as a curved line of large dashes.

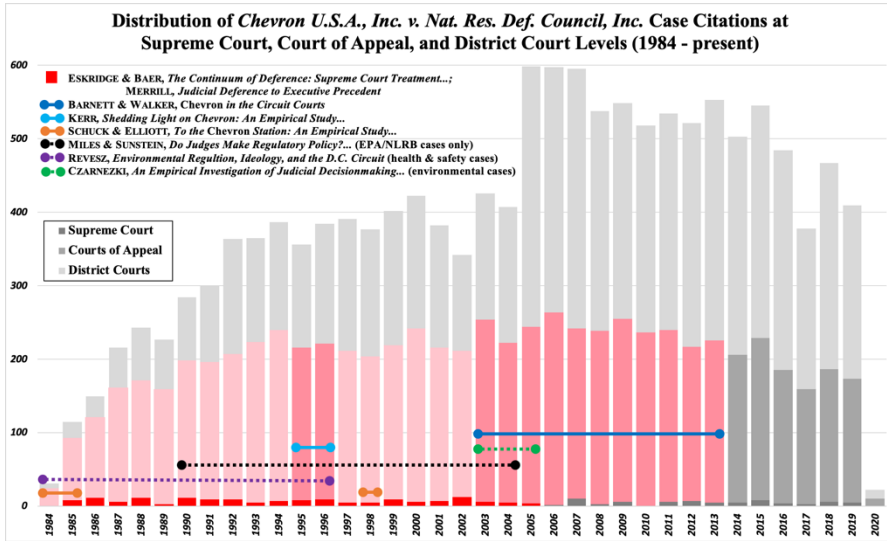
⁴⁷ See Thomas J. Miles & Cass R. Sunstein, *Do Judges Make Regulatory Policy? An Empirical Investigation of Chevron*, 73 U. CHI. L. REV. 823, 823 (2006) (examining only EPA and NLRB cases).

⁴⁸ *Id.* at 825.

⁴⁹ Richard L. Revesz, *Environmental Regulation, Ideology, and the D.C. Circuit*, 83 VA. L. REV. 1717 (1997).

⁵⁰ Jason J. Czarnezki, *An Empirical Investigation of Judicial Decisionmaking, Statutory Interpretation, and the Chevron Doctrine in Environmental Law*, 79 U. COLO. L. REV. 767, 767 (2008).

Figure 3



III. CURRENT STUDY

Upon reviewing the previous empirical studies of *Chevron* done to date, the paucity of insight into application at the initial federal level, i.e., in the district courts, became evident. It is naturally expected that the appellate court level addresses a mere fraction of the number of cases passing across the district court threshold.⁵¹ But for a true understanding of the doctrine's day-in, day-out application, there is a prudence in examining the lowest federal judicial tier as well. The studies described in Part II cover approximately twenty-eight percent of the possible cases to investigate and, in some instances, overlap.⁵² Again, further empirical study of *Chevron* application seems timely and useful as the current Court make-up has signaled a willingness to wrestle with the underlying wisdom of the doctrine and its scope.

⁵¹ See, e.g., *Federal Judicial Caseload Statistics 2019*, U.S. CTS., <http://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2019> [<http://perma.cc/8EAU-UV6E>].

⁵² See Figure 3, *supra* Part II. Twenty-eight percent is derived by assuming the subject-specific studies constituted examination of half the available cases. In reality, this number is likely much lower, possibly rendering the percent of cases study to be as low as nineteen percent.

A. Methodology

An examination of only federal district courts reduces the size of the data set to 7,123 cases. In this study, a catalogue of basic application of *Chevron* deference over a broad swath of cases is presented, rather than a more detailed study on a smaller case subset.

1. *Chevron* Citation as Proxy

It is not necessarily true that an opinion which cited to the underlying *Chevron USA* case applied the doctrine of *Chevron* deference as well. That is, citation is not expected to be an accurate proxy for the two-step *Chevron* application. However, based on the overall findings in the Barnett and Walker study, it was estimated the proxy would be accurate approximately 55% to 60% of the time.⁵³

2. Quasi-random Case Selection

Knowing that not all cases selected would apply the *Chevron* two-step analysis, this study set out to examine 500 cases, expecting an ultimate yield of about 275 cases of interest. Because many of the previous studies were conducted at the circuit court level, the district courts were first divided into subsets corresponding with their respective circuit. The circuit subsets were then divided according to the Westlaw “Depth of Treatment” designation.⁵⁴ This was done to capture a representative number of cases across all levels of discussion.⁵⁵ Next, the cases were divided by decade, as reflected in Table 1 below. Using the distribution in Table 1, the 500 cases were spread out proportionally over the circuit-depth-decade subcategories. Because cases must be chosen as whole numbers, numbers were rounded up where appropriate, and 511 total cases were selected. The individual cases within each subcategory were chosen randomly.

⁵³ Barnett & Walker, *supra* note 30.

⁵⁴ See *Why you need KeyCite on Thomson Reuters*, THOMSON REUTERS, <http://legal.thomsonreuters.com/en/insights/articles/why-you-need-keycite>.

⁵⁵ That is, a case which applied *Chevron* deference in a few brief sentences would be captured along with cases where the application occupied the majority of the opinion.

Table 1

Circuit	Depth of Treatment: 4				Depth of Treatment: 3				Depth of Treatment: 2				Depth of Treatment: 1			
	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20	1980-89	1990-99	2000-09	2010-20
1	0	4	9	15	1	22	25	18	8	30	49	53	2	5	13	6
2	2	8	24	38	7	42	65	69	24	126	143	151	4	24	22	11
3	0	3	22	28	6	21	49	72	10	70	156	173	4	17	12	19
4	0	8	24	33	2	18	46	66	8	44	100	121	4	7	11	15
5	0	2	15	31	1	18	62	37	10	49	108	147	1	13	11	19
6	0	5	16	22	3	24	57	35	7	66	92	100	2	9	11	18
7	0	3	7	12	4	19	38	33	15	84	82	84	2	19	10	10
8	0	7	8	8	1	16	46	31	3	70	71	75	9	13	8	13
9	0	12	40	65	6	46	103	128	19	132	303	257	7	15	26	94
10	1	2	12	34	2	23	37	51	10	55	54	79	0	3	9	6
11	0	1	26	23	2	22	28	53	6	44	116	138	1	11	15	15
DC	2	24	86	161	17	74	93	111	36	128	102	85	4	17	6	10

3. Coding

The basic identifying information (caption, citation, date, court, circuit, etc.) was entered and tracked in an Excel spreadsheet. Additional variables were entered as each case was examined. These variables included depth of treatment, subsequent treatment by the courts of appeals, document type, case disposition, as well as a count of the number of times the *Chevron USA* citation occurred. Each case was examined to see if a *Chevron* two-step analysis had been applied. If so, the level of rigor the court applied at each step was recorded using the following legend:

- 0 = no discussion
- 1 = passing mention
- 2 = limited discussion
- 3 = full discussion

This numerical coding allowed the entire dataset to be easily examined and the results to be represented graphically for additional clarity.

B. Results

The convenient coding of results in this study via Excel spreadsheet enabled the creation of simple graphical illustrations of the data, as seen throughout the following sections.⁵⁶ The use of this format also allowed data to be easily separated into relevant subsets and corresponding graphs for comparison purposes.

⁵⁶ Complete spreadsheet and corresponding graphs are available from the author upon request.

1. Frequency of Application

Out of the 511 cases reviewed, a *Chevron* analysis was found to be applied in 252 rulings. This means that for the cases randomly selected for this study, fifty-one percent contained one or more references to the underlying *Chevron USA* opinion but did not apply the two-step analysis laid out therein. This percentage is higher than that reflected in the Barnett and Walker study, but judicial level may account for the difference.⁵⁷ This means citation to the *Chevron USA* case was only an accurate proxy for application of the *Chevron* deference doctrine approximately half of the time—a key factor to be considered in formulating methodology for future studies. It is not surprising that the average number of *Chevron* citations in cases applying the deference doctrine was greater than those in the compliment set.⁵⁸ Interestingly, for the cases applying *Chevron*, twenty-seven percent cited to the *Chevron USA* opinion only once.⁵⁹

2. Frequency of Deference

This study revealed overall that the district courts grant deference to agency interpretations with high frequency. Specifically, the courts found the underlying statute to be unambiguous twenty-seven percent of the time at Step One of the *Chevron* analysis.⁶⁰ In these cases, Step Two was generally not considered.⁶¹ For the remaining cases where the statute was found to be ambiguous at Step One, the court deferred to the agency interpretation at a much higher rate than not. Of all cases where the deference doctrine was applied, the Step Two analysis found the agency interpretation to be unreasonable only nine percent of the time.⁶² The level of analytical rigor applied by the courts in coming to these decisions, however, was not constant across the board and is addressed in the following step-specific sections.

It is noted that in a circuit level review of the data in this study, the district courts in the D.C. Circuit are most likely to apply a *Chevron* analysis (68% application), followed by those in the Tenth Circuit (66% application). The Eighth and Ninth

⁵⁷ Barnett & Walker, *supra* note 30, at 27 (finding 1,327 relevant cases among 2,272 cases studied, a 58.4% rate of application).

⁵⁸ In cases applying *Chevron*, the average number of citations was 5 (with a maximum of 139). For cases in which the *Chevron USA* case was cited but the doctrine was not applied, the average citation count was 2 (with a maximum value of 39).

⁵⁹ See Figure 4.

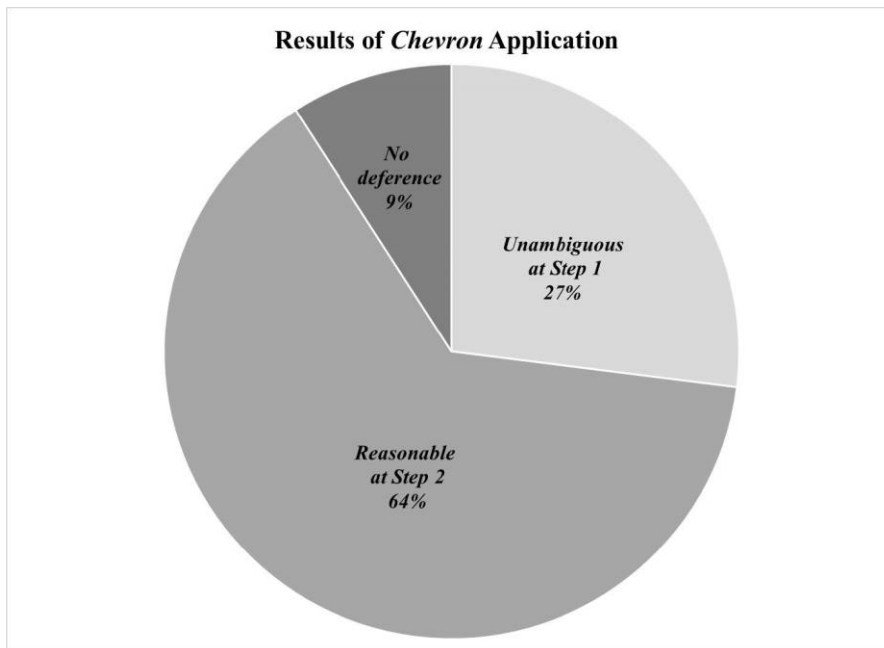
⁶⁰ *Id.*

⁶¹ In seven percent of the cases, the court went on to evaluate Step Two as well.

⁶² See Figure 4.

Circuits are closely tied behind (55% and 56% application, respectively).

Figure 4



3. Step One Analysis

When the two-step *Chevron* deference doctrine is applied, Step One is applied with varying amounts of rigor. Overall, a full examination of the text to determine the existence of ambiguity was performed 38.1% of the time, as depicted in Figure 5 below. However, this number is somewhat misleading as it reflects the data as whole. Breaking down the cases into sub-categories reflecting the outcome of the Step One analysis (i.e., ambiguous or unambiguous), it was found that a full analysis is applied 50% of the time in unambiguous findings, but much less—only 33.7% of the time—when ambiguity is discovered. Figure 6 reflects the complete range of levels of discussion in these two sub-categories. It is noted that, in Figure 6, a “passing mention” level of analysis when a statute was found unambiguous was usually a simple cite to prior or sister court precedent.

The discrepancy in application of a “full discussion” level of analysis between ambiguous and unambiguous findings, as reflected in Figure 6, begs the question of whether this result is a cause or an effect. That is, do courts include a deeper, more robust discussion when they are seeking to justify a finding of unambiguity? Or does a deeper, more robust discussion more frequently lead to a finding of

unambiguity? Absent insight into the minds of the individual judges behind these opinions, this query cannot be answered from the data gathered in this study, but it posits an interesting question worthy of further examination.

Figure 5

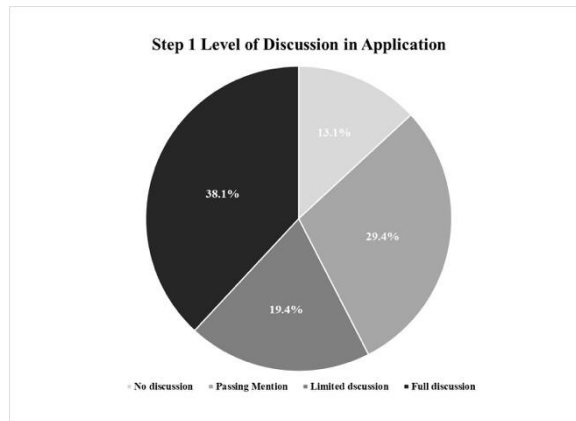
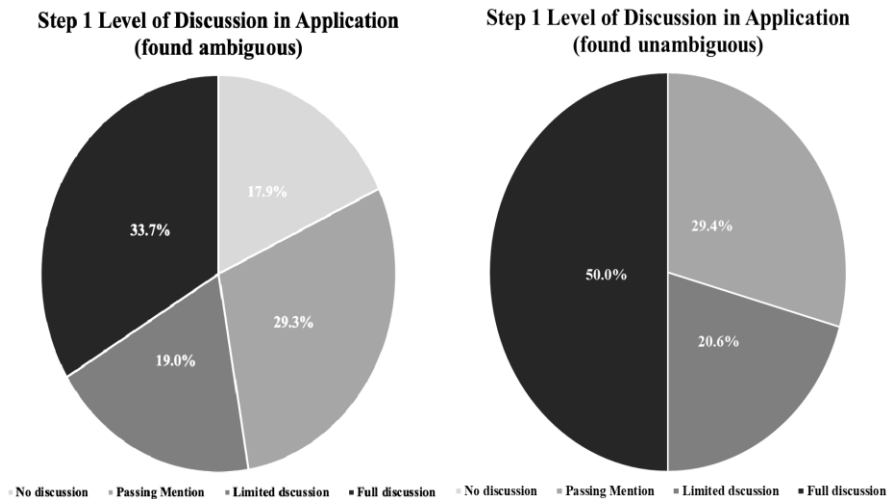


Figure 6



Overall, the levels of discussion at Step One in Figure 5 across the sampling of district court cases in this study, at first glance, seem heartening. Taken together, a limited or full discussion was applied in 57.5% of the cases.⁶³ This number would appear to

⁶³ See Figure 5.

bolster claims that the district courts are dutiful in applying appropriate rigor at Step One. However, it is disturbing to see that 29.4% of the time, the courts give Step One analysis no more than a passing mention.⁶⁴ It is even more disturbing that in 13.1% of cases, no discussion of Step One was included in a *Chevron* analysis.⁶⁵ These numbers underline the need seen by the Supreme Court in *Kisor* to emphasize the requirement to exhaust all the traditional tools of construction in determining if genuine ambiguity exists—a standard the district courts are failing to faithfully meet.

4. Step Two Analysis

Having determined there is an ambiguity present, the courts next consider at Step Two whether the agency's interpretation was reasonable. As seen in Figure 7, this study found a full discussion of the question was afforded 44.6% of the time across the board. But again, a discrepancy is seen when the data is sub-divided by result, i.e., by whether or not deference is ultimately given to the agency interpretation.⁶⁶

Much like the question posed in the Step One results above, there is a question of cause and effect presented in the Step Two results. Remembering that weighted percentages must be applied to the graphs in Figure 8 in order to produce the graph in Figure 7, it is somewhat striking to see that a full discussion occurs 56.5% of the time when no deference is given, as opposed to only in 42.9% of the cases where deference is granted. Is the higher percent of full discussion given as a justification for finding no deference is warranted? Or is a higher level of discussion more likely to lead to a denial of deference? These cause-and-effect questions were not anticipated at the outset of this study, and therefore, the study did not collect variables sufficient to address such inquiries.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ See Figure 8.

Figure 7

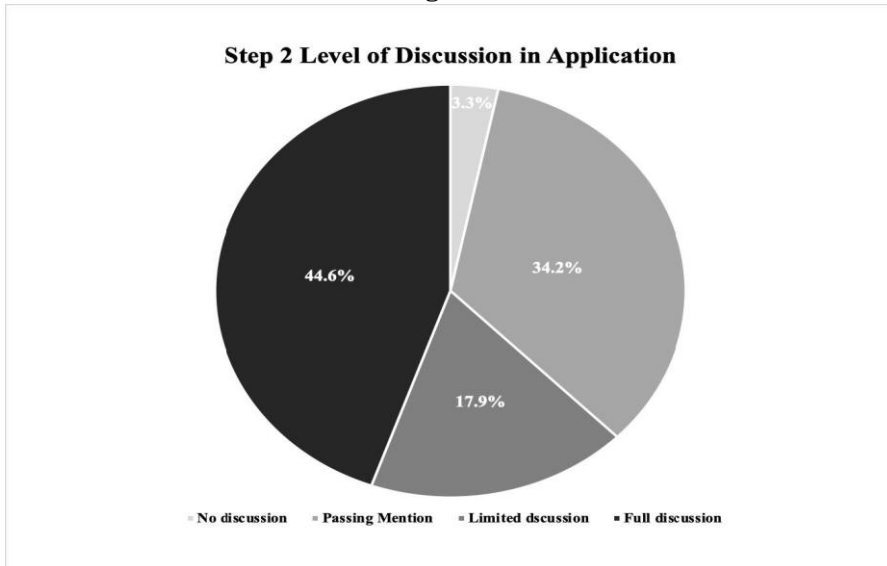
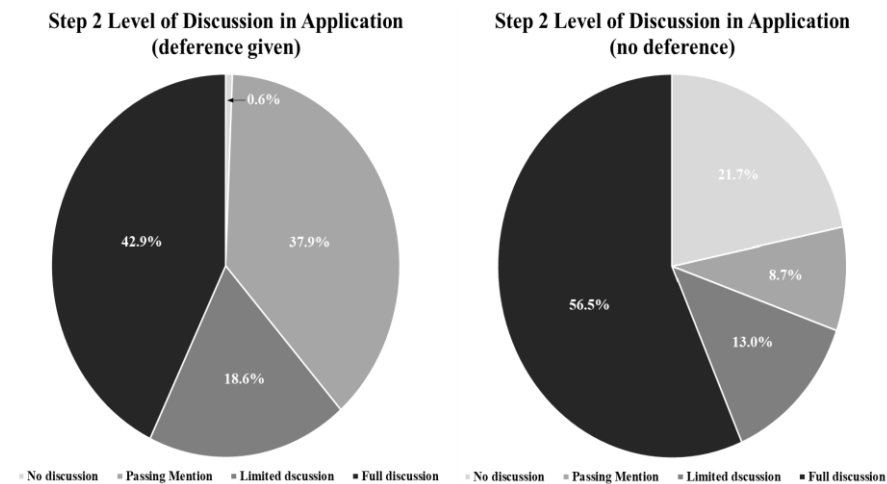


Figure 8



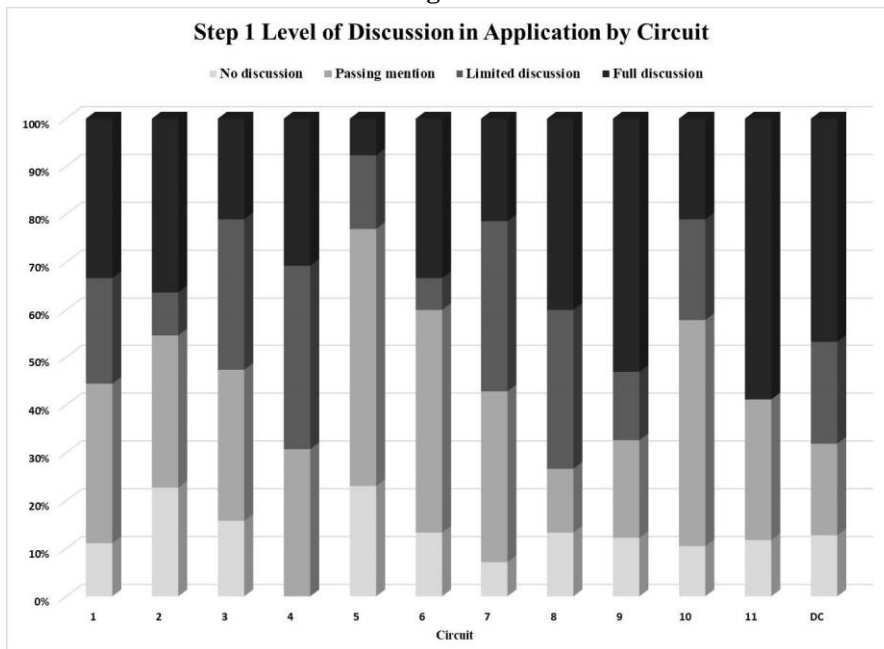
Again, it is initially encouraging to see the relatively high frequency of full discussion reflected in Figure 7. Nonetheless, it seems counterintuitive that a Step Two analysis would ever be given no discussion or a simple passing mention, much less that such would occur 37.5% of the time.⁶⁷ The district courts clearly have ample room for improvement in this area.

⁶⁷ 3.3% (no discussion) + 34.2% (passing mention) = 37.5%.

5. Circuit Comparisons

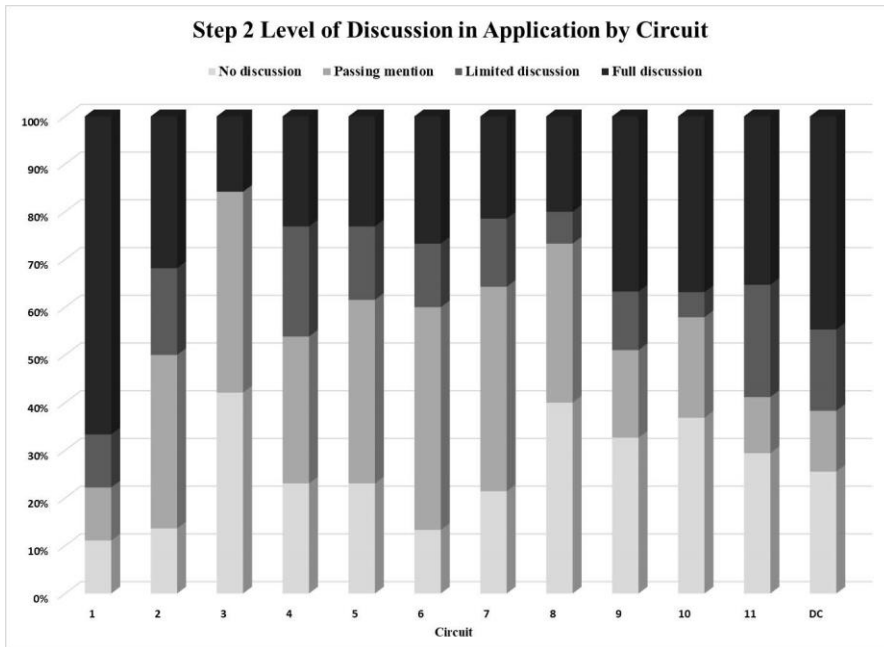
The results presented above can also be viewed on a circuit-by-circuit basis since each district court decision in the study was coded to identify its parent circuit. This introduces a refinement to the levels of discussion given for Steps One and Two above. In Figures 9 and 10 below, each circuit is presented as a bar with the varying levels of discussion reflected in the same colors used in Figures 5 through 8 above. Each bar reflects 100% of the data gathered at the circuit level and therefore, the colors reflect the percentage of application at each level, not actual numbers of cases in each category. According to Figure 9, the Eleventh Circuit applies a full discussion at Step One most often, followed closely by the Ninth Circuit and the D.C. Circuit. The Eleventh Circuit result, however, may be tempered by the fact that the “limited discussion” category is not reflected at all, and may be further exacerbated by the small number of cases studied for the Eleventh Circuit (17 cases total, as compared to 49 cases and 47 cases at the Ninth and D.C. Circuits, respectively). The Fifth Circuit, in contrast, seems to be most willingly to give no discussion or a passing mention in a *Chevron* Step One analysis.

Figure 9



At Step Two, reflected in Figure 10 below, the First Circuit is most likely to apply a full discussion, followed by the D.C. Circuit and a tie between the Ninth and Tenth Circuits. But again, the percentages are impacted by the small sample size at the First Circuit level—only nine cases falling in the First Circuit were studied.

Figure 10



IV. CONCLUSION AND FURTHER POSSIBLE INQUIRIES

This research seeks to fill an empirical study void by examining district court applications of the *Chevron* deference doctrine. The study found that for cases which apply the two-step analysis, the levels of rigor with which each step is applied varies significantly within the district courts themselves, from no discussion to full discussion, and equally varies among the respective circuit court groupings. Overall, there exists among the district courts a 38.1% full discussion application of Step One⁶⁸ and a 44.6% full discussion application at Step Two.⁶⁹ The failure of the courts to be more rigorous in *Chevron* application via full discussion suggests there may be merit to past academic

⁶⁸ See Figure 5.

⁶⁹ See Figure 7.

claims that the courts have wide room for improvement with respect to this doctrine.

Such claims have not been limited to academia. In his dissent in *TransAm Trucking, Inc. v. Administrative Review Board, United States Department of Labor*, then-Judge Gorsuch pointedly reminded the court that “there are countless cases finding a statute unambiguous after examining the dictionary.”⁷⁰ Similarly, Justice Kavanaugh, while he was on the D.C. Circuit bench, observed variation in *Chevron* application among lower courts and noted that “judges’ personal views are infecting these kinds of cases” where judges “have wildly different conceptions of whether a particular statute is clear or ambiguous.”⁷¹ Indeed, this disparity in rigorous application has prompted the Court to warn that “a court cannot wave the ambiguity flag just because it found the regulation impenetrable on first read.”⁷² Justice Scalia has noted that sometimes “interpretation requires a taxing inquiry” and “*Chevron* is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.”⁷³ Although this “taxing inquiry” may not be omitted on account of its onerous nature, this study, alongside results from prior studies, suggests courts appear to be doing just that.

In the future, the current study would be well served to be expanded to generate a greater sample size. Additionally, several supplementary lines of inquiry have been proposed above in Part III; although as presented, as cause versus effect inquiries, the study methodology would need to be significantly adjusted. Alternatively, updates of some of the prior studies presented in Part II would offer interesting insight, particularly on how the *Chevron* deference doctrine has weathered the last seven years at the circuit court level and the last fifteen years in the Supreme Court. Such expansions of the Barnett and Walker, and Eskridge and Baer studies, respectively, are still feasible at this point—albeit time-consuming—and the author strongly encourages the undertaking of these extensions to further general understanding of *Chevron* deference and how it has been and is currently being applied by the federal courts at all levels.⁷⁴

⁷⁰ 833 F.3d 1206, 1216 (10th Cir. 2016) (Gorsuch, J., dissenting).

⁷¹ Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2142, 2152 (2016).

⁷² *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019).

⁷³ *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

⁷⁴ In the author’s opinion, either update would be reasonable to accomplish with a suitable team of assistants.

Attacking *Chevron*: A Guide for Practitioners

*Anthony Caso**

INTRODUCTION

This Article is meant to assist advocates who find themselves fighting against *Chevron* deference—the argument that courts should cede to the administrative agencies the task of “interpreting” the text of the Act of Congress that is claimed to support agency actions. After a brief discussion of how *Chevron* deference works, this Article examines the problem of separation of powers that is inherent in the deference doctrine. The Article then turns to how to attack the deference doctrine when it is asserted as a defense by agencies.

Chevron deference is employed when an agency regulation is attacked as inconsistent with or beyond the scope of the federal law the agency is enforcing.¹ Under *Chevron*, the courts first determine whether the statutory provision at issue is ambiguous and second whether the administrative agency’s interpretation of that statute is “reasonable.”² So long as the agency has rule-making authority and the interpretation at issue was not developed in the midst of litigation over the disputed statutory text, the courts will give binding deference to “reasonable” agency interpretations.³ Under *Chevron*, when there is an ambiguity or gap in the legislative scheme, the court treats that ambiguity as a congressional delegation of power to the agency to fill the gaps and make policy to resolve the ambiguity.⁴ In other words, the courts hand over their authority to interpret law to the agency and assume Congress handed over its authority to make law to the agency.

* Professor of Law, Dale E. Fowler School of Law and Director of the Constitutional Jurisprudence Clinic, Chapman University, J.D. 1979, University of the Pacific, McGeorge School of Law, M.B.A. 1999, Golden Gate University. I would like to thank the United States Justice Foundation, which sponsored the Separation of Powers Project of the Constitutional Jurisprudence Clinic, which made this conference and this Article possible. I would also like to thank Dr. John Eastman who worked so hard to recruit speakers for the conference and who, as Dean of the School of Law at Chapman invited me to come to Southern California to take over as the Director of the Clinic.

1 *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984).

2 *See id.* at 843–44.

3 *See United States v. Mead Corp.*, 533 U.S. 218, 226–27, 229 (2001); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988).

4 *Chevron*, 467 U.S. at 843–44.

The problem of *Chevron* deference was demonstrated in Justice Kagan's concurring opinion (joined by Justice Breyer) in the recent decision in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*.⁵ The issue before the Court was whether the Department of Health and Human Services, the Department of Labor, and the Treasury Department ("Departments") had authority under the Affordable Care Act to promulgate a regulation exempting employers with religious or moral objections from providing no-cost contraceptive coverage in the group insurance policy.⁶ Did Congress grant that authority to the Departments in the statute? Justice Kagan wrote that she could find no clarity in the statute on the question.⁷

If I had to, I would of course decide which is the marginally better reading. But *Chevron* deference was built for cases like these. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984); see also *Arlington v. FCC*, 569 U.S. 290, 301, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (holding that *Chevron* applies to questions about the scope of an agency's statutory authority). *Chevron* instructs that a court facing statutory ambiguity should accede to a reasonable interpretation by the implementing agency. The court should do so because the agency is the more politically accountable actor. See 467 U.S. at 865–866, 104 S.Ct. 2778. And it should do so because the agency's expertise often enables a sounder assessment of which reading best fits the statutory scheme. See *id.*, at 865, 104 S.Ct. 2778.⁸

The statute is not clear, in Justice Kagan's view. Indeed, the statute says nothing about a requirement to provide no-cost contraceptive coverage nor the Departments' authority, or requirement, to provide a religious exemption to such a requirement.⁹ Thus she "would defer to the Departments' view of the scope of Congress's delegation."¹⁰ In this view, *Chevron* deference both does the job that Congress did not do (writing a clear statute) and the job the judiciary should do (interpret legal texts). In both instances, *Chevron* deference departs from the scheme of separated powers embedded in the Constitution.

Chevron implements the vision of Woodrow Wilson, the father of modern administrative law. Wilson disputed the need for separation of powers and instead argued for administrative

⁵ 140 S. Ct. 2367, 2397–400 (2020) (Kagan, J., concurring).

⁶ *Id.* at 2372–73 (majority opinion).

⁷ *Id.* at 2397 (Kagan, J., concurring).

⁸ *Id.*

⁹ *Id.* at 2373 (majority opinion).

¹⁰ *Id.* at 2400 (Kagan, J., concurring).

officials with “large powers and unhampered discretion.”¹¹ *Chevron* deference takes us a long way down the road to Wilson’s dream of administrators with “large powers and unhampered discretion.”¹² *Chevron* deference, in Justice Kagan’s view, gives the administrator the “large power” to write into the law that which Congress left out, and the seemingly “unhampered discretion” to do so by excluding the judiciary from its job of legal interpretation.¹³

First, this Article shows that the argument that Congress intended agencies to “interpret” the statute and “fill in the blanks” cannot be justified with reference to the text. Next, the Article demonstrates that separation of powers is a key structural element of the U.S. Constitution and that *Chevron* deference upends that structure of separated powers. The doctrine of deference allows administrative agencies to usurp the power of legislation, and it allows agencies to displace the courts as interpreters of congressional acts. Congress cannot delegate lawmaking any more than the courts can delegate their duty to decide cases or controversies.

Much of this is not new but is intended to give the advocate the necessary background to make the arguments. All of this is prelude to consideration of what an advocate should do in order to overturn or limit *Chevron*. This Article proposes two tactics. First, insist on the exceptions. Much like *Auer* deference to an agency’s interpretation of its own regulations has been circumscribed by an ever-growing list of exceptions,¹⁴ *Chevron* deference can also be limited—some limitations have already been imposed by judicial decision. Second, the advocate should insist that the courts return to their job of statutory construction.¹⁵ *Chevron* only applies if the court finds the statute ambiguous after exhausting all of the tools of statutory interpretation. These tools of statutory construction do not allow deference to the agency where the meaning of a statute cannot be fixed.¹⁶

11 Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q. 197, 213–14 (July 1887).

12 *Id.*

13 See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

14 *Kisor v. Wilke*, 139 S. Ct. 2400, 2414–15 (2019).

15 *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (“The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent.”).

16 ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 134 (2012) (“There are sometimes statutes which no rule or canon of interpretation can make effective or applicable to the situations of fact which they purport to govern. In such cases the statute must simply fail.” (citation omitted)).

Before discussing separation of powers, however, the Article discusses the question of whether Congress intended the courts to defer to executive agencies on questions of the meaning of legislative texts. That is, whether *Chevron* is a creature of legislative intent or one of judicial creation.

I. THE MYTH THAT DEFERENCE FLOWS FROM CONGRESSIONAL INTENT

The Supreme Court has often repeated the claim that Congress intended for the courts to defer to the judgment of agencies when interpreting a statute.¹⁷ This congressional intent is claimed to be found where Congress left a gap in the statutory scheme and gave rule-making authority to the agency.¹⁸ The Court has even described this as an “express delegation of specific interpretive authority” to the agency.¹⁹ The Court explained its thought process on the idea that *Chevron* deference was intended by Congress as follows:

We accord deference to agencies under *Chevron*, not because of a presumption that they drafted the provisions in question, or were present at the hearings, or spoke to the principal sponsors; but rather because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.²⁰

The problem with this line of thought is that there is no reference to any actual statute or congressional text expressing such an intent.²¹ Professor Hamburger observed: “As a result of *Chevron*’s presumption from ambiguity, the courts have ended up in the peculiar position of basing their deference on statutory authorization while presuming such authorization from what the statutes do not say.”²²

Further, this theory of implied congressional intent forces the courts to ignore the one clear statement from Congress on who should interpret the statute.²³ Section 706 of the Administrative Procedure Act provides: “To the extent necessary

¹⁷ See *Chevron*, 467 U.S. at 843–44.

¹⁸ See *Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173–74 (2007); see also *King v. Burwell*, 576 U.S. 473, 485 (2015).

¹⁹ *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001).

²⁰ *Smiley v. Citibank (S.D.)*, N.A., 517 U.S. 735, 740–41 (1996).

²¹ See *id.*; see also Philip Hamburger, *Chevron Bias*, 84 GEO. WASH. L. REV. 1187, 1192 n.15 (2016).

²² Hamburger, *supra* note 21.

²³ See *id.*

to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”²⁴ The phrase “decide all relevant questions of law” does not appear to be ambiguous.²⁵ “It is emphatically the province and duty of the judicial department to say what the law is.”²⁶ But Congress, in the Administrative Procedure Act, decided to remove any doubt on the question by specifying that the reviewing court is tasked with the duty to “interpret constitutional and statutory provisions.”²⁷

Rulemaking authority granted in a statutory scheme is often specific and reveals no intent to set up agencies as the final arbiter of the meaning of federal law. For instance, the Clean Air Act orders the Administrator of the Environmental Protection Agency to issue regulations prescribing air quality standards for designated air pollutants.²⁸ Nothing is said about the EPA’s authority to interpret the statute. Sometimes the statute grants a broad-ranging authority to an agency. One example is found in the Communications Act of 1934 where Congress granted the Federal Communications Commission the authority to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter.”²⁹ The rulemaking authority there is quite broad, but it says nothing about displacing the courts’ traditional function of interpreting the law.

Congress did not leave much room for the courts to presume a contrary intent from statutory silence. If there was evidence of such an intent, there would be no basis for the courts to refuse to apply *Chevron* deference when an agency has failed to invoke the doctrine or has affirmatively waived it. But as Justice Gorsuch has noted,

[the] Court has often declined to apply *Chevron* deference when the government fails to invoke it. *See* Eskridge & Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations From Chevron to Hamdan*, 96 *Geo. L. J.* 1083, 1121-1124 (2008) (collecting cases); Merrill, *Judicial Deference to Executive Precedent*, 101 *Yale L. J.* 969, 982-984 (1992) (same); *see BNSF R. Co. v. Loos*, 586 U. S. —, 139 S.Ct. 893 (2019).³⁰

²⁴ 5 U.S.C. § 706.

²⁵ *Id.*

²⁶ *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

²⁷ 5 U.S.C. § 706; *see* Hamburger, *supra* note 21, at 1192 n.15 (citing Thomas W. Merrill, *Judicial Deference to Executive Precedent*, 101 *YALE L.J.* 969, 994–95 (1992)).

²⁸ 42 U.S.C. § 7409.

²⁹ 47 U.S.C. § 201(b).

³⁰ *Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790

Nor can the courts base continued application of *Chevron* deference on a theory of congressional acquiescence. There have been instances where the courts have found “Congress’ failure to disturb a consistent judicial interpretation of a statute” as some evidence of congressional intent.³¹ However, with *Chevron* deference we are not talking about the consistent interpretation of a single statute. It is certainly not an interpretation of the judicial review provisions of the Administrative Procedures Act. Nothing in the Act permits the implication that issues of statutory interpretation are committed to agency discretion. Precisely the opposite is true. The Act expressly commits those questions to the courts. Further, *Chevron* deference is a doctrine that is applied to *every* statute conferring authority on an executive agency to make regulations.³² *Chevron* deference may be the preferred policy of the judiciary. There is no evidence, however, that it represents the intent of Congress.

Finally, the Supreme Court in *Mead* ruled that *Chevron* deference was only available to regulations enacted pursuant to the notice and comment provisions of the Administrative Procedure Act (or Orders issued through APA adjudication).³³ Yet the courts have not explained how this is consistent with the theory that Congress intended to leave the question up to the agency. If Congress is relying on agency expertise, what is the purpose of notice and comment procedures? Under the notice and comment provisions of the APA, the agency must publish notice of proposed rulemaking and then allow the public a period of time to comment on the proposal.³⁴ The agency must then respond to the comments.³⁵ If the agency decides to alter the proposal significantly, it must publish a new notice of proposed rulemaking starting the process all over.³⁶ The procedure is intended to ensure that the public, and regulated parties, have fair notice of and opportunity to comment on the regulation.³⁷

How does a requirement that the agency respond to public comments on a proposed regulation show that Congress desired to leave the policy up to the agency? The notice and comment procedural requirements are instead evidence that Congress does not entirely trust the agency’s decisions on policymaking and gap-filling.

(2020) (mem.) (statement of Gorsuch, J.).

³¹ *Monessen Sw. Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988).

³² *See United States v. Mead Corp.*, 533 U.S. 218, 226–27 (2001).

³³ *See id.*

³⁴ 5 U.S.C. § 553; *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 96 (2015).

³⁵ *Perez*, 575 U.S. at 96.

³⁶ *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 173 (2007).

³⁷ *Id.* at 174.

These procedural requirements show that Congress did not leave the agency free to act on its own. Nothing in the APA demonstrates that Congress gave the agency the authority to regulate free of interference from the courts on the question of whether the regulation comports with the statute enacted by Congress.

In any event, Congress has no power to confer either law-making power or judicial power on executive agencies.³⁸

II. THE PROBLEM OF SEPARATION OF POWERS

Chevron deference has administrative agencies usurping the judicial role of interpreting legal texts and the congressional role of enacting legislation. If the legislation is so vague as to have multiple or no discernable meaning, the agency is effectively exercising Congress' lawmaking power when it "interprets" the legislation. Agencies are left to fill gaps in the statutory framework and to make policy.³⁹ This administrative action is further insulated from meaningful review when the judiciary defers to the agency interpretation. *Chevron* creates the perfect storm for destruction of separation of powers limits that are embedded in the structure of the Constitution.

Separation of the powers of government is a foundational principle of our constitutional system. There can be little debate that separation of powers was considered an essential component in the plan of government by the Framers. Even before a national constitution was ever considered, the founding generation made sure that newly formed state governments were based on separated powers.

In Virginia, the Fifth Revolutionary Convention approved the Declaration of Rights in June of 1776 that insisted that "legislative and executive powers . . . should be separate and distinct from the judiciary."⁴⁰ The new Virginia Constitution adopted that same month also required that the branches of government be "separate and distinct" and commanded that they not "exercise the powers properly belonging to the other."⁴¹

³⁸ John C. Eastman, *The President's Pen and the Bureaucrat's Fiefdom*, 40 HARV. J.L. & PUB. POL'Y 639 (2017); see A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935); Panama Refin. Co. v. Ryan, 293 U.S. 388, 428–29 (1935).

³⁹ *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (quoting *Morton v. Ruiz*, 415 U.S. 199, 231 (1974)).

⁴⁰ VIR. DEC. OF RIGHTS (1776), reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 530 (John P. Kaminski et al. eds., 2009).

⁴¹ CONST. OF 1776, reprinted in 8 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 533 (John P. Kaminski et al. eds., 2009).

The Massachusetts Constitution of 1780 contained a similar provision and added the purpose of separated powers “to the end it may be a government of laws and not of men.”⁴²

The denial of separated powers was among the complaints listed against the crown in the Declaration of Independence.⁴³ Justice Story notes that the first resolution adopted by the Constitutional Convention in 1787 was for a plan of government consisting of three separate branches of government.⁴⁴

The Framers and Ratifiers of the Constitution understood that separation of powers was necessary to protect individual liberty. In this, the founding generation relied on the works of Montesquieu, Blackstone, and Locke for the proposition that institutional separation of powers was an essential protection against arbitrary government.⁴⁵

These warnings against consolidated power resulted in structural separation of power protections in the design of the federal government.⁴⁶ That design divided the power of the national government into three distinct branches, vesting the legislative authority in Congress, the executive power in the President, and the judicial responsibilities in the Supreme Court and lower federal courts.⁴⁷

The ratification debates demonstrate the importance of this separation to the founding generation. The argument was not whether to separate power, but whether the proposed constitution separated power enough.⁴⁸ Fearing that the mere prohibition of one branch exercising the powers of another was insufficient, the Framers designed a system that vested each

⁴² MASS. CONST. OF 1780, *reprinted in* 4 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 445 (John P. Kaminski et al. eds., 2009).

⁴³ THE DECLARATION OF INDEPENDENCE paras. 9–10 (U.S. 1776) (noting obstruction of “the administration of justice” and the king’s power to make “judges dependent on his will alone”).

⁴⁴ *See* 1 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 519 (Melville M. Bigelow ed., Little, Brown, & Co., 5th ed. 1905) (1833).

⁴⁵ *See, e.g.*, MONTESQUIEU, THE SPIRIT OF THE LAWS 152 (Franz Neumann ed., Thomas Nugent trans., Hafner Publ’g Co. 1949) (1748); 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 150–51 (William S. Hein & Co., Inc. 1992) (1765); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 82 (Thomas P. Peardon ed., Prentice-Hall, Inc. 1997) (1690).

⁴⁶ *See* THE FEDERALIST NO. 51, at 267 (James Madison) (George W. Carey & James McClellan eds., 2001); THE FEDERALIST NO. 47, *supra*, at 249, 251 (James Madison); THE FEDERALIST NO. 9, *supra*, at 38 (Alexander Hamilton); *see also* Letter from Thomas Jefferson to John Adams (Sept. 28, 1787), *in* 1 THE ADAMS-JEFFERSON LETTERS 199, 199 (Lester J. Cappon ed., 1959).

⁴⁷ *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

⁴⁸ THE FEDERALIST NO. 48, *supra* note 46, at 256 (James Madison).

branch with the power necessary to resist encroachment by another.⁴⁹ Madison argued that what the anti-federalists saw as a violation of separation of powers was in fact the checks and balances necessary to enforce separation.⁵⁰

James Madison explained that a mere prohibition on exercising the powers of another branch of government was not sufficient: such prohibitions were mere “parchment barriers.”⁵¹ Thus, the Constitution was designed to give each branch the power to protect its powers from the other branches.⁵² Because the three powers of government were not equal, the constitutional design does not have a pure separation of powers. To accomplish an equilibration of power, the Constitution gives each branch some limited role in the operation of the other branches.⁵³ Thus, for example, the Executive wields the power to veto legislation, while the Judiciary wields the power to determine the meaning of laws and whether they comport with the Constitution.⁵⁴ Leaving interpretation of laws to the lawmaking branch, according to Blackstone, is an invitation to “partiality and oppression.”⁵⁵ Sensible to Mindful of this danger, the Framers vested these powers in the judicial branch.⁵⁶

The Supreme Court has also recognized that Separation of Powers is the core structural principal of the Constitution.⁵⁷ As Justice Kennedy explained:

⁴⁹ *Id.*

⁵⁰ *Id.*; THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison); *see also* *Mistretta v. United States*, 488 U.S. 361, 380 (1989).

⁵¹ THE FEDERALIST NO. 48, *supra* note 46, at 256 (James Madison).

⁵² THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison).

⁵³ *Id.* at 267–68.

⁵⁴ At first blush, it appears that the checks and balances designed into the Constitution did not have the desired effect. However, then-Judge Kavanaugh noted that *Chevron* deference “encourages the Executive Branch . . . to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations” Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (reviewing ROBERT A. KATZMANN, *JUDGING STATUTES* (2014)). The adoption of the *Chevron* doctrine empowers the Executive at the expense of the Legislature. If there is a failure in the system of checks and balances, it is found in the refusal of the courts to enforce the separation of powers.

⁵⁵ BLACKSTONE, *supra* note 45, at 58.

⁵⁶ *See* FEDERALIST NO. 51, *supra* note 46 at 268–69 (James Madison).

⁵⁷ *Boumediene v. Bush*, 553 U.S. 723, 797 (2008) (“[P]ersonal liberty . . . is secured by adherence to the separation of powers.”); *Metro. Wash. Airports Auth. v. Citizens for Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 272 (1991) (“The ultimate purpose of this separation of powers is to protect the liberty and security of the governed.”); *Mistretta v. United States*, 488 U.S. 361, 380 (1989) (“This Court consistently has given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate Branches is essential to the preservation of liberty.”).

In recent years, perhaps, we have come to think of liberty as defined by that word in the Fifth and Fourteenth Amendments and as illuminated by the other provisions of the Bill of Rights. The conception of liberty embraced by the Framers was not so confined. They used the principles of separation of powers and federalism to secure liberty in the fundamental political sense of the term, quite in addition to the idea of freedom from intrusive governmental acts. The idea and the promise were that when the people delegate some degree of control to a remote central authority, one branch of government ought not possess the power to shape their destiny without a sufficient check from the other two. In this vision, liberty demands limits on the ability of any one branch to influence basic political decisions.⁵⁸

The doctrine of *Chevron* deference, however, breaches this core doctrine of separation of powers in two fundamental ways. First, it allows executive agencies to exercise Congress's power to legislate. The Constitution vests the power to make laws solely in Congress and strictly limits how those laws can be made. Second, *Chevron* deference impermissibly allows executive agencies to exercise the Judiciary's well-settled power "to say what the law is."⁵⁹

III. *CHEVRON* DEFERENCE ALLOWS THE EXECUTIVE TO EXERCISE LEGISLATIVE POWER

Chevron deference involves an explicit recognition that administrative agencies make "law"—that is to say, agencies promulgate substantive legal obligations (or prohibitions) that bind individuals. Pursuant to the doctrine, courts may not interfere with agency lawmaking so long as the congressional enactment is ambiguous, the agency has both expertise and rulemaking authority, and the agency's interpretation is at least a possible interpretation of the law.⁶⁰ The courts have recognized that agencies are clearly involved in lawmaking when they enact substantive rules that are subject to *Chevron* deference.⁶¹ There are two problems with deference in this regard. First, the Constitution assigns lawmaking exclusively to Congress. Second, reflecting the Founders' fears over the power of legislative branch, the Constitution specifies a particular procedure through

⁵⁸ *Clinton v. City of New York*, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring).

⁵⁹ *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

⁶⁰ There is no requirement for the agency construction of the statute to be the best interpretation. Indeed, under *Chevron* the agency is even empowered to subsequently change its mind about what the statute means. See *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–83 (2005).

⁶¹ See *United States v. Mead Corp.*, 533 U.S. 218, 233 (2001).

which laws are to be made.⁶² Agencies do not follow that procedure when promulgating regulations.⁶³

Article I, section 1, clause 1 of the Constitution provides: “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.”⁶⁴ This is the first of the three “vesting clauses”⁶⁵ that sets out the basic plan of government under the Constitution and that provide the framework for the scheme of separated powers. Powers vested in one branch under the vesting clause cannot be ceded to or usurped by another.⁶⁶

The legislative power is the power to alter “the legal rights, duties and relations of persons.”⁶⁷ This is the same definition given to “substantive rules” adopted by administrative agencies. Section 551 of the Administrative Procedure Act defines the term “rule” as an agency statement that prescribes “law or policy.”⁶⁸ These are “laws” that impose “legally binding obligations or prohibitions” on individuals.⁶⁹ It is difficult to see much space between agency “rules” and the “legislation” that Article I of the Constitution reserved exclusively to Congress.⁷⁰ Responding to the point that “some administrative agency action—rulemaking, for example—may resemble lawmaking,” the Supreme Court noted that agency action will always be limited to mere executive administration of the laws “because . . . [the agency’s] administrative activity cannot reach beyond the limits of the statute that created it.”⁷¹ If the question is whether Congress has delegated a power reserved exclusively to Congress, the *Chadha* Court noted that the courts were available to ensure that administrative agencies adhered to “the will of Congress.”⁷²

Those checks were largely illusory before *Chadha* was decided. The idea of ensuring that agency activity “cannot reach beyond the limits of the statute that created it” requires a statute with definable limits. If courts cannot determine the limits of

⁶² U.S. CONST. art. I, § 7, cl. 2.

⁶³ See Administrative Procedural Act, 5 U.S.C. § 553 et seq.

⁶⁴ U.S. CONST. art. I, § 1, cl. 1.

⁶⁵ U.S. CONST. art. II, § 1, cl. 1; U.S. Const. Art. III, § 1, cl. 1.

⁶⁶ *E.g.*, *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 67–68 (2015) (Thomas, J., concurring).

⁶⁷ See *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 952 (1983).

⁶⁸ The Administrative Procedure Act, 5 U.S.C. § 551 et seq.

⁶⁹ *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 123 n.4 (2015) (Thomas, J., concurring).

⁷⁰ See *Hamburger*, *supra* note 21, at 1194 n.21, 1196; Henry P. Monaghan, *Marbury and the Administrative State*, 83 COLUM. L. REV. 1, 5 (1983).

⁷¹ *Chadha*, 462 U.S. at 953 n.16.

⁷² *Id.*

congressional will, there is no standard for them to enforce.⁷³ In *J.W. Hampton, Jr., & Co. v. United States*⁷⁴ the Supreme Court came up with a theory that so long as Congress set down an “intelligible principle” for agency action, that was sufficient to avoid a conclusion that the Congress had impermissibly delegated its lawmaking power to the executive branch.⁷⁵ However, the idea that this doctrine requiring an “intelligible principle” would actually provide an enforceable norm was very short lived. Just four years after the *J.W. Hampton* decision, the Supreme Court ruled that a requirement for the agency to regulate in the “public interest” was a sufficient intelligible principle.⁷⁶ These decisions stripped both “intelligible” and “principle” from the standard, leaving Congress free to delegate that which the Constitution explicitly vests in Congress and Congress alone.

In any event, neither of the checks touted by the *Chadha* Court continue to exist under *Chevron*. Under *Chevron*, it is the agency that has the last word on whether the agency’s action reaches beyond the limits of the statute. The most the courts will do is determine whether the agency interpretation of the statute is “reasonable”—that is, whether the agency’s interpretation is a *possible* construction of the statute, though not necessarily the best reading. Further, the courts no longer ensure that agencies adhere to the will of Congress, since *Chevron* deference requires courts to defer to the agency’s determination of Congress’s will.⁷⁷

By taking the courts out of the role that the *Chadha* Court thought critical, *Chevron* deference invites the administrative agency to usurp Congress’s power to make law.⁷⁸ Further, it

⁷³ *Id.*

⁷⁴ 276 U.S. 394 (1928).

⁷⁵ *Id.* at 409.

⁷⁶ See *N.Y. Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24–25 (1932); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943).

⁷⁷ Of course, the courts are only supposed to defer once they determine that the statute is ambiguous. This requires the courts to use all of the tools of statutory construction to determine the meaning of the law. See *Gen. Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33 (2000); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). If the statute remains ambiguous once all the tools of statutory interpretation have been exhausted, a different problem is presented. See *Michigan v. EPA*, 576 U.S. 743, 762–63 (2015) (Thomas, J., concurring) (“For if we give the ‘force of law’ to agency pronouncements on matters of private conduct as to which ‘Congress did not actually have an intent,’ we permit a body other than Congress to perform a function that requires an exercise of the legislative power. . . . It is the power to decide—without any particular fidelity to the text—which policy goals EPA wishes to pursue.”) (internal citations omitted).

⁷⁸ Kavanaugh, *supra* note 54 at 2151.

invites Congress to increasingly delegate its lawmaking power to administrative agencies.⁷⁹ The result in either instance is that agencies in the Executive branch of government combine lawmaking with law execution in a single office. This is something that the structure of the Constitution was designed to prevent.⁸⁰ As the Supreme Court has noted on many occasions, this combination of powers in a single office is a threat to individual liberty.⁸¹

To that end, Congress cannot delegate its lawmaking power. The text of the Constitution is clear that the power of legislation—at least as far as the Constitution permits legislation at all—is reserved exclusively to Congress.⁸² The Constitution further limits how legislation can be made. Congress’s power to make law can only be exercised by following a specific procedure.⁸³ According to the text, Congress can *only* act pursuant to “a single, finely wrought and exhaustively considered, procedure”⁸⁴ that includes bicameralism (the requirement that a measure be approved by both houses of Congress) and presentment (allowing the President the opportunity to veto the legislation).⁸⁵ The Supreme Court recognized that these provisions might prevent Congress from acting in an efficient manner. However, “[c]onvenience and efficiency are not the primary objectives—or the hallmarks—of democratic government”⁸⁶

The system built by the founding generation was purposefully inefficient. Under the Constitution, the legislative branch is divided into two houses, each selected by a different manner.⁸⁷ No bill can become law until it has been enacted by both houses of the Legislature and then presented to the President for approval.⁸⁸ This is a cumbersome process but one that those who framed and ratified the Constitution thought necessary to preserve liberty.⁸⁹

79 *Michigan*, 576 U.S. at 762–63 (Thomas, J., concurring).

80 *Clinton v. City of New York*, 524 U.S. 417, 450–51 (1998) (Kennedy, J., concurring).

81 See THE FEDERALIST NO. 51, *supra* note 46 at 268–69 (James Madison); see also *Boumediene v. Bush*, 533 U.S. 723, 172–43 (2008).

82 See U.S. CONST. art I, § 1, cl. 1.

83 See *Rapanos v. United States*, 547 U.S. 715, 750 (2006); *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

84 *Chadha*, 462 U.S. at 951.

85 *Id.* at 946–51.

86 *Id.* at 944.

87 U.S. CONST. art. I, §§ 2, 3.

88 U.S. CONST. art. I, § 7, cl. 2.

89 JAMES MCCLELLAN, LIBERTY, ORDER, AND JUSTICE 339 (Liberty Fund, Inc. 3d ed.,

A unicameral legislative body would certainly have been more efficient, but most of the colonial governments had moved to a bicameral legislature by the time the Constitution was being drafted.⁹⁰ The Framers were concerned that a powerful legislative branch at the federal level would be a threat to liberty.⁹¹ They had learned that it was nearly impossible to restrain the legislative power when vested in only one body.⁹² As James Wilson would later remark: “A single legislature is calculated to unite in it all the pernicious qualities of the different extremes of bad government.”⁹³

James Madison explained, “[i]n republican government, the legislative authority necessarily predominates.”⁹⁴ The remedy was to split the legislative branch into two houses.⁹⁵ This fit into the scheme of divided power meant to preserve liberty.⁹⁶ By the time of the framing of the Constitution, the idea that the legislature had to be divided was a view held by “most persons of sound reflection.”⁹⁷ It was for these reasons that the Constitution specified a “single, finely wrought and exhaustively considered, procedure” for enactment of federal law.⁹⁸

Deferring to agency “gap-filling” and “policy making,” however, allows executive branch agencies to “make law” without following this single, finely wrought procedure. There is no need of political compromise or consensus building. There is no procedure for deliberation and there is certainly no element of republican government. Law is not proposed by representatives, it is imposed by executive branch employees.

2000) (1989) (“Speed, however, is not a virtue in the political process crafted by the Framers. The system is intended to promote careful deliberation, which is time-consuming, to be sure, but necessary to build a consensus so that the decision finally made has broad support.”).

⁹⁰ See FEDERAL FARMER: AN ADDITIONAL NUMBER OF LETTERS TO THE REPUBLICAN, (New York, May 2, 1788) *reprinted in* 20 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION DIGITAL EDITION 985–86 (John P. Kaminski et al. eds., 2009).

⁹¹ See JAMES WILSON, OF GOVERNMENT, THE LEGISLATIVE DEPARTMENT, LECTURES ON LAW 1791, *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 377, 377 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁹² *Id.*

⁹³ *Id.*

⁹⁴ THE FEDERALIST NO. 51, *supra* note 46, at 269 (James Madison).

⁹⁵ *Id.*

⁹⁶ See ST. GEORGE TUCKER, *Of the Several Forms of Government*, in VIEW OF THE CONSTITUTION OF THE UNITED STATES WITH SELECTED WRITINGS 21, 48 (1999); *see also* THE FEDERALIST NO. 51, *supra* note 46, at 268–69 (James Madison).

⁹⁷ JOSEPH STORY, 2 COMMENTARIES ON THE CONSTITUTION, § 547 (1833), *reprinted in* 1 THE FOUNDERS’ CONSTITUTION 378, 378 (Philip B. Kurland & Ralph Lerner eds., 1987).

⁹⁸ *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 951 (1983).

One argument for *Chevron* deference is that executive branch agencies are more politically accountable than the courts.⁹⁹ There are two responses. First, the courts are not supposed to be politically accountable. They are supposed to operate outside of politics and render judgment on the matters brought before them.¹⁰⁰ Second, executive agencies are not politically accountable. Rules cannot be changed simply because the individual occupying the Office of President has changed.¹⁰¹ Further, it is unlikely that the President could control the behavior of administrative agencies at that fine of a level.¹⁰² Even if one were to assume that the President had direct, day-to-day control over all of the executive agencies (including the so-called “independent agencies” which are designed to operate outside of the three branches of government), that does not alter the fact that the agencies are making law outside of the Constitutional procedure.

IV. *CHEVRON* DEFERENCE ALLOWS THE EXECUTIVE TO EXERCISE JUDICIAL POWER

Article III, § 1 of the Constitution vests the “judicial power” in the “Supreme Court and in such inferior Courts as the Congress may . . . establish.”¹⁰³ In a scheme of separated powers, the key to judicial power is the “interpretation of the law.”¹⁰⁴ This is a power that must be separated from both execution and legislation. Quoting Montesquieu, Justice Story notes “there is no liberty, if the judiciary power be not separated from the legislative and executive powers.”¹⁰⁵ The purpose of the judiciary is to stand as a neutral arbiter between the legislative and executive branches—a necessary check on the political branches of government.¹⁰⁶ The separate judicial power allows the courts to

⁹⁹ See *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2397 (2020) (Kagan, J., concurring).

¹⁰⁰ See THE FEDERALIST NO. 78, *supra* note 46, at 405–06 (Alexander Hamilton).

¹⁰¹ See *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42, 48 (1983).

¹⁰² See *City of Arlington v. FCC*, 569 U.S. 290, 313–14 (2013) (Roberts, C.J., dissenting).

¹⁰³ U.S. CONST. art. III, § 1.

¹⁰⁴ THE FEDERALIST NO. 78, *supra* note 46, at 404 (Alexander Hamilton); *Perez v. Mortg. Bankers Ass’n*, 575 U.S. 92, 119–20 (2015) (Thomas, J., concurring).

¹⁰⁵ JOSEPH STORY, 3 COMMENTARIES ON THE CONSTITUTION, § 1568 (1833), *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 200, 200 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹⁰⁶ THE FEDERALIST NO. 78, *supra* note 46, at 405 (Alexander Hamilton).

serve as “bulwarks” for liberty.¹⁰⁷ This requires that judges have the power to “declare the sense of the law.”¹⁰⁸

The scheme for balancing power between the branches of government depends on each branch exercising the full extent of its power.¹⁰⁹ In order to keep the political branches in check, the courts may not surrender their power to interpret the law to either of the political branches. The failure to exercise this duty would be an invitation to “partiality and oppression.”¹¹⁰ Each branch of government must support and defend the Constitution and thus must interpret the Constitution.¹¹¹ The Courts may not, however, cede their judicial power to interpret the laws to the Executive.¹¹² The judicial branch accomplishes its role by ruling on the legality of the actions of the executive and giving “binding and conclusive” interpretations to acts of Congress.¹¹³ Had the Constitution not assigned such a role to the judiciary as a separate branch, the plan of government “could not be successfully carried into effect.”¹¹⁴

Chevron deference, however, alters this framework in a way that the separation of judicial from executive power is no longer enforced. It is no longer the exclusive province of the courts to interpret congressional enactments. Instead, the court now treats the existence of an “ambiguity” as meaning that Congress intended the agency, and only the agency, to interpret the statute. So long as the agency interpretation is “reasonable,” *Chevron* requires the courts to cede their judicial power to the executive and approve the agency interpretation.

The Supreme Court took this line of argument to its logical extreme in *National Cable & Telecommunications Association v. Brand X Internet Services*.¹¹⁵ There, the court ruled that *Chevron* deference applied to the FCC’s decision that cable internet providers did not provide “telecommunications service” as defined by the Communications Act, and thus were exempt from common carrier regulation.¹¹⁶ That part of the decision is not surprising. The

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; see *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 944 (1983).

¹⁰⁹ THE FEDERALIST NO. 51, *supra* note 46, at 269 (James Madison).

¹¹⁰ BLACKSTONE, *supra* note 45, at 58.

¹¹¹ *United States v. Nixon*, 418 U.S. 683, 704 (1974).

¹¹² *See id.*

¹¹³ WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES, *reprinted in* 4 THE FOUNDERS’ CONSTITUTION 195, 195 (Philip B. Kurland & Ralph Lerner eds., 1987).

¹¹⁴ *Id.*

¹¹⁵ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

¹¹⁶ *Id.* at 977, 981.

Communications Act is a model of ambiguity, its provisions not anticipating the rapid evolution of broadband internet. The court was even willing to grant *Chevron* deference for a changed interpretation of the statute by the agency.¹¹⁷ The statute had not changed, the agency's policy had changed. That, however, is more a problem of agency lawmaking as discussed in the prior section. The innovation introduced by *Brand X* is that the agency interpretation of Communications Act ran contrary to a Court of Appeals interpretation of the same provision in a prior case.¹¹⁸ The Supreme Court ruled that *Chevron* required the Court of Appeals to ignore its prior ruling interpreting the Communications Act and instead defer to the Commission's new interpretation.¹¹⁹ In effect, the Supreme Court ruled that the agency had the power to overrule an Article III court on a question of statutory interpretation.¹²⁰ The Court justified this by asserting that the agency was not engaged in statutory interpretation but rather "gap-filling."¹²¹

The Supreme Court had the opportunity to limit or overrule *Brand X* in *United States v. Home Concrete & Supply, LLC*.¹²² At issue there was whether a subsequent regulation by the IRS could overrule a long-standing Supreme Court interpretation of the statute.¹²³ The Court ruled no—but not because it amounted to interference with the judicial power. Nor was the problem that the prior ruling was from the Supreme Court, as opposed to the Circuit Court of Appeals, as was the case in *Brand X*. Although the Supreme Court had noted in its prior ruling that the statute at issue was "ambiguous," that ruling was several decades before the *Chevron* ruling.¹²⁴ It seems that the court was saying that "ambiguous" may mean something different in the *Chevron* era. Further, the court argued that the interpretation set by the Supreme Court in the prior ruling "had the better side of the textual argument."¹²⁵ However, *Chevron* deference rulings consistently note that the agency's interpretation need not be the "best" reading of the statute.¹²⁶ So long as the agency's reading is "reasonable" the court must defer.¹²⁷ Thus, it is hard to say what impact, if any, *Concrete Home* will have on *Brand X*. A close read

¹¹⁷ *Id.* at 981.

¹¹⁸ *Id.* at 982.

¹¹⁹ *Id.* at 982–83.

¹²⁰ *See id.*

¹²¹ *Id.*

¹²² *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478 (2012).

¹²³ *Id.* at 481–82.

¹²⁴ *Id.* at 488–89.

¹²⁵ *Id.* at 489.

¹²⁶ *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005).

¹²⁷ *Id.*

of the case reveals that there is nothing in the majority opinion that challenges the *Brand X* holding that administrative agencies have the power to overrule prior court decisions.

A legislature cannot overrule a court, although it can enact a new law to avoid the effect of a ruling.¹²⁸ Similarly, prior rulings have held that the executive branch was bound to follow a final judgment of a court.¹²⁹ But *Brand X* holds that the executive is not bound at all by a judicial ruling on the interpretation of an Act of Congress.¹³⁰ Under *Brand X*, if it is a statute dealing with agency power and the court can find an ambiguity, the agency is free to come to a conclusion different from that reached by the court and the court must accept the agency's interpretation.¹³¹

The *Brand X* decision makes Montesquieu's worst fears of combined power a reality. An executive agency now has the power to make law (substantive rules that obligate individuals), enforce those laws, and to interpret its own authority to make those laws, free from judicial interference. The judicial, legislative, and executive powers are firmly held in a single hand.

Under *Chevron* deference, the regime of separated powers has come to an end. The agency now makes law, is the ultimate interpreter of its authority to make law, and executes the law it makes. Whatever the Supreme Court's motivation for developing this deference doctrine, it is clearly a doctrine that stands in opposition to the fundamental structure of the Constitution.

Those who seek to resurrect the rule of separated powers have their work cut out for them. *Chevron* has been in place for a long time and some members of the Supreme Court are unwilling to overturn precedent—even in cases that they believe were wrongly decided.¹³² Still, there are two specific grounds of attack that can help rebuild the separation of powers structure of the Constitution. First, advocates can work on building exceptions to the *Chevron* deference doctrine so that deference becomes the exception rather than the rule. Second, advocates can focus on Step 1 of the *Chevron* analysis and insist that the courts actually use all of the tools of statutory interpretation before concluding that the law is ambiguous. Finally, if after all the tools of statutory construction have been used the law is still ambiguous,

¹²⁸ See *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 218–19 (1995).

¹²⁹ See, e.g., *Zivotofsky v. Clinton*, 566 U.S. 189, 197 (2012).

¹³⁰ *Brand X*, 545 U.S. at 983–84.

¹³¹ *Id.*

¹³² See, e.g., *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2133–35 (2020) (Roberts, C.J., concurring); *Kisor v. Wilkie*, 139 S. Ct. 2400, 2422 (2019).

the advocate should argue that Congress has failed to enact a law at all but has instead attempted an unconstitutional delegation of its lawmaking power to the Executive branch.

V. ATTACKING CHEVRON – LIMITING EXCEPTIONS

One way to limit a rule is build a fence of exceptions around its application. An example of this is another type of deference in Administrative Law that also raised serious separation of powers concerns—*Auer* deference. Under *Auer* deference, courts are required to give controlling deference to an agency’s interpretation of its own rules.¹³³ With *Auer* deference, the entity that wrote the rule was also the only entity that could interpret the rule.¹³⁴ Justice Scalia, author of the court’s opinion in *Auer*, later came to criticize the rule as a violation of separation of powers and called for overturning that deference doctrine.¹³⁵ As the critiques mounted, the court began consciously cataloging the exceptions to the doctrine that had been noted in prior decisions.¹³⁶ Finally, in the 2019 Term, it looked like there were enough votes to overturn *Auer*. In *Kisor v. Wilkie*, however, the majority narrowed *Auer* and reemphasized the requirement that reviewing courts exhaust the traditional tools of statutory interpretation before finding a sufficient ambiguity that might raise the issue of deference to the agency interpretation.¹³⁷ Even then, the agency interpretation must be a reasonable one.¹³⁸

Advocates should explore a similar approach for limiting the scope of *Chevron* deference. The Supreme Court has already ruled that *Chevron* deference is not available when the agency interpretation of the statute is contained in an opinion letter.¹³⁹ The court expanded this limitation in *United States v. Mead Corporation*¹⁴⁰ to rule that *Chevron* can only apply if Congress has granted rulemaking (or adjudicatory) authority to the agency.¹⁴¹ There must be evidence that Congress granted the authority to issue rules on the subject at issue that carry the force of law.¹⁴² Under these cases, an agency is not granted

¹³³ *Christopher v. Smithkline Beecham Corp.*, 567 U.S. 142, 155 (2012); *Auer v. Robbins*, 519 U.S. 452, 461–63 (1997).

¹³⁴ *Auer*, 519 U.S. at 461.

¹³⁵ *Talk Am., Inc. v. Mich. Bell Tel. Co.*, 564 U.S. 50, 68–69 (2011) (Scalia, J., concurring).

¹³⁶ *See Kisor*, 139 S. Ct. at 2414–18.

¹³⁷ *See id.* at 2423.

¹³⁸ *Id.* at 2422.

¹³⁹ *See Christensen v. Harris County*, 529 U.S. 576, 587 (2000).

¹⁴⁰ *See United States v. Mead Corp.*, 533 U.S. 218, 254–56 (2001).

¹⁴¹ *See id.* at 229.

¹⁴² *See id.* at 231–32; *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649–50

Chevron deference if it does not have authority to issue rules (or binding legal rulings through adjudication) on the specific question for which it is seeking deference. Further, an argument can be made that deference should not be granted if the interpretation in question was not adopted as part of notice and comment rulemaking or adjudication under the APA.

The Supreme Court has also shown reluctance to grant deference where the rule is one of “vast ‘economic and political significance’” in the absence of clear authority from Congress for the rule.¹⁴³ Then Judge Kavanaugh framed this as the “major rules doctrine,” which denies *Chevron* deference for significant rules in the absence of *clear* congressional authorization.¹⁴⁴ Justice Breyer referred to these as “important . . . question[s]” that Congress was more likely to answer itself rather than leave to an administrative agency.¹⁴⁵

The “major rules doctrine” appears to have started with a case that should have been decided on the question of whether the agency interpretation was a reasonable one. In *MCI Telecommunications Corp. v. AT&T*,¹⁴⁶ the question was whether the FCC could interpret the term “modify any requirement” to allow the Commission to render voluntary a filing that the statute made mandatory. The Court held that the term “modify” in the statute could not be read to permit the FCC to eliminate a statutory requirement.¹⁴⁷ As such, no deference was owed because the interpretation went “beyond the meaning that the statute can bear.”¹⁴⁸ Although cited by the “major rules doctrine” cases, *MCI* is better situated as a case where the agency’s interpretation was not reasonable. Still, advocates can certainly use this case where the agency strays too far from the apparent meaning of the statute.

A better case for the beginning of the “major rules doctrine” is *FDA v. Brown & Williamson Tobacco*.¹⁴⁹ There, the Food and

(1990). *But see* Barnhart v. Walton, 535 U.S. 212, 222 (2002) (finding an interpretation by an agency subject to *Chevron* deference even where it was not adopted through notice and comment rulemaking where it was a long-standing interpretation).

¹⁴³ Util. Air Regul. Grp., v. EPA, 573 U.S., 302, 321, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

¹⁴⁴ U.S. Telecom Ass’n v. FCC, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

¹⁴⁵ Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 370, 383 (1986).

¹⁴⁶ 512 U.S. 218 (1994).

¹⁴⁷ *Id.* at 231–32.

¹⁴⁸ *Id.* at 229.

¹⁴⁹ 529 U.S. 120 (2000).

Drug Administration claimed authority to regulate tobacco products under the Food Drug and Cosmetic Act.¹⁵⁰ That law was enacted in 1938,¹⁵¹ but the FDA did not discover its authority to regulate tobacco under the Act until 1996.¹⁵² Since Congress had adopted other regulatory programs to cover tobacco products, the court ruled that tobacco products were not within the agency's regulatory authority.¹⁵³ The court noted, "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."¹⁵⁴

This reasoning was also employed by the court in rejecting EPA's attempt to use existing authority under the Clean Air Act to issue air pollutant standards in order to regulate greenhouse gases. The court noted that EPA's interpretation of its authority under the Clean Air Act "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization."¹⁵⁵

*King v. Burwell*¹⁵⁶ is another case that can be included in the "major rules doctrine." The Patient Protection and Affordable Care Act requires the establishment of an "exchange" (an insurance marketplace for the purchase of health insurance) in each state.¹⁵⁷ If the state failed to create an exchange, the Act required the federal government to create the exchange for that state.¹⁵⁸ Tax credits were available under the Act for the purchase of health insurance through "an Exchange established by the State."¹⁵⁹ The question before the Court was whether an exchange created by the federal government was "an Exchange established by the State" for purposes of the tax credit.¹⁶⁰ The Internal Revenue Service promulgated a rule interpreting the statute as providing tax credits for purchase of insurance through a federally created exchange.¹⁶¹

The Supreme Court declined to apply *Chevron* deference to the IRS rule because it raised a question of "deep 'economic and

¹⁵⁰ *Id.* at 125.

¹⁵¹ *Id.* at 131.

¹⁵² *Id.* at 125.

¹⁵³ *Id.* at 161.

¹⁵⁴ *Id.* at 160–61.

¹⁵⁵ *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).

¹⁵⁶ 576 U.S. 473 (2015).

¹⁵⁷ *Id.* at 483.

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 484.

political significance.”¹⁶² In such cases, the Court is hesitant to rely on an implied delegation to the administrative agency to resolve the issue.¹⁶³ Here, the deciding factor for the Court was its finding that it was unlikely that Congress would delegate to the IRS a question regarding health insurance policy.¹⁶⁴ Thus, where the question raises a question of “deep ‘economic and political significance,’”¹⁶⁵ the advocate should explore whether the agency claiming the benefit of *Chevron* deference is in fact an expert on the particular question involved. While the IRS may have been expert on issues of tax policy and tax credits, it had no expertise on the program the tax credits were enacted to support. Without that policy background, the courts are unwilling to simply to defer to the agency. Even if the agency has expertise on the issue, the courts require a greater degree of clarity from showing that Congress intended to delegate resolution of the question to the agency.

A related doctrine is constitutional avoidance. “Where an administrative interpretation of a statute invokes the outer limits of Congress’ power, we expect a clear indication that Congress intended that result.”¹⁶⁶ The question in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers* was whether the Corps of Engineers could regulate an isolated body of water (not connected to any other body of water and completely within the boundaries of a single state)—a question that pushes the limits of the Congress’s powers under the Commerce Clause.¹⁶⁷ The agency argued that migratory birds could view the body of water as a potential spot to stop (the “glancing duck test”)¹⁶⁸, and that was sufficient to come within the Commerce Clause.¹⁶⁹ The Court refused to resolve the question without a clear signal from Congress that it was pushing such a claim of jurisdiction.¹⁷⁰

The advocate can use these existing exceptions as a starting point for arguing for new exceptions and further limitations on

¹⁶² *Id.* at 485–86 (quoting 573 U.S. at 324).

¹⁶³ *Id.* at 486.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. at 324).

¹⁶⁶ *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001).

¹⁶⁷ *Id.* at 162–64.

¹⁶⁸ Larry R. Bianucci & Rew R. Goodenow, *The Impact of Section 404 of the Clean Water Act on Agricultural Land Use*, 10 UCLA J. ENV’T. L. & POL’Y 41, 65 (1991).

¹⁶⁹ *Id.* at 164.

¹⁷⁰ *Id.* at 173–74.

deference. The real battle, however, ought to be over the issue of statutory interpretation.

VI. ATTACKING CHEVRON—A RETURN TO STATUTORY INTERPRETATION

Chevron deference only applies “if the statute is silent or ambiguous with respect to the specific issue.”¹⁷¹ Before a court can conclude a statute is ambiguous, however, it must first employ all the tools of statutory interpretation in an attempt to discern Congress’s intent.¹⁷² This requires the court to search for the statute’s meaning, rather than just attempting to find an ambiguity. While “clever lawyers - and clever judges - will always be capable of perceiving *some* ambiguity in any statute,”¹⁷³ Justice Scalia noted, “Chevron is . . . not a declaration that, when statutory construction becomes difficult, we will throw up our hands and let regulatory agencies do it for us.”¹⁷⁴

Statutory interpretation may be the most effective attack against an agency claiming the benefit of *Chevron* deference. However, such a strategy will require the advocate to master not only the statutory scheme at issue in the case, but also the major canons of statutory construction.

Then Judge Kavanaugh argued that courts, when faced with a statutory construction question, should start off with the “best reading of the text” and then apply the canons of statutory construction.¹⁷⁵

When faced with such a question, one should start with the text of the specific statute at issue.¹⁷⁶ The controlling presumption is “that a legislature says in a statute what it means and means in a statute what it says there.”¹⁷⁷ Here, you need to look at the statutory scheme as a whole, and place the specific statute at issue in context.¹⁷⁸ The “best reading” is arrived at by starting with the words of the statute, the context

171 *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984).

172 *See Gen. Dynamics Land Sys. v. Cline*, 540 U.S. 581, 600 (2004); *Immigr. & Naturalization Serv. v. Cardoza-Fonseca*, 480 U.S. 421, 446–48 (1987).

173 *Abbott Lab’s v. Young*, 920 F.2d 984, 995 (D.C. Cir. 1990) (Edwards, J., dissenting) (emphasis in original).

174 *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting).

175 *Kavanaugh, supra* note 54, at 2121.

176 *See Cmty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 739 (1989); *United States v. Great N. Ry. Co.*, 287 U.S. 144, 154–55 (1932).

177 *Conn. Nat’l Bank v. Germain*, 503 U.S. 249, 253–54 (1992).

178 *See King v. Burwell*, 576 U.S. 473, 492 (2015); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 320 (2014).

of the statute in the statutory scheme, and the general rules of the English language.¹⁷⁹

A good resource for understanding the canons of statutory construction is Justice Scalia and Bryan Garner's book, *Reading Law*.¹⁸⁰ In addition to explaining the standard canons, the book provides an extensive bibliography of books and articles on interpretation of legal texts. For the advocate who needs to research statutory interpretation, this resource is a good starting point.

There is one rule of statutory interpretation that is particularly relevant to the issue of *Chevron* deference. *Chevron* only applies when, after exhausting all of the tools of statutory construction, the statute remains ambiguous. Under *Chevron*, the courts give the agency the power to fix the meaning of a genuinely ambiguous statute; however, “[t]o give meaning to what is meaningless is to create a text rather than to interpret one.”¹⁸¹

The Supreme Court, in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*,¹⁸² was confronted with a question of what exactly Congress authorized the Occupational Safety and Health Administration to do to protect workers from toxic substances. The statute at issue authorized the Secretary to promulgate health standards “which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard . . . for the period of his working life.”¹⁸³ Did the statute authorize OSHA to regulate for a “risk free” workplace or was the agency required to conduct a cost-benefit analysis on the regulation? If it is required to make a decision on the basis of a cost-benefit analysis, then how is the agency to draw the line? What cost is too high, and what benefit is too low?

Then Justice Rehnquist, in his concurring opinion, noted that Congress “improperly delegated” to the Secretary of Labor how to balance costs and benefits of the regulation.¹⁸⁴ As he explained, the statute was “completely precatory, admonishing the Secretary to adopt the most protective standard if he can, but

¹⁷⁹ See *Util. Air Regul. Grp.*, 573 U.S. at 327.

¹⁸⁰ See SCALIA, *supra* note 16; see also Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

¹⁸¹ See SCALIA, *supra* note 16, at 134.

¹⁸² 448 U.S. 607 (1980).

¹⁸³ *Id.* at 612.

¹⁸⁴ *Id.* at 672 (Rehnquist, J., concurring).

excusing him from that duty if he cannot.”¹⁸⁵ According to Justice Rehnquist, the statute could not stand because it was a delegation that failed to provide an intelligible principle, failed to establish ascertainable limits on the agency’s power under the statute, and failed to provide congressional decisions on the “important policy choices” involved with the regulation.¹⁸⁶

No other member of the Court joined Justice Rehnquist’s opinion, but there is increased interest among some of the current justices in the nondelegation doctrine. The advocate should not shy away from including these arguments as part of his or her presentation to the court, especially when the statutory text is not amenable to clear interpretation after exhausting all of the tools of statutory construction.

VII. CONCLUSION

Chevron deference is a judicially created doctrine. Although it purports to be based on implied delegations by Congress, there is nothing in the text of statutes that agencies implement or the Administrative Procedure Act that provides support for the deference doctrine. Indeed, the Administrative Procedure Act expressly calls on the courts, not the executive, to interpret statutes and resolve issues of law.

Aside from its creation out of whole cloth, the deference doctrine upends the structure of separated powers that lies at the foundation of the Constitution. It allows executive agencies to exercise the lawmaking power that belongs exclusively to Congress as well as the judicial power that belongs exclusively to the judiciary. But advocates need not treat application of deference as a *fait accompli*. The purpose of this article is to give advocates the foundation in the arguments that can be made to attack deference and ultimately overturn *Chevron*.

¹⁸⁵ *Id.* at 675.

¹⁸⁶ *Id.* at 685–86.

Delegation of Powers: A Historical and Functional Analysis

*Richard A. Epstein**

INTRODUCTION

There is a spate of interest in the “nondelegation doctrine”—the prohibition against the delegation of legislative powers to the executive branch of government, or worse, to some independent agency. The immediate impetuses of the debate are the recent Supreme Court decisions in *Gundy v. United States*¹ and *Kisor v. Wilkie*.² Those cases have spurred the renewed interest in delegation—it seems that five members of the Supreme Court think that the time for reexamination is now.³ At this point, the mood is quite different from a generation ago, when Professor Cass Sunstein dismissed the Supreme Court’s 1935 invocation of the nondelegation doctrine in both *A.L.A. Schechter Poultry Corp. v. United States*⁴ and *Panama Refining Co. v. Ryan*⁵ with this famous quip: “[I]t is more accurate, speaking purely descriptively, to see 1935 as the real anomaly. We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).”⁶ It is precisely because the good old days of judicial lassitude may be numbered that the nondelegation doctrine has received inordinate attention in recent

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¹ 139 S. Ct. 2116 (2019).

² 139 S. Ct. 2400 (2019).

³ See *Gundy*, 139 S. Ct. at 2131. In *Gundy*, Justice Gorsuch was joined by Chief Justice Roberts and Justice Thomas in dissent. Justice Alito concurred in the judgment solely to allow the issue to be decided in full when Justice Kavanaugh could contribute. Justice Kavanaugh has since opined that the Gorsuch dissent in *Gundy* “may warrant further consideration in future cases.” *Paul v. United States*, 140 S. Ct. 342 (2019).

⁴ 295 U.S. 495 (1935).

⁵ 293 U.S. 388 (1935).

⁶ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000). I criticize his position in RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF MODERN ADMINISTRATIVE LAW 67–73* (2020) [hereinafter *DUBIOUS MORALITY*].

years from courts and scholars alike.⁷ Much of the discussion has centered on historical questions within a broad originalist framework. These analyses have led to conclusions that appear at first glance to be in deep tension with each other.

The effort to revive the nondelegation doctrine has met fierce resistance on historical and originalist grounds. Most notable is the exhaustive historical account offered by Professors Julian Davis Mortenson and Nicholas Bagley, who in their forthcoming article, *Delegation at the Founding*,⁸ take the position that looking for evidence of a nondelegation doctrine in the founding period is a bit like looking for a unicorn: lots of talk in theory but no presence in fact. In their view, “any particular use of coercive rulemaking authority could readily be characterized as the exercise of either executive or legislative power, and was thus formally valid regardless of the institution from which it issued.”⁹ In their view, it follows “[e]asily the best reading of the historical materials is that this question was simply left to politics.”¹⁰ It is to construct a firewall against such a movement that Mortenson and Bagley write in protest by reviewing the evidence in sufficient detail in order to beat the conservative originalists at their own game. Accordingly, they target Justice Gorsuch’s dissent in *Gundy*.¹¹

Gorsuch’s opinion [in *Gundy*] calls for ditching the intelligible principle standard in favor of a test that would distinguish between those statutes allowing the executive to “fill up the details” and those that confer policymaking discretion. Were it to become law, Gorsuch’s approach would force courts to make subjective and contestable judgments about what counts as a detail and what counts as something more.¹²

Yet at no point do they explain why the “intelligible principle standard,” which they misconstrue,¹³ is free of similar ambiguities as the “fill-in-the-details” standard. Their selective appeal to linguistic relativism should be regarded as a tacit sign of intellectual surrender.¹⁴ Ironically, the principle of intelligibility has its own peculiar history that when properly understood is perfectly consistent with the fill-in-the-details standard they disparage. What is really at stake here, therefore, is not the choice of labels, but a

⁷ See, e.g., Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164 (2019).

⁸ Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021).

⁹ *Id.* (manuscript at 1).

¹⁰ *Id.* (manuscript at 4).

¹¹ *Id.* (manuscript at 18–22).

¹² *Id.* (manuscript at 20).

¹³ See discussion of *Hampton* *infra* p. 34.

¹⁴ Richard A. Epstein, *Linguistic Relativism and the Decline of the Rule of Law*, 39 HARV. J.L. & PUB. POL’Y 583 (2016).

claim that only the lowest level of judicial scrutiny should be given to nondelegation challenges. Justice Gorsuch’s fill-in-the-details test is really a stand-in for a claim that a more robust form of scrutiny should be adopted in these cases.

Nonetheless, their call has been taken up by other scholars on delegation in specific substantive areas. Thus, Cristine Kexel Chabot analyzes in great detail the delegations with respect to the public debt and concludes that both Hamilton and Madison blessed the actions of the First Congress that delegated the powers to “borrow Money” and “pay the Debts” conferred on Congress by Article I, Section 8.¹⁵ In a parallel development, Nicholas Parrillo explores a congressional delegation that occurred in 1798, which gave authority to the executive branch to obtain an inventory of real estate values throughout the United States.¹⁶ This project was necessary to implement the “direct taxation provision” found in Article I, Section 9, Clause 4: “No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration herein before directed to be taken.”¹⁷ Executive branch officials were in charge of collecting, sorting, and evaluating the information, as has always been common in running surveys of this sort.

Executive prerogative in this area dates to the Domesday book,¹⁸ which surveyed English titles under the supervision of the King, acting with his Council, long before the tripartite distinction between legislative, executive, and judicial was fully established.¹⁹

¹⁵ Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming 2021).

¹⁶ See 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. (forthcoming 2021).

¹⁷ U.S. CONST. art. I, § 9, cl. 4.

¹⁸ See FREDERIC WILLIAM MAITLAND, *DOMESDAY BOOK AND BEYOND: THREE ESSAYS IN THE EARLY HISTORY OF ENGLAND* (1897). The effort, starting in 1085, to make a detailed study of the entire lands of England was done in large measure to find a taxation base. See *id.* at 1–3. As such, it involved the cooperation of “barons,” “legates,” and “justices.” *Id.* at 1. Justices were involved with the cooperative efforts because they were needed to resolve disputes over ownership. See *id.* at 11.

¹⁹ Neither Parliament nor any other legislative body had a role to play in this operation. It was an executive function issued by the King in Council, with a judicial backup. Here is one description:

Then, at the midwinter [1085], was the king in Gloucester with his council After this had the king a large meeting, and very deep consultation with his council, about this land; how it was occupied, and by what sort of men. Then sent he his men over all England into each shire; commissioning them to find out ‘How many hundreds of hides were in the shire, what land the king himself had, and what stock upon the land; or, what dues he ought to have by the year from the shire.’

ALFRED THE GREAT, *THE ANGLO-SAXON CHRONICLE* 107 (James Henry Ingram trans., 1996).

It is just not feasible for any deliberative body to engage in a survey of this kind, and the only question of delegation is how best to do this survey, which in this instance followed lines that are still in use today.²⁰ Chabot and Parrillo, each separately, have undertaken their analyses with the same motivation that drove Mortenson and Bagley: to defend the current broad versions of the nondelegation doctrine from ungrounded attacks.²¹ In so doing, however, they have vastly overstated the potential consequences of reversing the outcome of *Gundy* by assuming that a reversal would entirely eviscerate the post-New Deal version of the nondelegation doctrine. In reality, it is both possible and correct to limit Gorsuch's argument in *Gundy* to accommodate the progressive state (which in my view should be struck down on other constitutional grounds).²²

All these claims are subject to the obvious objection that the term "legislative power" must demarcate some area of exclusive legislative power, in contradistinction to both the "executive power" as used in Article II, and the judicial power, as used in Article III. Without doubt, there is much overlap in the work done among the political branches, and in many cases, it is far easier for an executive to discharge the task than Congress. After all, do we really expect Congress to make a survey of all lands in the United States? Or to renegotiate various kinds of debts, all of which require detailed knowledge of individual transactions, and none of which require the articulation of any major policy decision? But it hardly follows from these sensible divisions of labor between the Congress (which only met periodically during the Founding Era) and the Executive (who was, and is, always on call) that the overlap in functions between the two branches was complete. Nor does it follow that overturning some matters of delegation necessarily requires the invalidation of the entire administrative state.

²⁰ As Richard FitzNeal wrote in the *Dialogus de Scaccario*:

For as the sentence of that strict and terrible last account cannot be evaded by any skilful [sic] subterfuge, so when this book is appealed to . . . its sentence cannot be quashed or set aside with impunity. That is why we have called the book 'the Book of Judgement' . . . because its decisions, like those of the Last Judgement, are unalterable.

RICHARD, SON OF NIGEL, *THE COURSE OF THE EXCHEQUER* 64 (V.H. Galbraith & R.A.B. Mynors eds., Charles Johnson trans., 1950).

²¹ "Even if the Court does not categorically invalidate all agency rulemaking about domestic private conduct other than fact-finding, rulemaking is so ubiquitous that mere doubt about its constitutionality could work major changes in the nondelegation doctrine and administrative law more generally." Parrillo, *supra* note 16 (manuscript at 6). "The new Supreme Court is poised to bring the administrative state to a grinding halt. Five Justices have endorsed Justice Gorsuch's dissent in *Gundy v. United States*—an opinion that threatens to invalidate countless regulatory statutes in which Congress has delegated significant policymaking authority to the executive branch." Chabot, *supra* note 15 (manuscript at 1).

²² See RICHARD A. EPSTEIN, *HOW PROGRESSIVES REWROTE THE CONSTITUTION* (2006).

Given the fever pitch of the nondelegation discussion, it is no surprise that Mortenson and Bagley's article has prompted a vigorous response. In his detailed historical account of the same materials, Ilan Wurman defends a more exacting nondelegation position by arguing that the essential features of a given legal scheme must be passed by a legislature before the executive (or his delegate) is allowed to fill in the blanks.²³

Wurman is far closer to the truth, but for the moment, it should be sufficient to note at least one counterexample to the view that legislation and executive action are perfectly substitutable. It should be perfectly clear, as becomes evident in the pages below, that at no time could the executive unilaterally impose a pension system, create a patent system, organize a post road system, or conduct an inventory of real estate, without having first taken its cue from Congress. The reason we do not get a constant repetition of the same theme is that some version of a nondelegation norm is so central to the constitutional structure that no commentator thought fit to deny it in theory and no President sought to extend his power beyond the implicit line in the sand that was as apparent in the Founding period as it is today.

Filling in the details about how this schema should work is no easy task. It is hardly evident that the operation of the delegation doctrine at the Founding should bear any close similarity with the nondelegation doctrine today when the major shifts in constitutional order of the progressive era—the expansion of federal commerce and taxing powers, as well as the contraction of constitutional protections for economic liberties and property rights—have led to the rise of a modern administrative state that may well involve a very different form of administrative law.²⁴

It is important here not to get ahead of oneself, for what is often missing in these elaborate historical debates is a sure sense of why anyone—legislators, judges, lawyers, laypersons, and even scholars—should care about the doctrine in the first place. This Article aims to fill the gap with a functional analysis of the nondelegation doctrine that helps explain where it should have teeth and where it should not. Accordingly, Part I offers a brief account of the evolution of the nondelegation doctrine from a historical—mostly originalist in nature—and doctrinal perspective. Part II develops a simple analytical model to explain

²³ Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L. J. (forthcoming 2021).

²⁴ See DUBIOUS MORALITY, *supra* note 6.

why and how the doctrine should be used, by resorting back to a traditional account of agency costs, which builds upon the classic 1976 article on the subject by Meckling and Jensen, there restricted to the context of public corporations. Part III explains how this model works in the context of private business contexts, in order to set up a baseline against which the public law nondelegation doctrine, which operates in a different institutional setting, can be evaluated. In so doing, this Article looks both at bailment arrangements with chattels and trustee decisions over corporate assets to show the persistent net benefit from delegating to agents creates a rebuttable presumption in favor of delegation. But like any rebuttable presumption, it is necessary to state the conditions in which the presumption can be overcome. In this case, the presumption should be abandoned whenever there is evidence of a serious conflict of interest between the welfare of the principal, the public at large, and its agents, Congress, the President, and various administrative agencies. In Part IV, the Article circles back from the private sector to the public sector in order to apply this model to help explain a broad range of delegation cases, starting with the First Congress's treatment of pensions, patents, and post roads, and then extending forward through the nineteenth century into the post-New Deal developments ending up with *Gundy*.

In carrying out this four-part exercise, it is important to never lose sight of two inescapable difficulties in the articulation and application of any legal principle. The moment anyone on or off the courts starts to talk about rebuttable presumptions in any legal setting, it necessarily implicates trade-offs in the economic analysis. In the end, there is always some need to balance interests, which will inexorably lead to hard borderline cases whether the analysis is done on a class basis or a case-by-case basis. In close cases on which reasonable persons can disagree, the novel circumstances that give rise to cases are likely to result, metaphorically and literally, in five-to-four decisions in the Supreme Court.

I. A BRIEF HISTORY OF THE NONDELEGATION DOCTRINE

As is characteristic of many major legal principles, the nondelegation doctrine has its origins in Roman law. It began with a rigid general principle, *delegatus non potest delegare*—the delegatee is not able to delegate to a subdelegatee. Indeed, as will become clear, that maxim does not stand in splendid isolation, but rather operates as a special instance of broader principles of “natural justice” as it is termed in England, or “procedural due process” as it is termed in the United States. The basic principles

of natural justice are two: *nemo iudex in causa sua* (“no one should be a judge in his own cause”) and *audi alteram partem* (“hear the other side”).²⁵ The nondelegation maxim has the typical Roman law strengths and weaknesses. The former is its shrewd condensation of a principle with strong intuitive appeal that survives through the ages. Yet its characteristic weakness, true of much Roman law doctrine, is that it is overbroad in part because it does not offer an explicit rationale for its adoption. More concretely, in the Roman setting, most of these delegations were from single principals to a single agent. The principle does not explicitly address the rise of large corporate structures, which play a central role today and require extensive delegation to operate. In addition, the natural law theories with which the Romans and early Anglo-Americans worked did not offer a strong defense of their principles in the consequentialist terms that today rule the roost.²⁶

Yet that same conceptual weakness applies to the constitutional scholarship of today. One common feature of both originalism and living constitutionalism is that neither approach appeals to consequentialist theories to make sense out of the nondelegation doctrine, as is evident in the articles that reexamine the delegation doctrine. Indeed, the canonical texts that deal with this problem offer little assistance in this endeavor. Consider a famous passage from John Locke’s Second Treatise:

The *legislative cannot transfer the power of making laws* to any other hands: for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the common-wealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said, We will submit to rules, and be governed by *laws* made by such men, and in such forms, no body else can say other men shall make *laws* for them; nor can the people be bound by any *laws*, but such as are enacted by those whom they have chosen, and authorized to make *laws* for them. The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.²⁷

²⁵ See SIR WILLIAM WADE & CHRISTOPHER FORSYTH, *ADMINISTRATIVE LAW* 384, 405 (11th ed. 2014). More specifically, “in administrative law natural justice is a well-defined concept which comprises two fundamental rules of fair procedure: that a man may not be a judge in his own cause; and that a man’s defence must always be fairly heard.” *Id.* at 374. Wade and Forsyth make numerous references to the American cases and the parallel concept of procedural due process.

²⁶ See generally Richard A. Epstein, *The Utilitarian Foundations of Natural Law*, 12 HARV. J.L. & PUB. POL’Y 713, 716 (1989).

²⁷ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 141 (C.B. Macpherson ed., 1980) (1690).

Locke's argument is sound as far as it goes, but, for a canonical text, it does not go very far. It is surely the case that if a group of legislators is selected by some legitimate process, it cannot simply wash its hands of its responsibilities, backed by individual oaths of office, by asking a second body to step in its shoes to do its legislative work. For these purposes, it does not matter how the legislature is selected: it applies to a Republican form of government that features indirect elections (including the selection of Senators by state legislatures), just as it applies to legislatures who operate by, as Madison feared, simple popular majorities. The basic risk is the same regardless of whether we call the action of the derivative actor an outright transfer of power or only its further delegation.²⁸ Consistent with this view, there has long been a principle that the government cannot transfer its police power to a third party.²⁹ Nor indeed could any individual legislator decide to appoint a successor to his place and then resign from office. The new body will not come up with the same laws as the old body, given its different membership. Indeed, if by some miracle it did, everyone would think of this delegation as a form of harmless error.

This same principle can be extended, as Wurman correctly argues, to a situation in which the original legislature reserves the power to call back its power at some future time. That option still leaves the interim actions with full force and effect, unless the reclamation of the power is somehow read to "void" those actions in ways that only complicate the reliance interest of citizens in the consistency and integrity of law, which Locke long prized.³⁰ As was said by Chief Justice Taney in *Luther v. Borden*, it is dangerous business to bless any transfer of power (including overthrow) which calls into question the status of all interim actions.³¹ Locke only deals with the case of total

²⁸ For the strong arguments in favor of this position, see Wurman, *supra* note 23 (manuscript at 4–6) rejecting the position of Mortenson and Bagley that there was a categorical distinction between alienation and delegation. Wurman summarizes their position as follows: "[T]he Founders agreed that although the legislative branch could not *alienate* its power—it could not give away its power for good—the legislative branch could *delegate* its power, so long as it had the ultimate authority to reclaim any legislative power that it had so delegated." *Id.* (manuscript at 4).

²⁹ See, e.g., *Stone v. Mississippi*, 101 U.S. 814, 817–18 (1879). "All agree that the legislature cannot bargain away the police power of a State," such that the state could not make a long-term binding contract to give rights to lotteries. These contracts "are not, in the legal acceptance of the term, *mala in se*, but, as we have just seen, may properly be made *mala prohibita*. They are a species of gambling, and wrong in their influences. They disturb the checks and balances of a well-ordered community." *Id.* at 821.

³⁰ LOCKE, *supra* note 27, § 142. The same position is articulated in LON L. FULLER, *THE MORALITY OF LAW* 33–38 (rev. ed. 1969).

³¹ See 48 U.S. 1, 38–39 (1849).

delegation, alienation, or transfer, but does not address the interim cases of partial delegation that were then everyday occurrences in England, given its complex system of public administration that befit a major power.³² For Locke's purposes, it may well have been sufficient to block the major abuse, but for anyone who works within a detailed constitutional framework, the intermediate cases present the real challenge. It is here that the differences are indeed troublesome, for everyone on both sides of the debate admits that some delegation is necessary and some prohibited, differing only in the putative extent of the differences, without offering any theory as to how they should be resolved.

The old maxim that a public office is a public trust deserves in these cases to be taken literally, and a private trustee cannot put someone else in his place unless and until there is some orderly process, usually set out in the trust instrument, for them to do so.³³ But by the same token, the principle does not quite explain what the legislative power is, or whether a limited delegation should be regarded as a permissible delegation to the executive or an improper transfer of some portion of the legislative power. That line-drawing difficulty is reflected in the constitutional text. Article I deals with the legislative power but defines only specific grants of power in which the House and the Senate do not legislate. Specifically, Article I includes the Senate's power to approve treaties and confirm principal officers, the House and Senate's respective roles in impeachment, and the processes in making resolutions or proclamations.³⁴ These specific powers survive any general categorization, and leave wide open the

For, if this court is authorized to enter upon this inquiry as proposed by the plaintiff, and it should be decided that the charter government had no legal existence during the period of time above mentioned,—if it had been annulled by the adoption of the opposing government,—then the laws passed by its legislature during that time were nullities; its taxes wrongfully collected; its salaries and compensation to its officers illegally paid; its public accounts improperly settled; and the judgments and sentences of its courts in civil and criminal cases null and void, and the officers who carried their decisions into operation answerable as trespassers, if not in some cases as criminals.

Id.

³² See WADE & FORSYTH, *supra* note 25, at 373–475.

³³ See, e.g., S. DOC. NO. 93-1, at 115–16 (1973) (“The ideal concept of public office, expressed by the words, ‘A public office is a public trust’, signifies that the officer has been entrusted with public power by the people; that the officer holds this power in trust to be used only for their benefit and never for the benefit of himself or of a few; and that the officer must never conduct his own affairs so as to infringe on the public interest. All official conduct of Members of the Senate should be guided by this paramount concept of public office.”).

³⁴ U.S. CONST. art. I; see generally *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 318–29 (1936).

possibility that some delegations by the legislature properly hand things over to the President, or to the heads of his departments.³⁵ Getting the right answer in the extreme all-or-nothing case remains critical for the overall enterprise, but it does not tell when or why lesser forms of delegation should be regarded as permissible actions or an impermissible surrender of legislative power.

These principles, and these risks, were well understood in the founding period. Thus, the public trust language was in common use at the time. Elsewhere in the Second Treatise, Locke wrote of the legislative power “to which all the rest are and must be subordinate, yet the legislative being only a fiduciary power to act for certain ends, there remains still *in the people a supreme power to remove or alter the legislative*, when they find the *legislative* act contrary to the trust reposed in them.”³⁶ With a heavy reliance on Locke, Robert Natelson identified the following six standard fiduciary duties: (1) follow instructions and remain within authority, (2) loyalty and good faith, (3) care, (4) exercise personal discretion, (5) account, and (6) impartiality.³⁷ It takes little imagination to see that the duty to exercise personal discretion operates as a limit on the power of delegation. But the statement of that principle, however powerful, does not tell how far it goes. Madison himself was always of two minds on the subject. In the one breath, in anticipation of *Wayman*, he could state with confidence that the trichotomy of the legislature that makes the law, the executive who enforces it, and the judiciary that construes the law is a fundamental bulwark of liberty: “The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”³⁸ But he also knew that the lines could not be precisely drawn, and was prepared to lie with the consequences. Thus, in his defense of the 1800 Virginia resolutions, he wrote:

³⁵ U.S. CONST. art. I, § 8, cl. 18.

³⁶ LOCKE, *supra* note 27, § 149.

³⁷ Robert G. Natelson, *The Legal Origins of the Necessary and Proper Clause*, in *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE* 57–59 (Gary Lawson et al. eds., 2010). Elsewhere, Natelson has written, “I have not been able to find a single public pronouncement in the constitutional debate contending or implying that the comparison of government officials and private fiduciaries was inapt. The fiduciary metaphor seems to rank just below ‘liberty’ and ‘republicanism’ as an element of the ideology of the day.” Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1086 (2004).

³⁸ *THE FEDERALIST* NO. 47, at 249 (James Madison) (Gideon ed., 2011).

However difficult it may be to mark, in every case, with clearness and certainty, the line which divides legislative power, from the other departments of power; all will agree, that the powers referred to these departments may be so general and undefined, as to be of a legislative, not of an executive or judicial nature; and may for that reason be unconstitutional. Details, to a certain degree, are essential to the nature and character of a law³⁹

That position made its way into the case law through a well-known passage from Chief Justice Marshall in *Wayman v. Southard*.⁴⁰ He addresses the nondelegation principle in connection with deciding whether the federal courts are entitled to make rules of procedure for all actions, state or federal, brought in federal court. He starts by stressing what he regards as an obvious proposition: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”⁴¹ But there are certain issues that are subject to control by either Congress or the Executive, or by the Executive or the Judiciary—including setting the rules of the return of writs and other processes. The Chief Justice then must draw the line between the exclusive and nonexclusive cases that *Mortenson and Bagley* deny exist, and he does so in this much-mooted passage that echoes Madison’s views:

The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law; but the maker of the law may commit something to the discretion of the other departments, and the precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.⁴²

Marshall thus establishes a rebuttable presumption in favor of the delegations Congress can make to the two other branches of government, while accepting as binding the tripartite division of powers set out in Articles I, II, and III of the Constitution. The terms that Marshall uses to organize cases in that overlapping domain are as good as one can get in dealing with terms that fall into a continuum. Indeed, precisely this logic is evident in the 1934 federal statute that delegated to the Supreme Court superintendence over the Federal Rules of Civil Procedure. The key provision reads:

Be it enacted . . . That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of

³⁹ James Madison, *The Report of 1800*, in 17 THE PAPERS OF JAMES MADISON 303, 324 (David B. Mattern et al. eds., 1991); Wurman, *supra* note 23, at 20, discussed in connection with the Aliens Friends Act.

⁴⁰ 23 U.S. 1 (1825).

⁴¹ *Id.* at 42.

⁴² *Id.* at 46.

the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant.⁴³

In *Sibbach v. Wilson & Co.*,⁴⁴ the Supreme Court cited *Wayman* to support this proposition, while paying full attention to the proviso found in the last sentence quoted above:

Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose, save where a right or duty is imposed in a field committed to Congress by the Constitution.⁴⁵

The clear inference from these two delegation cases is that some general nondelegation doctrine was operative as an indisputable background norm. In the end, a categorical distinction between branches of government necessarily gives rise to some difficult cases of degree in the middle. But so long as the basic principle is observed, the system will survive the numerous marginal cases, at least if we can develop some analytical framework to resolve these problems.

II. THE ANALYTICAL TRADEOFF

The ups and downs in the historical debates over the nondelegation doctrine should come as no surprise, but they are just a reflection of the larger debate over the role of agents in all kinds of business and social transactions. The Roman maxim *qui facit per alium facit pro se* ("he who transacts through another transacts for himself") applies across the board for the simple reason that it is typically not possible for any individual to spread himself so thin that he can manage everything he needs managed without cooperation from others. In general, the basic principle of contractual choice is that voluntary agreements are for mutual benefits, and that principle applies as much to the agency relationship as it does to ordinary contracts of hire and sale. By extension, the decision to use an agent, and thus to delegate power, should be understood as part of the basic logic of the division of labor. Thus, when specific tasks are divided in routine transactions, the allocation of rights and responsibilities

⁴³ Act of June 19, 1934, ch. 651, 48 Stat. 1064, 1064 (codified as amended at 28 U.S.C. § 2072).

⁴⁴ 312 U.S. 1, 9–10 (1941).

⁴⁵ *Id.* (citing *Wayman*, 23 U.S. at 42).

is almost never an all-or-nothing affair. There is a bilateral risk. The principal may fear that the agent will stray too far from the appointed task, including running away with either goods or money. The agent fears that the principal may not pay for the work done, or may give garbled instructions that make the effective discharge of the task impossible. So, in virtually every situation, some restrictions monitored in a wide variety of ways are placed on the agent's discretion. Knowing what these restrictions look like and why they are imposed gives a sense of direction to private law transactions that can be used to evaluate the public law transactions that inspired some version of the nondelegation doctrine.

To gain this sense of direction, we have to start with a simple model of comparative advantage: what is it that the principal can do better than the agent, and what can the agent do better than the principal? The principal, if an individual, in general will have a strong sense of his or her own preferences, and an ideal agency relationship is one that makes sure that the contractual decisions made by the agent are the perfect reflection and implementation of the preferences of the principal. In a situation of perfect trust and perfect knowledge, the delegation problem literally takes care of itself. The principal gives the signal and the agent springs into action, and all proceeds in accordance with the plan when monitoring costs are zero for both sides. This is closely related to the principle that no protection against government takings with a just compensation remedy is ever necessary in a world in which the risks of ignorance and fraud are put to one side.⁴⁶ It is better for both sides to save the transaction costs needed to set just compensation when the risk of misbehavior by government is zero.

But the perfect correlation of knowledge and preferences is yet another illustration of why, for lawyers and economists, Coase's "zero transaction costs" world is the closest that we get to heaven.⁴⁷ In reality, there is always some slippage on either knowledge or motivation, and the potential of some conflict of interest requires imposing limitations on the power of the agent. For example, the regulations of habitat protection under the Endangered Species Act⁴⁸ go far beyond the original intention of the statute, which contemplated that the government would have to pay to secure the habitat from private owners. Yet in *Babbitt*

⁴⁶ See Richard A. Epstein, *Property, Speech, and the Politics of Distrust*, 59 U. CHI. L. REV. 41, 52 (1992).

⁴⁷ See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

⁴⁸ See 16 U.S.C. § 1531.

v. Sweet Home Chapter of Communities for a Great Oregon,⁴⁹ the principles of administrative deference sustained such regulations (championed by environmentalists), even though they cut far deeper than the original statutory design allowed.⁵⁰ Clearly the political balance inside the Department of Interior was different from that inside the Congress that passed the statute, and a healthy dose of Chevron deference let the Supreme Court easily ratify that conscious agency drift.⁵¹ Similarly, the gender discrimination rules under Title IX, when applied to intercollegiate athletics, converted a general antidiscrimination statute into a rigid quota statute, and this too was done by an agency determination. The scope of this agency determination was then further extended by an agency letter that has remained in effect for over forty years.⁵²

The agency costs associated with this form of delegation in these political contexts are far more comprehensive than those that are involved in the famous, but stripped-down, agency cost model of Michael Jensen and William Meckling,⁵³ because they cannot be analyzed exclusively within a simple profit-maximization model. Jensen and Meckling were well aware of the generality of the problem, but to make their foray tractable they confine their work to “the analysis of agency costs generated by the contractual arrangements between the owners and top management of the corporation.”⁵⁴

⁴⁹ 515 U.S. 687, 708 (1995).

⁵⁰ *Id.* For criticism, see generally Richard A. Epstein, *Babbitt v. Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation*, 5 S. CT. ECON. REV. 1 (1996).

⁵¹ *Babbitt*, 515 U.S. at 703, 708.

⁵² The operative provision of Title IX reads: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a). The exhaustive regulations under this section relating to Title IX are found in 34 C.F.R. § 106.41 (2020) and Title IX and Intercollegiate Athletics, 44 Fed. Reg. 239 (Dec. 11, 1979) (to be codified at 45 C.F.R. pt. 26), which pushes the envelope even further. For my criticism, see Richard A. Epstein, *Foreword: “Just Do It!” Title IX as a Threat to University Autonomy*, 101 MICH. L. REV. 1365 (2003).

⁵³ Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976). Jensen and Meckling provide the following definition for an agency relationship: “[A] contract under which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decision making authority to the agent.” *Id.* Note that their definition speaks of “delegating some [not all] decision making authority to the agent.” *Id.* And further, they “define *agency costs* as the sum of: (1) the monitoring expenditures by the principal, (2) the bonding expenditures by the agent, (3) the residual loss.” *Id.* (citation omitted).

⁵⁴ *Id.* at 309.

Nonetheless, that model can be usefully extended to address the nondelegation problem in constitutional law. The more general formulation of the problem has the delegator (the legislature to whom all powers in Article I of the Constitution are granted) acting at Time I in setting priorities that have to be executed at Time II by its agent (the President, or his agent) that could be then handed off to some sub-delegate. The principal has better collective knowledge of the priorities to be embodied in the general problem, but down the road the agent will have better information about the costs and benefits of various strategies that are not available to the principal. The problem need not stop at three levels, for in complex organizations, multiple levels of delegation should be regarded as the rule, not the exception. Accordingly, even in the best of situations, we should expect to see the emergence of a mixed strategy in which some *ex ante* explicit limitations are placed by any principal on its agent, but some degree of deference is left to the action down below.

Consistent with the Jensen and Meckling model, we expect to observe trade-offs at the margin. Too little oversight allows an agent to go astray, and too much oversight could create costly paralysis or delay.⁵⁵ The exact point of trade-off will depend on the alignment at each level of the interest of principal and agent. This is why it is commonly the case that general partners (often family relations) allow for the broad delegation of authorities, because a generalized duty of good faith—defined here as one in which each party takes the interests of his partner as equal to his own—is likely to occur in these settings where the biological connection operates as a nonlegal but powerful constraint.⁵⁶ Hence, as the trust relationship increases, the level of monitoring is reduced, which gives the small family firm an advantage over firms of comparable size that do not share the same degree of genetic and social overlap. Yet by the same token, the use of family ties necessarily limits the size of the firm, so that more formal restraints have to be imposed when the size of the firm

⁵⁵ *Id.*

⁵⁶ The biological notion is one of inclusive fitness, whereby the parties share some but not all common genes. For the leading paper on this topic, see W.D. Hamilton, *The Genetical Evolution of Social Behaviour*, 7 *J. THEORETICAL BIOLOGY* 1, 1–2 (1964) (developing the identical framework as Jensen and Meckling to describe biological overlaps between relatives). In the simple agency cost example, a parent shared fifty percent of the genes with a child. Hence, it will take any action that costs it one unit to itself so long as it generates two units of benefit for the offspring. That relationship is easily satisfied with newborns and young children. But parent-child conflicts emerge on both sides as both parents and children age. The ratio remains the same, but the conditions for its satisfaction differ. See Robert L. Trivers, *Parent-Offspring Conflict*, 14 *AM. ZOOLOGIST* 249, 250 (1974).

must expand in order to meet the demands of a larger market. Billions of credit or debit card transactions cannot be individuated to take into account the peculiar preferences of all individuals. There must be, and is, a standard protocol that is easy to apply, done with a high level of certitude that binds all participants to the letter of the standard contract, with no room for individuation of transaction or institutional discretion in execution.

III. PRIVATE LAW APPLICATIONS

It should be evident both with public corporations and with political governance that the slippage is far greater, such that the level of social control has to be more intense.⁵⁷ Therefore, it is important to understand how this mini drama plays out in connection with sub-delegation in a variety of settings. Thus, in a simple family example with no institutional overtones, a parent allows his son to drive his car. But usually there is an explicit prohibition against the son allowing his friends to drive the car as well. The father made the initial delegation because he had confidence in his son, but he has no knowledge or control over any his son's friends or acquaintances should the car be further handed over, i.e., by way of a sub-bailment. So, if the restriction is put on, the understanding is that it will be followed. There may be some exceptions for cases of genuine necessity, but the amount of discretion will be proportionately reduced when it is possible for the son to speak with the parent before making the sub-delegation. In essence, the knowledge of the principal is brought forward to reduce the conflicts in question. Moreover, in some cases, there may be no explicit instruction one way or another about whether the delegation should be allowed, at which point the parties face the same question of implied limitations on conduct for both agent and principal that arise everywhere in the law. The ever-present knowledge of potential

⁵⁷ These bona fide contracts date back to Roman law and apply in cases in which there is need for flexibility, as in a partnership, where duties are defined in terms of good faith. See G. INST. 3.137 ("Likewise, in contracts of this description the parties are reciprocally liable, because each is liable to the other to perform what is proper and just; while, on the other hand, in the case of verbal obligations one party stipulates and the other promises; and in the entry of claims one party creates an obligation by doing so, and the other becomes liable."). Note the opposition between the good faith contracts (sale, hire, agency, and partnership) and the stipulation, a formal unilateral contract whereby one person promises to pay a particular sum of money or to hand over a particular thing. Usually there is discretion in the former and none in the latter, but the distinction is never absolute. Adjustments are expected as a matter of course in the consensual good faith contracts, but with liquidated obligations, the exceptions are narrow and must be specially pleaded. The same basic framework applies today to various types of commercial arrangements.

conflicts of interest is probably strong enough in most contexts to impose on the bailee an obligation not to allow other persons to drive the car unless permission can be explicitly obtained from above or unless narrow conditions of necessity pertain.

Speaking generally, the scope of the limitations likely increases when there are multiple principals (e.g., co-owners of the car). Where the number of co-owners is small, informal adjustments usually work to reach a solution. But when the number of co-owners is large, the prospect of disagreement is great so that collective decisions cannot be made in the first instance. It is this transactional situation that explains why the separation of ownership and control in the corporate context is a necessity, and it explains why that division gives rise to more stringent limitations on the actions of the board of directors.⁵⁸ Along with the limitations on sub-delegation, there are also limitations that deal with substantive terms: how long does the delegation last; what are the maximum and minimum prices that can be set; what other collateral conditions should be imposed as well. It is in all cases important to see how explicit delegations operate to form the framework for implicit limitations.

These arguments, moreover, make it clear from the corporate context that there are no watertight separations between the matters that are left to a board of directors and matters that may be properly delegated to the CEO, who in turn can delegate these decisions downward. But the common thread that runs through all these cases is whether the delegation is so loose that it raises risks of deviation from the master plan. From this simple observation comes the central distinction in corporate law that delegations to agents who have conflicts of interests with the corporation are subject to higher scrutiny, under the so-called fair value rule, than delegations in which there are no such conflicts of interest—where a lower, somewhat indefinite business judgment rule insulates agents from liability for simple mistakes.⁵⁹ The simple point is that, just as we should not expect perfect precision on these matters in the private sector, so we should not, as becomes clear, expect it in the public sector. But

⁵⁸ For the seminal work, see generally ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932).

⁵⁹ For a general discussion, see FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 90–108 (1991). Note that their exposition equivocates, as do other sources, on the precise scope of the business judgment rule. Simple negligence will not trigger the obligation, but the plus factors (e.g., knowledge or gross neglect) are notoriously difficult to pin down—a problem that carries over to sub-delegation issues, which are not discussed there. I examine some of these issues in Richard A. Epstein, *Inside the Coasean Firm: Why Variations in Competence and Taste Matter*, 54 *J.L. & ECON.* S41 (2011) (dealing with a variety of agency relationships).

the common theme that broad delegations are routinely subject to restraints over critical matters of time, place, and manner that narrower ones may escape runs through both areas and helps in the public law to give some sense as to how the various cases should be decided.

The public corporation occupies, however, an intermediate position between the small group and large government entities at all levels. The question then arises as to what the various forms of private structures (corporations, condominiums, and unions) tell us about the larger problem.⁶⁰ There are two key features in the private context that have to be kept in mind in making any transition from a private to a public entity.⁶¹ These two features of private organizations tend to reduce the differences in preferences among joint investors in a corporation or in a large limited partnership.⁶² The first is that all of these people came together voluntarily in a common venture.⁶³ Accordingly, powerful selection pressures are at work both on formation and on subsequent transfers, so that the heterogeneity among its members will be reduced, thereby easing the costs of collective deliberation.⁶⁴ Few people voluntarily enter into an organization where they expect to have deep philosophical divisions with the dominant faction.⁶⁵ Then, second, even when these differences do emerge, as they will with time, the individuals involved have the ability to alienate shares or partnership interests to others who know the terms and conditions in the original charter.⁶⁶ The outliers leave and the others join in, given an effective way to narrow the gap in preferences. The dissidents sell out to others whose own preferences are aligned with the group. Or, in the alternative, there can be a takeover bid by an outsider which then cashes out the original members who can go their own separate ways.⁶⁷

The situation with public bodies is very different. Membership in the group is not obtained by agreement, but by citizenship that comes as of birthright or by admission through

⁶⁰ For my earlier treatment of this issue, see Richard A. Epstein, *Redistribution Within Collective Organizations: What Corporations, Condominiums and Unions Tell Us About the Proper Use of Government Power*, 8 N.Y.U. J.L. & LIBERTY 280 (2014).

⁶¹ See *id.* at 281.

⁶² See *id.* at 284.

⁶³ See *id.*

⁶⁴ See *id.*

⁶⁵ See *id.* at 285.

⁶⁶ See *id.*

⁶⁷ See Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 113 (1965) (noting that the takeover is often a one-shot way to eliminate conflicts of interest among existing shareholders).

naturalization. The number of citizens (the rough functional equivalent to shareholders or partners) is likely to be very large, which on familiar transaction costs grounds generates huge impulses toward representative government. But the sentiments within these populations can be widely diverse. Yet at the same time there is no simple sale mechanism that can reduce the variance among members. And there is nothing remotely equivalent to the takeover mechanism. Since these large groups of individuals may have diverse sentiments, the practice of delegation could easily shift the center of gravity in the smaller group from what it is in the larger. There must accordingly be mechanisms that can control these risks, and a limitation on delegation is one such device. These pressures, moreover, are likely to become more insistent as the size of government gets larger, so that in principle a nondelegation doctrine should be part of the toolkit to deal with the risks of deviation from collective sentiment. How this plays out is dependent on the size of government and the kinds of powers that it exercises. What follows is an effort to trace that development historically.

IV. CONSTITUTIONAL DISPUTES OVER THE NONDELEGATION DOCTRINE

It should be no surprise that the principles that yield no clear answer in all situations will give rise to spirited debate when their application is disputed. The set of relevant cases starts with the Founding period, indeed the first Congress, and works its way forward. Here is a quick tour, which shows no evidence of any serious challenge to the nondelegation doctrine during the pre-New Deal era. Quite simply, given the model above, all of these cases should resist a nondelegation challenge, even if we treat the legal constraint, as we should, as posing serious limitations on the powers of Congress. Put another way, the below cases—none of which invalidated a delegation as unconstitutional—were rightly decided.

A. Disabled Veterans.

The Confederation Congress authorized by statute a payment of pension to disabled veterans who fought in the Revolutionary War.⁶⁸ It soon came time for the first Congress to implement that mandate, which in full reads as follows:

⁶⁸ See Mortenson & Bagley, *supra* note 8 (manuscript at 88) (providing a helpful summary).

An ACT providing for the Payment of the Invalid Pensioners of the United States. Be it enacted by the Senate and House of Representatives, of the United States of America in Congress assembled, That the Military Pensions which have been granted and paid by the states respectively, in pursuance of the Acts of the United States in Congress assembled, to the Invalids who were wounded and disabled during the late war, shall be continued and paid by the United States from the fourth day of March last, for the space of one year, under such regulations as the President of the United States may direct.⁶⁹

The question in this case was whether the delegation in question, under which the President and Secretary Knox subsequently required that the payments be made in two equal installments and requiring affidavits as evidence of injury and entitlement to payment, was constitutional.⁷⁰ In dealing with this statute, Professor Wurman is right to point out that Congress had by indirection fixed the amount of money to be paid and the period of time over which it was to be paid, so all that was left were matters of implementation.⁷¹ In effect, the 1789 legislation adopts a mixed strategy wherein the job of Congress was to “continue” payments authorized previously by the Confederation government, so that the action is one for the assumption of debts for work done by the pensioners in the federal service. At this point, the only thing left for the President to do was to ask for proof of disability and fix an amount. Given the constraints otherwise in place, this delegation made sense. There is little reason to think that Congress has better knowledge on questions of implementation or that the Presidential delegation indicated any skew in favor of one class of veterans over another. The case looks like one of a faithful agent—this makes the delegation proper.

The overall situation would have been very different if the Act had not provided directly, or by reference, for the allocation, such that the President would have had power to determine the total budget and the individual payments.⁷² At which point, the nondelegation doctrine should have been called into play given the explicit constitutional provision that all appropriations bills begin in the House of the Representatives.⁷³ And it would have been a

⁶⁹ An Act Providing for the Payment of the Invalid Pensioners of the United States, ch. 24, 1 Stat. 95 (1789).

⁷⁰ See Wurman, *supra* note 23 (manuscript at 45–46) (outlining this implementation).

⁷¹ *Id.*

⁷² U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives . . .”).

⁷³ See *id.*

different manner if the President had decided to extend the period for payment or to include veterans from the French and Indian wars. Accordingly, this analysis also calls into question Mortenson and Bagley's support for "a non-exclusivity thesis," if that is taken to assume that the entire matter could be solved either by the Congress or the President so that the nondelegation doctrine just disappeared, given that budget constraint.⁷⁴

This pension does raise the larger question of what sorts of delegation should be made to the administrative agencies. In dealing with this topic, Professor Aditya Bamzai notes the extensive nineteenth century practice under which it was commonplace to delegate to executive branch officials the power to determine the amounts owed in connection with civil and military salaries, pensions, promotions, fines, and discharges for government employees; the terms and conditions of patent and land grants, including railroad rebates.⁷⁵ He writes: "Under the traditional interpretive approach, American courts 'respected' longstanding and contemporaneous *executive* interpretations of law as part of a practice of deferring to longstanding and contemporaneous interpretation *generally*."⁷⁶ This line of cases was relied on by Justice John Paul Stevens to establish the general proposition that delegation to administrative agencies under standards of deference long preceded his decision in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*⁷⁷

The Stevens position, however, is not consistent with the basic framework developed here. The continuous application of a body of rules to a large number of small disputes allows an administrative agency to develop a workable standard via a course of dealing (as that term is used in commercial transactions)⁷⁸ that both advances uniformity and gravitates, as is the case with most customs that arise through informed trial and error in consensual arrangements, toward an efficient solution.⁷⁹ By so doing, the optimal conditions for delegation set

⁷⁴ See Mortenson & Bagley, *supra* note 8 (manuscript at 7).

⁷⁵ Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 126 YALE L.J. 908, 916 (2017).

⁷⁶ *Id.*

⁷⁷ 467 U.S. 837, 844 n.14 (1984) (citing *Edwards' Lessee v. Darby*, 25 U.S. 206 (1827) (priority to rival land grants); *Brown v. United States*, 113 U.S. 568 (1884) (naval retirement benefits); *United States v. Moore*, 95 U.S. 760 (1877) (surgeon pay increase); *United States v. Ala. Great S. R.R. Co.*, 142 U.S. 615 (1892) (railroad rebates). For an extensive discussion of these cases, see Richard A. Epstein, *Structural Protections for Individual Rights: The Indispensable Role of Article III—or Even Article I—Courts in the Administrative State*, 26 GEO. MASON L. REV. 777, 792–99 (2019).

⁷⁸ See U.C.C. § 1-303(d) (AM. L. INST. & UNIF. L. COMM'N 2019).

⁷⁹ See generally Richard A. Epstein, *The Path to The T.J. Hooper: The Theory and History of Custom in the Law of Tort*, 21 J. LEGAL STUD. 1 (1992).

out above are satisfied. The field is one in which Congress is likely to be unable to deal with subtle differences in individual cases that arise over years, let alone decades. The agency expertise is able to achieve that result, and in general does so in an area that is not charged heavily with political differences, so that, presumptively, officials in the executive branch will act as faithful agents of the legislature. Accordingly, the deference that is accorded is to the line of authorities, and not to an individual instance that breaks from the accepted practice:

It is a settled doctrine of this court that in case of ambiguity the judicial department will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and, if such construction be acted upon for a number of years, will look with disfavor upon any sudden change, whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.⁸⁰

Properly understood, this proposition is the polar opposite of the much-mooted Chevron deference. First, the issue raised in that case, about what counts as a “stationary source,”⁸¹ is not one that is resolved by looking at a pattern of past practices in small cases. Rather, *Chevron* makes this critical error that has set the law into a state of intellectual disarray. Second, the deference here is not to a line of cases, but to the last agency decision even if that decision diverts (often without special explanation) from an established line of cases.⁸² Hence, the rapid deviation from settled practice does indicate some deviation from the anticipated norm, so that when applying Chevron deference to decisions in the modern administrative state, one should be careful of these broad delegations. At this point, the need to constrain discretion points to the use of *de novo* review on questions of law, which is itself the textual norm under Section 706(a) of the Administrative Procedure Act, in part to avoid invalidation on what should be a revived nondelegation doctrine.⁸³

B. The Patent Act of 1790.

Yet another critical statute passed by the first Congress was the Patent Act of 1790, which also contained a mix of a legal

⁸⁰ *Ala. Great S. R.R. Co.*, 142 U.S. at 621.

⁸¹ *Chevron*, 467 U.S. at 840.

⁸² See, e.g., *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 990 (2005). For a longer treatment of this issue, see DUBIOUS MORALITY, *supra* note 6, at 97–98.

⁸³ 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”).

standard coupled with a delegation of its application. Its key provision for this point reads:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the petition of any person or persons to the Secretary of State, the Secretary for the department of war, and the Attorney General of the United States, setting forth, that he, she, or they, hath or have invented or discovered any useful art, manufacture, engine, machine, or device, or any improvement therein not before known or used, and praying that a patent may be granted therefor, it shall and may be lawful to and for the Secretary of State, the Secretary for the department of war, and the Attorney General, or any two of them, if they shall deem the invention or discovery sufficiently useful and important, to cause letters patent to be made out in the name of the United States . . .⁸⁴

This statute clearly contains an explicit delegation to three cabinet members, which has to be valid under any system of law, for it manifestly cannot be the case that the Congress has the degree of expertise to collectively decide on whether a given patent application meets a standard that is remarkably similar in language and purpose to the one which exists today.⁸⁵ The administrative decisions in individual cases to grant or deny are by no stretch of the imagination legislative acts. Mortenson and Bagley claim that this system represents some vast delegation of administrative power whereby “[t]he executive branch was thus empowered to prescribe, recognize, and adjust the private rights of both inventors and putative infringers—in other words, just the kind of ‘blank check to write a code of conduct governing private conduct’ that Justice Gorsuch decried in *Gundy*.”⁸⁶ Not so. The entire operation of the Patent Act of 1790 did not reflect the mores of the modern administrative state.⁸⁷ Indeed, as Adam Mossoff notes, the Act of 1790 was a conscious effort to break from the English system, which tolerated such discretion, to its vast disadvantage⁸⁸:

It is the core difference between defining a patent, on the one hand, as a private property right or, on the other hand, as a regulatory entitlement—between securing rights through private law doctrines and legal institutions constrained by the rule of law versus granting

⁸⁴ Patent Act of 1790, ch. 7, § 1, 1 Stat. 109, 109.

⁸⁵ *Id.*; see also 35 U.S.C. § 101 (“Whoever invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent therefor, subject to the conditions and requirements of this title.”).

⁸⁶ Mortenson & Bagley, *supra* note 8 (manuscript at 84).

⁸⁷ See Adam Mossoff, *Institutional Design in Patent Law: Private Property Rights or Regulatory Entitlements*, 92 S. CAL. L. REV. 921, 921–23 (2019).

⁸⁸ See *id.* at 921–22.

rights as matters of public policy and through discretionary decision-making processes in the political organs of the government.⁸⁹

Indeed, the constant reference to the term “grant” in the Act of 1790 is strong evidence that they conceived of these patent rights as vested once created, and thus, protected as a form of property against government expropriation, which in turn led to a restricted view of government.⁹⁰ Thus, John Duffy made explicit the contrast between the pre- and post-New Deal view of patent rights: “Unlike the sweeping delegations conferred in the Progressive and New Deal eras, the delegations of governmental power for the patent system were, and still are [as of 2000], extraordinarily narrow.”⁹¹

Given this institutional framework, it is not surprising that the downward delegation to the committee of three met both of the tests for a sensible delegation set out above: There was greater knowledge down below on particular cases and no obvious sign of institutional bias. Today, it may seem ludicrous that three of the first four cabinet members—the Postmaster General was not included—should be pressed into this service. Indeed, as the pace of business increased, a separate patent (and trade) office was developed to deal with the overall issue, again without serious challenges to the delegation. But there is no evidence that this particular delegation led to any deviation from the proposed statutory standard, and the decision in the executive branch allows for an individualized update based on knowledge that was obtained after the statute was enacted. There is, of course, some looseness in the language, but that hardly condemns this statute on the grounds of vagueness, for over 200 years of constant tinkering has not yielded a general formulation that radically departs from the 1790 standard.

Mortenson and Bagley miss all of the institutional constraints operative in the field when they describe this delegation of authority to the executive branch as a “blank check” to write an entire patent code.⁹² There is no doubt that these decisions necessarily require some determination as to whether the new device represents a sufficient advance over previous

⁸⁹ *Id.* at 922.

⁹⁰ *See, e.g.*, Richard A. Epstein, *Patent Originalism*, CASE W. RES. L. REV. (forthcoming 2021).

⁹¹ John F. Duffy, *The FCC and the Patent System: Progressive Ideals, Jacksonian Realism, and the Technology of Regulation*, 71 U. COLO. L. REV. 1071, 1133 (2000); *see also* B. ZORINA KHAN, *THE DEMOCRATIZATION OF INVENTION: PATENTS AND COPYRIGHTS IN AMERICAN ECONOMIC DEVELOPMENT, 1790–1920*, at 51 (2005) (explaining that in contrast to British patent law, “U.S. doctrines emphatically repudiated the notion that the rights of patentees were subject to the arbitrary dictates of government”).

⁹² Mortenson & Bagley, *supra* note 8 (manuscript at 84).

devices to count as a “nonobvious” advance worthy of protection.⁹³ But even though these judgments are required to make good the statutory scheme, it would be wrong to say that the Patent and Trademark Office could do whatever it wanted. It could not, for example, decide to issue patents while ignoring some of the requirements set out in the statute; nor could it decide to deny patents by insisting on some non-statutory element of its own, even though the application meets all the other standards. That principle has some traction in modern administrative law, in cases such as *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, where Justice Rehnquist in the sharpest of terms took the view that the Circuit Court for the District of Columbia was out of line when it tried to slow down the construction of nuclear power plants (which it eventually did anyhow) by adding new requirements to those set out in the Administrative Procedure Act.⁹⁴ The limits on delegation are also evident in the simple proposition that the Patent and Trademark Office most certainly could not decide to adopt some “first-to-file” approach, writ large,⁹⁵ which would, unless suitably cabined, allow non-inventors to claim patent rights. Indeed, when the “first-inventor-to-file” rule was adopted in 2011, it was through an explicit provision of the America Invents Act and not by any pronouncement of the Patent and Trademark Office.⁹⁶ Furthermore, individual decisions are also subject to judicial review, which could not take place sensibly if the entire process were as ill-formed as *Mortenson and Bagley* suggest. In fact, the general patent law does not operate through government regulations but relies on judicial decisions to fill in the gaps, which works the same way no matter who decides the various questions raised in patent enforcement. And, of course, neither the President nor any of his subordinates could decide to introduce any patent system at all if Congress had not exercised the grant of power given to it under Article I, Section 8, Clause 8.⁹⁷

⁹³ 35 U.S.C. § 103 (“A patent for a claimed invention may not be obtained, notwithstanding that the claimed invention is not identically disclosed as set forth in section 102, if the differences between the claimed invention and the prior art are such that the claimed invention as a whole would have been obvious before the effective filing date of the claimed invention to a person having ordinary skill in the art to which the claimed invention pertains. Patentability shall not be negated by the manner in which the invention was made.”).

⁹⁴ 435 U.S. 519, 525 (1978). Justice Scalia wrote a spirited defense of the Rehnquist opinion in Antonin Scalia, *Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court*, 1978 SUP. CT. REV. 345 (1978).

⁹⁵ *Mortenson & Bagley*, *supra* note 8 (manuscript at 85 n.299).

⁹⁶ America Invents Act, Pub. L. No. 112-29, § 3, 125 Stat. 285 (2011) (codified as amended at various sections of 35 U.S.C.).

⁹⁷ Congress has the power “[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” U.S. CONST. art. I, § 8, cl. 8.

The modern system of patent examination should similarly escape challenges on nondelegation grounds notwithstanding the enormous increase in the number and complexity of patent applications. But that same judgment cannot be made about the modifications in patenting procedure inside the revised Patent and Trademark Office in connection with the Patent Trial and Appeals Board (PTAB) that was established under the 2011 America Invents Act.⁹⁸ The first of these difficulties relates to the breakdown in the doctrine of separation powers that arises when a party charged with patent infringement in federal district court is allowed, with the consent of the PTAB, to transfer that case to the board for review on key issues of patent validity. There is no reason why this departure from well-established nineteenth century practice should be tolerated, as the Supreme Court unfortunately did in *Oil States Energy Servs., LLC v. Greene's Energy Group, LLC*.⁹⁹ Notwithstanding this erroneous decision, the nondelegation doctrine does raise deep concerns with the procedures that were developed inside the PTAB to deal with the administrative rehearing, most notably in the decision to allow the head judge of the PTAB to select on an ad hoc basis the members of the panel, based on the likelihood that they would decide a case consistent with the PTAB judge's view of department policy, and to add additional members to the panel (including himself) to change the outcome if the projected results are not to his liking.¹⁰⁰ At this point, the case for the nondelegation doctrine merges with a fundamental concern about due process, as noted earlier, and the entire structure should be struck down because the risk of deviation from Congressional policy by these ad hoc adjustments is too great when no added informational advantage comes from delegating this extraordinary power to the chief judge of any court.¹⁰¹ The

⁹⁸ America Invents Act, Pub. L. No. 112-29, 125 Stat. 284, 284–341 (2011).

⁹⁹ 138 S. Ct. 1365 (2018). The most powerful precedent against ousting the courts of jurisdiction is *McCormick Harvesting Mach. Co. v. Aultman*. 169 U.S. 606 (1898). There the Court stated:

It has been settled by repeated decisions of this court that when a patent has received the signature of the secretary of the interior, countersigned by the commissioner of patents, and has had affixed to it the seal of the patent office, it has passed beyond the control and jurisdiction of that office, and is not subject to be revoked or canceled by the president, or any other officer of the government.

Id. at 608–09 (citations omitted).

¹⁰⁰ For my critiques, see Richard A. Epstein, *The Supreme Court Tackles Patent Reform: A Series of Articles Examining Oil States Energy Services, LLC v. Greene's Energy Group, LLC*, 19 FEDERALIST SOC'Y REV. 172, 180, 188 (2018).

¹⁰¹ The concern was raised, but not resolved, in *Nidec Motor Corp. v. Zhongshan Broad Ocean Motor Co. Ltd.*, 868 F.3d 1013, 1020 (Fed. Cir. 2017) (Dyk, J., concurring).

standard practice in these situations is to select judges by a system of rotation to control the risk of downstream abuse,¹⁰² and that practice should be followed in cases of this sort. There is nothing about the changes in technology or legal standards that requires a different result.

C. Post Roads Debate

The nondelegation doctrine also lies at the center of the Second Congress, with the Post Roads Debate of 1791 in the House of Representatives.¹⁰³ The Constitution lists among the enumerated powers given to Congress under Article I, Section 8, Clause 7, the power “[t]o establish Post Offices and post Roads.”¹⁰⁴ One measure of the importance of this power was that the Post Office received cabinet status in 1792, when it joined the four initial departments (State, Treasury, War, and Justice) of George Washington’s first cabinet.¹⁰⁵ But the question then arises whether any of this function could be delegated by Congress to the President and his officers, including the Postmaster General. The same answer does not necessarily apply to post roads and to post offices, because the former involves the creation of a network industry, in which the location of post roads across the various cities and states could determine the overall efficiency of the system. In contrast, the location of a post office within a given city would mainly be of concern to the local residents of that community. The Congress had before it a map that indicated the location of the proposed post roads, when Representative Sedgwick proposed that the entire road network be scrapped and the matter be turned over to the President under a delegation of executive authority to the effect that roads would be laid down “by such route as the President of the United States shall, from time to time, cause to be established.”¹⁰⁶

[A]fter a three-member panel of administrative judges denied petitioner Broad Ocean’s request for joinder, Broad Ocean requested rehearing and requested that the rehearing be decided by an expanded panel. Subsequently, ‘[t]he Acting Chief Judge, acting on behalf of the Director,’ expanded the panel from three to five members, and the reconstituted panel set aside the earlier decision.

Id.

¹⁰² See, e.g., Marin K. Levy, *Panel Assignment in the Federal Courts of Appeals*, 103 CORNELL L. REV. 65, 66–67 (2017).

¹⁰³ Nat’l Archives, *Post Office and Post Roads, [7 December] 1791*, FOUNDERS ONLINE (Dec. 7, 1971), <http://founders.archives.gov/documents/Madison/01-14-02-0126> [<http://perma.cc/TEXG-3CY6>].

¹⁰⁴ U.S. CONST. art. I, § 8, cl. 7.

¹⁰⁵ *Postal Service Act Regulates United States Post Office Department*, HIST. (Feb. 18, 2021), <http://www.history.com/this-day-in-history/postal-service-act-regulates-united-states-post-office-department> [<http://perma.cc/SE48-CYGA>].

¹⁰⁶ 3 ANNALS OF CONG. 229 (1791). See Wurman, *supra* note 23 (manuscript at 14–20) (critiquing Mortenson & Bagley, *supra* note 8 (manuscript at 97–106)) for exhaustive

It is clear from the overall debates that some form of a nondelegation doctrine was recognized, even if its contours were not fully described. Had Sedgwick's resolution passed, the case for a strong nondelegation doctrine would have been much diminished, but since his motion was defeated, it remains uncertain whether the outcome turned on constitutional principles or simply on an issue of prudence—namely, since the map had already been laid out, why delegate the matter any further?

In dealing with this issue, that question is urgent because of the delegation's evident lack of any direction as to which towns should be included along the route of the established post roads and which should be excluded. That point let Representative Page in the 1791 debate offer this instructive *reductio ad absurdum*:

If the motion before the committee succeeds, I shall make one which will save a deal of time and money, by making a short session of it; for if this House can, with propriety, leave the business of the post office to the President, it may leave to him any other business of legislation; and I may move to adjourn and leave all the objects of legislation to his sole consideration and direction . . . I look upon the motion as unconstitutional, and if it were not so, as having a mischievous tendency . . .¹⁰⁷

Note the equivocation in the last phrase, precisely because the proposed motion did not go the extreme, but took a weaker position. His remarks, as emblematic of the general debate, however, beg for an explanation as to why everyone agrees with the unconstitutionality of the extreme position, even if it is not clear how far they are prepared to back off from it. The most powerful reason for condemning the outright transfer of power points to the following vice, namely, that the President could easily choose routes that excluded certain cities that Congress would have included. But that point need not be dispositive, for the President through delegation could have superior knowledge as to how all the pieces of the puzzle fit together and thus at a larger level establish a set of post roads that would conform to a general desire to stitch the nation together through a single system. And in any event, even Page would have to concede that any contracting done in making existing roads suitable as post roads would have to be left to the President as beyond the effective power of Congress.

discussions on a nondelegation doctrine at the Founding. Section 1 of the Act set out the routes in one paragraph. See Post Office Act of 1792, ch. 7, § 1, 1 Stat. 232. The list of towns covered from Maine to Georgia is set out in Wurman, *supra* note 23 (manuscript at 14 n.76).

¹⁰⁷ 3 ANNALS OF CONG. 233–34 (1791).

In this case, everything is in equipoise. The Congress *might* have a better sense of its own preferences, but the President *might not* have any obvious agenda to deviate from the ideal solution. It is a close call either way, which is why the nondelegation dispute was not fully resolved. Indeed, it is evident from the specific provisions of the Post Office Act of 1792 that the mixed solution was preferred. The Act ran for thirty sections, in which it set out an elaborate administrative structure that at points eschewed delegation, but at other points embraced it.¹⁰⁸ Thus Section 1 of the Act contained a detailed account of all the post roads that should be established from Maine to Georgia.¹⁰⁹ But as comprehensive as that list was, it was not fully exhaustive, given Section 2, which states “[t]hat it shall and may be lawful for the Postmaster General to enter into contracts, for a term not exceeding eight years, for extending the line of posts”¹¹⁰ On the issue of rates there is a similar level of exactitude in Sections 9 and 10, which set out with great particularity basic postage rates for delivery by land and sea.¹¹¹ Yet at the same time, Section 3 contains this broad delegation: “He shall also have power to prescribe such regulations to the deputy postmasters, and others employed under him, as may be found necessary, and to superintend the business of the department”¹¹² It would therefore be absurd to read this statute as if it were intended to preclude any level of departmental delegation. But by the same token, the level of specificity in portions of the statute show some concern with the delegation doctrine. No matter which way this evidence is interpreted, it would be hasty to conclude that any broader delegation of powers would have passed muster as a matter of course.

Yet there is enough in this Act to give some insight into subsequent developments, for with the advantage of hindsight, it should be clear that the results reached in 1792 were very dependent on scale.¹¹³ The knowledge advantage of the executive branch dominates today given the increase in scale; it is no longer

¹⁰⁸ Post Office Act of 1792, ch. 7, 1 Stat. 232.

¹⁰⁹ Post Office Act § 1.

¹¹⁰ *Id.* § 2, at 233.

¹¹¹ *See id.* § 9, at 235, § 10, at 235.

¹¹² *Id.* § 3, at 234.

¹¹³ The issue also arises in connection with impeachment. With a small Senate and large House, a trial by the full Senate makes sense, especially when the official impeached is the President. But with lower-level officials, it is highly costly, and hence rules that delegated the matter to a Senate panel, subject to oversight, passed muster. *See Nixon v. United States*, 506 U.S. 224 (1993). For context, see U.S. CONST. art. I, § 3, cl. 6 (providing that the “Senate shall have the sole Power to try all Impeachments,” which leaves it open whether the Senate as a whole has to sit). In *Nixon*, a divided court held up a system where the case was delegated in the first instance to a committee, with review by the entire Senate. *Nixon*, 506 U.S. at 224.

possible to run a single post road from Maine to Georgia—you need an elaborate lattice. Hence the case for delegation becomes overwhelming, but at the same time the risk of political favoritism is larger. At this point, more extensive delegation is necessarily accepted, but at the same time, in line with the general theory of agency costs, we should expect Congress to establish other procedures for oversight and audit that are intended to rein in abuse, which always arises in these settings. Such procedures do not make an appearance in the 1792 Act. Hence the newer arrangement should also pass muster because Congress itself could have no collective judgment as to the ideal route structure.

D. Delegation of Tariff Determinations

Among the central sources of revenue in the United States during the nineteenth century were tariffs and custom duties, which were explicitly authorized under Article I, Section 8, Clause 1, which gave Congress the power to “lay and collect . . . Duties, Imposts and Excises,” so long as these were uniform throughout the United States.¹¹⁴ This protectionist system is not consistent with the classical liberal ideal of free trade, but its explicit textual authorization means that the only serious question is how to administer it, given that tariff determinations and adjustments have to be made for literally thousands of products that are often difficult to define, let alone classify.¹¹⁵ There is clearly the most practical justification for the delegation of this power first by Congress to the President and through him to lesser officials charged with the determination of particular rates for particular classes of goods. This issue arose in the important case of *J.W. Hampton, Jr., & Co. v. United States*,¹¹⁶ which dealt with a statute requiring administrators to make tariff adjustments within relatively limited boundaries. In *Hampton*, the administrator had the power to impose tariffs on foreign goods such that “the duties not only secure revenue, but at the same time enable domestic producers to compete on terms of equality with foreign producers in the markets of the United States.”¹¹⁷ The statute followed a mixed strategy because the basic delegation in question had to fall

¹¹⁴ U.S. CONST. art. I, § 8, cl. 1.

¹¹⁵ See, e.g., *United States v. Mead Corp.*, 533 U.S. 218, 239 (2001) (Scalia, J., dissenting) (applying *Skidmore* deference to tariff classification of the United States Customs Service).

¹¹⁶ 276 U.S. 394 (1928). See also *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (“That congress cannot delegate legislative power to the president is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution.”). For further explication, see DUBIOUS MORALITY, *supra* note 6, at 48.

¹¹⁷ 276 U.S. at 404.

between four and six cents per unit and was subject to approval or disapproval by the President. Here is a case in which Congress has only a limited ability to engage in fine tuning of Madison's "details" that this statute appears to embody, and the technical adjustments in this case appear to be subject to a formula that further limits the scope of administration discretion. Chief Justice William Howard Taft upheld this delegation of power, to an Article I court no less, saying: "It may be that it is difficult to fix with exactness this difference, but the difference which is sought in the statute is perfectly clear and perfectly intelligible."¹¹⁸

That is just as it should be, given that there is a formula that can be used to determine the tariff within those limits. The principle here is indeed similar to that found in Roman law, where the requirement that the price be "certain" for the transaction to go forward did not require that the price be given in numerical form.¹¹⁹ It was enough if a formula was supplied that allowed the price to be calculated once certain measurable variables were entered, such as the age and source of the wine. Just that mechanism is used today to allow people to calculate the sales price on certain items in uncertain market conditions. There is no sensible theory that says that a delegation of this sort should be rejected: all the expertise is downstream, and there is little risk of deviation from the main plan, especially when a judicial challenge is available in egregious cases under the principle of judicial review. The challenge that remains is what happens in the modern industrial age, which imposes far greater demands on the regulatory state.

E. Delegation in the Modern Industrial Age

The challenges to the nondelegation principle become much more difficult to assess in the modern industrial age now that the tasks of government are far larger. The initial impulse on these issues comes first with the rate regulation cases that began to hit the courts in the post-civil war period.¹²⁰ With the rise of the railroads, it quickly became clear that competitive solutions were not always, even often, obtainable by market processes.¹²¹ The root of the problem was the long-haul, short-haul inversion that arose because of the organization of the routes.¹²² The most

¹¹⁸ *Id.*

¹¹⁹ See DIG 18.7.1 (Ulpian, Sabinus 28).

¹²⁰ See, e.g., *Munn v. Illinois*, 94 U.S. 113 (1876).

¹²¹ See, e.g., Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93, 94 (1994).

¹²² *Long Haul-Short Haul Rate Discrimination*, ENCYCLOPEDIA.COM (Mar. 8, 2021), <http://www.encyclopedia.com/politics/encyclopedias-almanacs-transcripts-and-maps/long-haul-short-haul-rate-discrimination> [http://perma.cc/8FRM-X4AD].

famous example is that there are four different railroads that could shift and move freight and passengers from San Francisco to Chicago, but only one such railroad that could move traffic from Omaha to Kansas City. Given the multiple avenues on the long-haul lines, the prices tended to be bid down toward marginal cost. But given the inelastic supply on the short haul, the railroads could raise rates far above marginal costs, and these rates were still (as by definition) below what these shippers were prepared to pay for access to the system. It was therefore perfectly efficient to have these inversions, but it was also politically impossible to justify them. Hence the Interstate Commerce Act of 1887¹²³ (a huge deal at the time) adopted, as its core administrative standard, a principle that left little to the imagination, namely that the short-haul rates could not be higher than the long-haul rates of which they were a part.¹²⁴ That strategy forced rates up on the long haul to control the risk of rate inversions. Subsequent iterations of the Interstate Commerce Act, however, adopted direct ratemaking standards intended to keep rates of return at competitive levels.¹²⁵ Indeed that practice gave rise to a famous ratemaking difficulty that started with the *Minnesota Rate* cases,¹²⁶ in which the Supreme Court held that the desire (here expressed at the state level) to prevent the imposition of monopoly rates had to be policed in order to guard the railroads, and later other public utilities, from the risk of confiscation.¹²⁷ These issues arose under both state and federal law, and the former was not constrained by the nondelegation argument applicable to the federal Constitution any more than it was constrained to avoid delegation to various sorts of administrative agencies. Instead, state administrative law could impose limitations that could vary from state to

¹²³ Interstate Commerce Act of 1887, ch. 104, 24 Stat. 379 (codified as amended at various sections of 49 U.S.C.).

¹²⁴ See also *id.* at 380 (“That it shall be unlawful for any common carrier subject to the provisions of this act to charge or receive any greater compensation in the aggregate for the transportation of passengers or of like kind of property, under substantially similar circumstances and conditions, for a shorter than for a longer distance over the same line, in the same direction, the shorter being included within the longer distance”). The statute allowed for exceptions to the basic rule in “special cases,” which obviously makes the delegation more questionable. One way in which this flexibility was recognized was in cases of competition on the short-haul route. See *Interstate Com. Comm’n v. Ala. Midland Ry. Co.*, 168 U.S. 144, 165 (1897).

¹²⁵ See, e.g., Hepburn Act, ch. 3591, 34 Stat. 584 (1906); see also Mann-Elkins Act of 1910, ch. 309, 36 Stat. 539.

¹²⁶ *Chi., Milwaukee & St. Paul Ry. Co. v. Minn. ex rel. R.R. & Warehouse Comm’n*, 134 U.S. 418 (1890).

¹²⁷ The theme was further developed in *Smyth v. Ames*, 169 U.S. 466, 470 (1898). See also *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 610 (1944).

state.¹²⁸ Given the nature of the problem, some degree of delegation had to be tolerated. No one thought that the Congress could set out a precise formula to deal with these complex ratemaking issues. Overall, the federal constitutional law that developed to deal with these problems had sufficient integrity that the modern condemnation about the runaway administrative state did not have much traction in that period.

The same cannot be said, however, of the far more ambitious problems under the New Deal which, if anything, were the obverse of those of the earlier rate making cases. Thus, whether one speaks of the Motor Carrier Act of 1935,¹²⁹ the National Labor Relations Act of 1935,¹³⁰ the Fair Labor Standards Act of 1938,¹³¹ the Communications Act of 1934¹³²—but not the Securities Act of 1933,¹³³ nor the Securities Exchange Act of 1934,¹³⁴ which were primarily antifraud acts—a different problem was faced. With this vast expansion of federal power, it was now necessary for administrative bodies, such as the National Labor Relations Board, to undertake such tasks as determining the proper bargaining unit of union elections and the proper definition of an hour for minimum wage and overtime regulation under the Fair Labor Standards Act. Similarly, the Interstate Commerce Commission had to determine the kinds of freight that different forms of vehicles could take over interstate highways.¹³⁵

This spate of new powers drove two additional challenges under the nondelegation doctrine, most notably in *A.L.A. Schechter Poultry Corp. v. United States*.¹³⁶ There, the Schechters were indicted for acts that were said to be in violation of the Code of Fair Competition for the Live Poultry Industry in the New York Metropolitan area,¹³⁷ which was promulgated under Section 3 of the

¹²⁸ For an exhaustive compilation of state law reactions to the nondelegation doctrine, see Benjamin Silver, *Nondelegation in the States*, (Dec. 31, 2020) (unpublished manuscript) (on file with author).

¹²⁹ Motor Carrier Act of 1935, Pub. L. No. 74-255, 49 Stat. 543.

¹³⁰ National Labor Relations Act of 1935, Pub. L. No. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–169).

¹³¹ Fair Labor Standards Act, Pub. L. No. 75-718, 52 Stat. 1060 (codified as amended at 29 U.S.C. § 201).

¹³² Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (codified as amended at 47 U.S.C. § 151).

¹³³ Securities Act of 1933, Pub. L. No. 73-22, 48 Stat. 74 (codified as amended at 15 U.S.C. §§ 77a–77aa).

¹³⁴ Securities Exchange Act of 1934, Pub. L. No. 73-291, 48 Stat. 881 (codified as amended at 15 U.S.C. §§ 78a–78qq).

¹³⁵ See Interstate Commerce Act of 1887, ch. 104, § 1, 24 Stat. 379, 379 (codified as amended at various sections of 49 U.S.C.).

¹³⁶ 295 U.S. 495 (1935).

¹³⁷ See *id.* at 519.

National Industrial Recovery Act.¹³⁸ One ground on which the Court rejected the Codes was the view that the Commerce Clause governed only the interstate legs of the journey between New Jersey and New York, and did not extend to ground transportation by separate vehicle in New York state alone.¹³⁹ That argument did not have a long shelf life and was overturned two years later in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*¹⁴⁰

The fate of the nondelegation doctrine is more complex. In *Schechter Poultry*, Chief Justice Charles Evans Hughes noted that the Codes did not use “[u]nfair competition” in its common law sense, which embraced two distinct and well-recognized torts: passing off one’s own goods as if they were made by another (superior) competitor, and falsely disparaging the goods of a competitor to make one’s own goods look better.¹⁴¹ The reason that banning these actions would have met any standard of nondelegation is that they relied explicitly on well-established common law causes of action. But the new use of the term unfair competition bore no relationship to its common law cousin, because Congress deemed the common law definition “too narrow” for its purposes.¹⁴² So at this point, a statement of what a term did not mean was not an articulation of what it did mean, and Justice Hughes took the position that no court should be put, in the course of resolving future cases, in the position of rescuing a statute that did not provide a workable definition of what conduct it covered. One of the key features of any criminal statute is that it gives fair notice of the covered offenses. So, the sword quickly struck:

Section 3 of the Recovery Act . . . is without precedent. It supplies no standards for any trade, industry, or activity. It does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure. Instead of prescribing rules of conduct, it authorizes the making of codes to prescribe them. For that legislative undertaking, section 3 sets up no standards, aside from the statement of the general aims of rehabilitation, correction, and expansion described in section 1.¹⁴³

Exactly what is wrong with that delegation? First, the analysis did not change because the President had “approved the

¹³⁸ See *id.* at 521; see also National Industrial Recovery Act, Pub. L. No. 73-67, § 3(a), 48 Stat. 195, 196 (1933) (authorizing the President to “approve a code or codes of fair competition”).

¹³⁹ See 295 U.S. at 543.

¹⁴⁰ See 301 U.S. 1, 37–38 (1937).

¹⁴¹ See 295 U.S. at 531–32.

¹⁴² See *id.* at 532.

¹⁴³ *Id.* at 541.

code by an executive order.”¹⁴⁴ Instead, what drove the analysis was the scope of the delegation on matters including wage and hour laws—whose constitutionality at that time was not yet established—as well as various rules governing the slaughter and preparation of the animals for market, and the provision as to the kind of animals (including “sick chickens”) that could be sold in commerce. And in this case, Justice Cardozo described the actions as “delegation running riot” and, echoing Locke, noted that “[n]o such plenitude of power is susceptible of transfer.”¹⁴⁵ The point here should be taken literally: it is highly likely that the strong pro-New Deal Congress was delighted with the flurry of presidential activity because of its welcome extension of progressive principles beyond the hoary conceptions of the common law, which at least at that time held some doubt. The correct point here is not to mock the decision as a lone outcast in a long history of cases. Rather, it is to make the candid judgment that Justice Hughes was right in finding that this was an unsustainable delegation of power that should not survive.

Indeed, in one sense, this kind of broad delegation surely did survive: the delegation issue arose in oblique fashion the next year in the well-vetted case of *United States v. Curtiss-Wright Export Corp.*¹⁴⁶ In May 1934, both Houses of Congress passed a joint resolution that, in explicit terms, strongly empowered the President. The resolution stated that if he thought that a prohibition of a sale of arms to parties involved in the armed conflict in Chaco (a border war between Bolivia and Paraguay) would reestablish peace, he could impose by proclamation a prohibition on the sale of arms to the warring parties.¹⁴⁷ As by evident prearrangement, that same day President Roosevelt issued a proclamation to that effect,¹⁴⁸ which he then revoked in November 1935.¹⁴⁹ In the interim, defendant Curtiss-Wright violated the prohibition, for which a criminal prosecution followed, but only after Roosevelt’s revocation of the proclamation.¹⁵⁰ The resolution was not legislation, and the proclamation was not the signing of a bill into law.

Curtiss-Wright defended on the ground that the particular resolution created an improper delegation of power to the President

¹⁴⁴ *Id.* at 525.

¹⁴⁵ *Id.* at 553 (Cardozo, J., concurring).

¹⁴⁶ See 299 U.S. 304, 314 (1936).

¹⁴⁷ See *id.* at 311–12.

¹⁴⁸ See *id.* at 311.

¹⁴⁹ See *id.* at 313.

¹⁵⁰ See *id.* at 314.

because it conferred “unfettered discretion”¹⁵¹ in violation of the nondelegation doctrine, whose existence was taken for granted in the opinion. But Justice Sutherland responded: “Whether, if the Joint Resolution had related solely to internal affairs, it would be open to the challenge that it constituted an unlawful delegation of legislative power to the Executive, we find it unnecessary to determine.”¹⁵² Note that this resolution was not legislation, but a directive to the President on how he might proceed *if* he chose to proceed. The President’s response was not a signing of a bill, but the issuance of a proclamation—leaving open the question of whether the President, in his extensive (if undefined) control over foreign affairs, needed to have the backing of a congressional resolution in the first place, or whether he could have engaged in that action on the strength of his own powers alone.¹⁵³ Sutherland chose the second route, by announcing that the President was this nation’s “sole organ” in international relations.¹⁵⁴ The joint resolution was thus superfluous, and the application of the nondelegation doctrine necessarily disappeared.

But how? Justice Sutherland’s main point was that foreign affairs are governed by entirely different principles than domestic affairs because the President’s powers over foreign affairs did not come from Congress, but were obtained in an entirely different fashion: “As a result of the separation from Great Britain by the colonies, acting as a unit, the powers of external sovereignty passed from the Crown not to the colonies severally, but to the colonies in their collective and corporate capacity as the United States of America.”¹⁵⁵ How that happened was never explained, and if anything, *Federalist Paper No. 69* takes the position that the President as Commander-in-Chief of the army and navy has far more limited powers than either the English Crown or a state governor.¹⁵⁶ The absolutist position of

¹⁵¹ See *id.* at 315.

¹⁵² *Id.*

¹⁵³ See *id.* at 319–20.

¹⁵⁴ See *id.*

¹⁵⁵ *Id.* at 316.

¹⁵⁶ See THE FEDERALIST NO. 69, at 357 (Alexander Hamilton) (Gideon ed., 2011)

The president is to be commander in chief of the army and navy of the United States. In this respect his authority would be nominally the same with that of the king of Great Britain, but in substance much inferior to it. It would amount to nothing more than the supreme command and direction of the military and naval forces, as first general and admiral of the confederacy; while that of the British king extends to the *declaring* of war, and to the *raising* and *regulating* of fleets and armies; all which, by the constitution under consideration, would appertain to the legislature.

Hamilton later claims that in some instances the President is inferior in power to state governors. See *id.* at 360.

Curtiss-Wright is an evident source of uneasiness, and the decision was cut back to an uncertain extent in the 2015 decision of *Zivotofsky v. Kerry*,¹⁵⁷ in which Justice Kennedy issued an *ipse dixit* that backtracked from the President's claim of exclusive authority: "This Court declines to acknowledge that unbounded power."¹⁵⁸

Yet, now suppose that the delegation issue arose in a domestic context where (by hypothesis) some legislative act was necessary for its exercise. Could the President decide, for example, to intervene in a violent labor dispute by prohibiting the sale of guns, if he thought that conditions warranted it? It is a very close case indeed, and typically it is not one that would arise, in part because state officials have a general charge to keep order and would take over the situation. Or in most cases, legislation that contains far more particularity—allowing the protection of federal buildings against violence—would take over. This point is explored later, in a discussion of the *Steel Seizure* case which held that the President had exceeded his power.¹⁵⁹

The delegation issue, however, arose again in *National Broadcasting Co. v. United States*,¹⁶⁰ where the Supreme Court was asked to construe the phrase "public interest, convenience, or necessity" as it appeared in the Communications Act of 1934.¹⁶¹ At this point, the difference between *Schechter Poultry* in 1935 and *National Broadcasting Co.* in 1943 is that the common law benchmarks on which Justice Hughes and Justice Cardozo had relied were nowhere to be found. Now a broad reading of the statute was par for the course precisely because of the demotion of common law notions. Of course, it was still possible to read the 1934 Act as if it required that the government organize a bidding system whereby various firms could compete for various parts of the spectrum in auctions organized by the United States.¹⁶² At this point, it would be required to set up standards for interference between neighboring frequencies (a problem that gets less serious as transmission improves), and to create rules for bidding, a task that is better done by an agency than by Congress. The agency has more knowledge with little incentive or ability to skew the bidding or interference rules in favor of one party. Here, a system of *ex post* challenges on grounds of bias is

¹⁵⁷ 576 U.S. 1 (2015).

¹⁵⁸ *Id.* at 20.

¹⁵⁹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 614 (1952).

¹⁶⁰ 319 U.S. 190, 209 (1943).

¹⁶¹ See *id.* at 214–18.

¹⁶² For this suggestion, see R. H. Coase, *The Federal Communications Commission*, 2 J.L. & ECON. 1, 17–24 (1959).

likely to work far more efficiently than an effort to invite judicial review before the rules are allowed to go into effect.

The difficulty here was that Justice Frankfurter, the indefatigable progressive, could not stop with such modest ambitions. A year before Friedrich Hayek published *The Road to Serfdom*—which defended the view parallel to that taken in this Article, that it is dangerous to do too much with administrative control¹⁶³—Justice Frankfurter, suffering no doubts, wrote:

The Act itself establishes that the Commission's powers are not limited to the engineering and technical aspects of regulation of radio communication. Yet we are asked to regard the Commission as a kind of traffic officer, policing the wave lengths to prevent stations from interfering with each other. But the Act does not restrict the Commission merely to supervision of the traffic. It puts upon the Commission the burden of determining the composition of that traffic. The facilities of radio are not large enough to accommodate all who wish to use them. Methods must be devised for choosing from among the many who apply. And since Congress itself could not do this, it committed the task to the Commission.¹⁶⁴

Justice Frankfurter committed the basic economic blunder of assuming that shortages could not be resolved by competitive bids, indicating that comparative hearings should be used to resolve the competing applications in line with the basic scheme.¹⁶⁵ But in this instance, how does any conscientious agency best determine the composition of the traffic? The FCC dithered over the issue until 1965, when it tried to plug the holes in the record by giving, without weights, the full seven relevant issues for deciding these hearings: (1) diversification of control of the media of mass communications, (2) full-time participation in station operation by owners, (3) proposed program service, (4) past broadcast record, (5) efficient use of frequency, (6) character, and (7) other factors.¹⁶⁶

It should be evident that the level of discretion given here is as great as the unconditional defenders of delegation think, and it is equally clear that the standard here does not have the perfectly intelligible features of the tariff determinations done in *Hampton*.¹⁶⁷ Here, there is little guidance from the statute and immense discretion over the entire process, which should doom

¹⁶³ See generally FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 1 (1944).

¹⁶⁴ *Nat'l Broad. Co.*, 319 U.S. at 215–16.

¹⁶⁵ See *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 337–38 (1945).

¹⁶⁶ For the historical development, see KPMG LLP, *Final Report: History of the Broadcast License Application Process*, FCC 4–5 (Nov. 2000), http://transition.fcc.gov/opportunity/meb_study/broadcast_lic_study_pt1.pdf [<http://perma.cc/7AKC-DMJ5>].

¹⁶⁷ See *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 405–09 (1928).

this statute on the nondelegation doctrine because the nonmarket system of allocation does not and could not work. But once the progressive mindset takes over, the statute is unquestionably constitutional, which means that the vague standard is as good as can be found given the statutory ambition, should be treated as a feature, not a bug of the system. Hence any aggressive application of the nondelegation doctrine becomes a thing of the past. The basic plan of this statute is to encourage indeterminate property rights, at which point, the delegation doctrine has to expand in scope to be sufficient to handle the situation in which constitutionality was beyond dispute. Put otherwise, there are no principled limits on delegation to administrative agencies when the property rights model of business organization is rejected. The invocation of the nondelegation doctrine should not be used as a backdoor device to undermine the substantive determination on the merits of the statute, no matter how unsound that constitutional determination might be. As the substantive law expands, the nondelegation doctrine of necessity recedes.

Jumping ahead, the next quantum leap in delegation arises in *Mistretta v. United States*, which addresses delegation in the criminal context.¹⁶⁸ Here, the progressive mindset has proved to be much more concerned with the traditional procedural protections. Therefore, modern cases dealing with the assistance of counsel, self-incrimination, cross-examination, and searches and seizures are not examined under rational basis. Rather, they often deal with quite specific protections, such as the *Miranda* rules for the investigation of criminal subjects.¹⁶⁹ But as a general matter, both in civil and in criminal cases, it is easier to define the violation than it is to specify the sanction for its occurrence, especially when modern notions of exculpation broaden the relevant inquiry. Phrases like “in the sound discretion of the trial judge” are rife, and they persist because whether the issue is damages or injunctions, fines or imprisonment, the choices are far from ideal. In the criminal law, it is easy to see how the exercise of discretion need not only be unsound, but it can also be inconsistent across cases. This piles concerns of equal treatment on top of substantive fairness, which leads to strong pressures to institute a sentencing commission of sorts to improve both matters. The ground rules of that sentencing commission are complex themselves, and rules that

¹⁶⁸ 488 U.S. 361, 371–72 (1989).

¹⁶⁹ See *Miranda v. Arizona*, 384 U.S. 436, 439 (1966).

they generate often introduce new anomalies to replace the old.¹⁷⁰ A divided Supreme Court sustained this exercise against an application of the nondelegation doctrine, invoking the intelligible principle test of *Hampton* to address these difficulties.¹⁷¹ Mortenson and Bagley applauded the decision, writing, “By the founders’ lights, *Mistretta v. United States* was thus rightly decided: even if ‘rulemaking power originates in the Legislative Branch,’ it ‘becomes an executive function’ at the moment it is ‘delegated by the Legislature to the Executive Branch.’”¹⁷² Current delegation is strikingly different from any form of delegation found in the early cases, which deal with revolutionary war pensions, patents or post roads, all of which were bounded inquiries conducted toward satisfying a stated statutory end.¹⁷³ The guidelines did—and did not—work, but *United States v. Booker* pulled back from *Mistretta* explicitly to remove the constitutional doubts that excessive delegation gives to mandatory rules, so much so that I regard *Booker* as qualifying *Mistretta*, presumably on nondelegation grounds.¹⁷⁴ The solution seems sensible, for it gives some assistance over uniformity and fairness even at the cost of letting the occasional fringe judge systematically go outside guidelines. Once again, some tradeoffs are needed.

F. Gatekeeper function: *Gundy* After *Auer*

Even after the massive expansion of delegated authority to accommodate vague New Deal directives, do any limitations on delegated powers survive decisions like *National Broadcasting Co. v. United States*? The answer is yes, for many key issues of delegation do not involve trade-offs among intangibles that require administrative actions. In particular, there are still key “gateway” provisions that only ask the simple question of whether certain

¹⁷⁰ Here are the ground rules: The Commission “is established as an independent commission in the judicial branch of the United States.” 28 U.S.C. § 991(a). It has seven voting members (one of whom is the Chairman) appointed by the President “by and with the advice and consent of the Senate.” *Id.* “At least 3 of the members shall be Federal judges selected after considering a list of six judges recommended to the President by the Judicial Conference of the United States.” *Id.* “Not more than four members of the Commission shall be members of the same political party . . .” *Id.* The Attorney General, or his designee, is an *ex officio* nonvoting member. *Id.* The Chairman and other members of the Commission are subject to removal by the President “only for neglect of duty or malfeasance in office or for other good cause shown.” *Id.* Except for initial staggering of terms, a voting member serves for six years and may not serve more than two full terms. 28 U.S.C. § 992(a)–(b).

¹⁷¹ *Mistretta*, 488 U.S. at 372.

¹⁷² Mortenson & Bagley, *supra* note 8 (manuscript at 56) (citing *Mistretta*, 488 U.S. at 386 n.14).

¹⁷³ *See id.*

¹⁷⁴ *United States v. Booker*, 543 U.S. 220 (2005).

types of individuals or projects fall within the scope of the statute. This very issue arose recently in the much-mooted decision of *Gundy v. United States*,¹⁷⁵ where the question was whether under the Sex Offender Registration and Notification Act (SORNA),¹⁷⁶ Congress could confer authority on the Attorney General to decide whether SORNA's registration requirements applied to sex offenders who committed their offenses prior to the passage of the statute. SORNA also delegated to the Attorney General the ability to prescribe rules for sex offender registration. This raised a distinct problem given that the government would be required to devise ways to notify individuals—many whom had been outside the prison system for years—that they were subject to a new registration requirement that carried with it criminal penalties.

It should be evident that there is a sharp distinction between the two delegated tasks. The second—giving notice to past offenders and requiring their registration—looks just like filling in the details of a scheme. But the same cannot be said of the first decision dealing with the proposed retroactivity of the criminal law. That decision raises not only the added administrative burden, but questions of whether to override a presumption against retroactive legislation given that these past offenders may still be recidivists. Thinking through the moral, practical, and constitutional dimensions on retroactivity is cut from a different cloth from devising notice provisions. Any legislature would be well advised to study these issues in detail. The question then is whether that ultimate decision could be delegated to the Attorney General, especially when he need not (and in fact did not) make any study of any sort. In principle, the right answer is clear enough: if the Congress cannot decide whether or not SORNA should be made retroactive, then they should not pass any provision dealing with the question. They cannot punt it over to the Attorney General any more than they could let him decide, for example, whether the statute should apply to both women and men offenders.

Justice Kagan did not address this simple solution. Instead, she sustained the delegation by reaching the dramatic conclusion that the operation of the entire administrative state was at risk if this statute were struck down on nondelegation grounds:

Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional—dependent as Congress is on the

¹⁷⁵ 139 S. Ct. 2116, 2121 (2019).

¹⁷⁶ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, §§ 101–155, 120 Stat. 587 (codified as amended at 34 U.S.C. §§ 20901–20962).

need to give discretion to executive officials to implement its programs. Consider again this Court's long-time recognition: "Congress simply cannot do its job absent an ability to delegate power under broad general directives."¹⁷⁷

Yet the differences between the simple up-down decision in *Gundy* and the dubious stretch of administrative power in *Mistretta* should require no explanation. As noted earlier, *Mistretta* was qualified and may, in some interpretations, have been overturned in *Booker*, but even if it was not, it is worlds apart from *Gundy*, which could be reversed without bringing the administrative state to a halt. Yet unfortunately, Justice Kagan never explored a narrower argument that would allow the Attorney General to set the registration requirement, without also being allowed to answer the gatekeeper question of whether the statute should extend to prior offenders. Indeed, *Gundy* comes very close to Locke's extreme hypothetical of the outright delegation of the entire legislative power to an official inside the executive branch.¹⁷⁸ After all, by that logic, the government could apply SORNA to all persons whether or not they were in prison when the statute was enacted, resulting in the destruction of the structural separation between the legislative and executive branch. This is not a case where a functional analysis calls for delegation. There is no new downstream information that the Attorney General can gather that the legislature cannot. And there is a serious risk that the Attorney General's decision could skew the outcome in a way that the majority did not approve. Hence a narrow nondelegation decision preserves the doctrine without calling into question any of the major delegation statutes of either the founding period or the progressive age.

None of this logic was able to deter Mortenson and Bagley, who continue to insist that the line between legislation and the executive power cannot be drawn.¹⁷⁹ But their account never explains what is left of the primary distinction between Article I and Article II of the Constitution. Rather, they consistently reject the account championed by Justice Gorsuch and others that legislation has "to mean the power to adopt generally applicable rules of conduct governing future actions by private persons."¹⁸⁰ That account contains a serious weakness because in *Gundy* the proposition that SORNA applies to sexual offenders who were released from custody has the same generality whether propounded by statute or regulation. But to the requirement of

¹⁷⁷ *Gundy*, 139 S. Ct. at 2130 (citing *Mistretta*, 488 U.S. at 372).

¹⁷⁸ See *supra* text accompanying note 31.

¹⁷⁹ See Mortenson & Bagley, *supra* note 8 (manuscript at 31).

¹⁸⁰ *Id.* (citing *Gundy*, 139 S. Ct. at 2133).

generality must be added the proposition that the Attorney General could *not* on his own motion require any sexual offenders to register with his office, even if he can fill in the details on how the registration system should work.

This is not a novel position. Just this understanding of the limitations on presidential power was articulated in the *Steel Seizure* case, brought against Charles Sawyer, Truman's Secretary of Commerce.¹⁸¹ Limitations on the executive are certainly embodied in the decisions of all the Justices who questioned the power of President Truman to seize on his own initiative the steel plants during the Korean War on the ground that it was necessary to keep production going in the face of a strike.¹⁸² Justice Frankfurter had taken the view that the Labor Management Act of 1947 had considered and rejected the idea of vesting the President with this power, and that such power could not be read into the President's personal powers derived solely from holding the office.¹⁸³ And Justice Jackson famously concluded that the President's power was "at its lowest ebb" when it was against the will of the Congress.¹⁸⁴ Yet the assorted statements from notable political theorists that Mortenson and Bagley cite include such heavyweights as Montesquieu¹⁸⁵ and Rousseau¹⁸⁶, and constitutional founders who do not address explicitly the architectural split between Article I and Article II. And even their citation to Locke ignores Paragraph 141, cited above in favor of relying on the anodyne Section 143, which talks about standing laws and arbitrary decrees, without addressing the separation of powers implicit in his discussion of the legislative power in Paragraph 141.¹⁸⁷ Indeed, with all the

¹⁸¹ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 582–84 (1952).

¹⁸² *Id.* at 588–89.

¹⁸³ *Id.* at 599 (Frankfurter, J., concurring).

No room for doubt remains that the proponents as well as the opponents of the bill which became the Labor Management Relations Act of 1947 clearly understood that as a result of that legislation the only recourse for preventing a shutdown in any basic industry, after failure of mediation, was Congress.

Id.

¹⁸⁴ *Id.* at 637 (Jackson J., concurring). Low ebb does not mean, however, that the President always loses. Indeed, in *Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015), the majority of the Court held that the President exercised the exclusive power to recognize foreign nations on an issue where there is a genuine constitutional gap, resting on a theory of consistent practice over the years. But note that recognition is not a legislative act.

¹⁸⁵ Mortenson & Bagley, *supra* note 8 (manuscript at 32 n.106) (citing Montesquieu Book 11, Chapter 6) ("The other two powers may be given rather to magistrates or permanent bodies, because they are not exercised on any private subject; one being no more than the general will of the state, and the other the execution of that general will[.]").

¹⁸⁶ *Id.* (citing JEAN-JACQUES ROUSSEAU, SOCIAL CONTRACT (1762)).

¹⁸⁷ *Id.* (citing JOHN LOCKE, SECOND TREATISE ¶ 143 (1689)).

huffing and puffing, these attacks miss the narrow ground by which *Gundy* can be attacked, namely that it seeks to delegate a simple dichotomous decision on statutory coverage that raises none of the tradeoffs required under other modern Progressive statutes such as the Federal Communications Act. Those delegations remain valid under the analysis made here, at least if these statutes remain constitutional, which in my view they should not.

The fear with respect to excessive delegation expressed first by Mortenson and Bagley, and subsequently by Parrillo is all the more remarkable because neither of them—nor for that matter, Wurman—cite the one case that was correctly under siege in *Gundy*, namely the extravagant decision of Justice Scalia in *Auer v. Robbins*,¹⁸⁸ which was spared constitutional oblivion by Justice Kagan's ingenious reinterpretation in *Kisor v. Wilkie*.¹⁸⁹ In one sense, *Auer* is not a delegation decision at all, because the Congress did not ask the Secretary to decide whether to include “executive, administrative or professional employees” as protected workers, which would have been an impermissible delegation.¹⁹⁰ It is even worse, because the Secretary of Labor unilaterally extended the scope of the Fair Labor Standards Act in the teeth of statutory language that required the other result.¹⁹¹ That said, *Auer* and *Kisor* are constitutional opposites. The issue in *Kisor* was a narrow and technical question that dealt with the award of disability benefits for an ex-marine who suffered combat-related injuries. The particular statutory phrase at issue was whether there were “relevant official service department records” which should have been considered in his case for disability benefits.¹⁹² The key issue was defining “relevant.”¹⁹³ At one level, the case is a pure question of statutory construction that the Court could decide on its own, given that the text of the Administrative Procedure Act requires these questions of statutory construction be decided *de novo*.¹⁹⁴ After the legal determination, the VA, in the ordinary course of business, can make a factual determination of when the various

¹⁸⁸ 519 U.S. 452 (1997). For a more detailed discussion, see DUBIOUS MORALITY, *supra* note 6, at 134–35.

¹⁸⁹ *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

¹⁹⁰ *Auer*, 519 U.S. at 454, 461.

¹⁹¹ *See id.* at 461.

¹⁹² *Kisor*, 139 S. Ct. at 2409.

¹⁹³ *See id.*

¹⁹⁴ 5 U.S.C. § 706 (“To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.”). *Contra* *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (which never cites the operative text).

injuries arose. This last delegation is required by the general test: there is better downstream information that would be useful to handle individual cases, without any fear of systematic bias. But there is no reason to delegate down to the agency questions that are properly left to judicial interpretation.

Nonetheless, *Kisor* served as a jumping-off point from which to examine the judicial deference afforded to federal agencies in interpreting the language of federal statutes in the context of the Department of Labor's unilateral decision to expand the jurisdiction of the Fair Labor Standards Act. *Auer* involved the question of the proper scope of the Fair Labor Standards Act, which provides first that the minimum wage and overtime provisions should apply to employees, subject to an exception that excludes "bona fide executive, administrative, or professional" employees from the overtime provisions.¹⁹⁵

During the Clinton Administration, Secretary of Labor Robert Reich reclassified police sergeants and lieutenants as ordinary employees, equivalent to the patrolmen whom they were charged to supervise. Justice Scalia applied extreme deference to sustain this position that runs contrary to both the applicable statutory context and ordinary usage. The deference in this case extended coverage far beyond any sensible reading of the statute, allowing the Secretary to rope into the statute individuals who did not belong there. Justice Kagan (who also wrote in *Gundy*) knew that the Scalia opinion was highly vulnerable, so she overruled the case, de facto, by announcing that deference should only apply after every effort was made with traditional statutory tools to find the correct meaning of the phrase—at which point that outcome in *Auer*, as well as similar coverage cases, should be read as if it were a tantamount violation of the nondelegation doctrine. Justice Kagan wrote, "[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous," and she added that "before concluding a rule is genuinely ambiguous, a court must exhaust all the 'traditional tools' of construction."¹⁹⁶ So once again, *Auer*, like *Gundy*, is indefensible (as a purported delegation) even in a regime that accepts the delegations found permissible in *National Broadcasting Co. v. United States*,¹⁹⁷ and perhaps even *Mistretta*.

There is a double irony here. The progressives strongly backed *Auer* and its progeny, but they are deeply opposed to

¹⁹⁵ 29 U.S.C. § 213(a)(1).

¹⁹⁶ *Kisor*, 139 S. Ct. at 2415.

¹⁹⁷ 319 U.S. 190 (1943).

Gundy.¹⁹⁸ Indeed, *Gundy* was represented by the Stanford Law School Supreme Court Legal Clinic while the Trump Administration's Deputy Solicitor General Jeffrey Wall defended SORNA.¹⁹⁹ Nothing in the principle of separation of powers calls for any distinction between civil and criminal cases. But if there were any such distinction, then *Gundy* should be subject to greater scrutiny than *Auer* because the requirements of notice are always stronger in the criminal context. But the correct solution for progressives as well as classical liberals is the nondelegation principle, which blocks both *Auer* and *Gundy*. Both cases set policy on basic coverage while neither fills in the details (valuation and administration). The line at the founding is the same line today.

V. CONCLUSION

The basic rule against sub-delegation has its origins in private law, dating back to Roman times. Yet an absolute prohibition would make it impossible for people to form partnerships or other kinds of complex associations, all of which may require multiple levels of delegation. What is true of private firms is also true within the public sector. Congress itself receives delegated power from the people, but routinely makes further delegations down to particular agencies. There is no other organizational structure that could allow any set of general legislated principles to be applied to particular cases. In both these settings, therefore, the task is to find ways to allow for delegation, but to control for the potential of abuse, either by the party who makes the delegation or, what is relevant here, the party to whom that delegation is made. Controlling for abuse involves complex trade-offs in an effort to minimize the two types of error that always arise under conditions of uncertainty: blocking a delegation that should be permitted and permitting a delegation that should be blocked. There is no single simple strategy that deals with these problems, so every legal system must adopt mixed strategies that rely on some combination of ex ante and ex post sanctions.

This essay has explored how these two sanctions mix, first by dealing with the private delegation issues, which in turn become a template by which to analyze the delegation problem under

¹⁹⁸ Indeed, there was not a single amicus brief in support of the government, with both progressive and libertarian organizations urging reversal. See *List of 29 Filings for Gundy v. United States*, WESTLAW, [https://1.next.westlaw.com/RelatedInformation/I90a2c403933011e99b14f2ee541cf11a/riFilings.html?docSource=01b390dec9f64aa5beb0845fdb9b0c81&pageNumber=1&facetGuid=hc78d6806e458f19c4b8a254945fcadea&transitionType=ListViewType&contextData=\(sc.Default\)](https://1.next.westlaw.com/RelatedInformation/I90a2c403933011e99b14f2ee541cf11a/riFilings.html?docSource=01b390dec9f64aa5beb0845fdb9b0c81&pageNumber=1&facetGuid=hc78d6806e458f19c4b8a254945fcadea&transitionType=ListViewType&contextData=(sc.Default)) [http://perma.cc/2TJG-6VJK].

¹⁹⁹ *Gundy*, 139 S. Ct. at 2118.

American constitutional law. The basic model asks two questions. First, can the delegatee take advantage of knowledge about a particular case that is not available to the principal? Where it is true, the delegation should be encouraged. Second, is there a danger that the delegatee will adopt a substantive position at odds with the general program set out by the principal? The principal could be a board of directors of a corporation or association, or the United States Congress.

In general, the presumption should be set in favor of allowing delegation to proceed, but subject to this critical caveat: in an individual case, the government's decision could be challenged after the fact, on the grounds that it exceeds the proper scope of delegation. But in an important class of cases, the ex-ante prohibition of delegation should be implemented. These include cases where the delegated party seeks to expand (or contract) its jurisdiction in ways that are inconsistent with the terms of the original grant, or allow them to make critical decision that the principal could have made with equal dispatch.

In general, relatively few challenges should succeed on these grounds. That result holds not because there are no principled limitations on the delegated powers of the agent, but, rather, because these limitations are routinely observed. That basic insight informs the analysis of key legislative actions during the Founding period, where delegation to executive branch officials was commonly and correctly used in cases involving patents, pensions, post offices, land recordations, and taxes that required the application of general principles to particular cases. But it is one thing to show that these delegated actions took place, and quite another to show that they exceeded appropriate limitations, usually by consciously defying the norms set out in the basic legislation.

Accordingly, the formulation offered, most notably by Chief Justice Marshall, in *Wayman v. Southard*²⁰⁰ is that the legislature sets the basic parameters while the executive or administrator fill in the details. This is not an empty proposition that allows any and all tasks to be shifted back and forth between legislative and executive officials either "easily" or "readily" as Mortenson and Bagley claim. Rather, in all cases it takes legislation to get the process going, and requires the executives to follow the basic prescription, without adding or eliminating any of its requirements.

That basic prohibition works as well in modern times as it did in the Founding period. What differs between the pre- and post-New Deal constitutions is the specificity of the terms of the

²⁰⁰ 23 U.S. 1 (1825).

mandates that are allowed. In the earlier period where the tasks of government were more clearly confined to land grants, patents, post offices, tariffs and the like, these delegations were quite limited so that the basic nondelegation principle was rarely tested. But moving onto the Progressive Era, the aims of government expanded for two reasons: first the scope of federal power under the Commerce Clause expanded, and second the limitations on government power, at both the federal and state level, to regulate economic liberties or private property were largely erased. Together these developments gave space for major government initiatives that require the operation of the administrative state. Hence, either executive branch officials or independent agencies had to bear an ever-larger fraction of the work under broad, but necessarily vague, formulas such as “public interest, convenience, or necessity.”²⁰¹ The only way those delegations could be attacked is to strike down the basic scheme on constitutional grounds, which was far more common when the Commerce Clause was narrowly read and economic liberties and private property enjoyed greater protection. Those days are gone, and with their passing the set of delegations necessarily had to increase. It would, moreover, in my view be grossly improper to try to use the back-door tactic of the nondelegation doctrine to undermine the New Deal synthesis on both federal power and individual rights. Those doctrines should be overruled (as I have long urged) explicitly, or kept. And the scope of the delegation doctrine should be determined by the chosen set of constitutional principles, not otherwise. But even when these constitutional changes are given full rein, there still comes a point at which the legislature sets the mission, and the executive fills in the details. The misguided operations of the FCC may still be protected, but by the same token the sprawling delegations of *Mistretta* can be blocked and the bald delegation in *Gundy* can be undone. As such the nondelegation doctrine survives, but in the end of the day, it does not flourish as a dominant constraint on governmental power.

²⁰¹ *Nat'l Broad. Co.*, 319 U.S. at 215.

Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary

*Kurt Eggert**

“[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition.”
– James Madison¹

“[Originalism’s] greatest defect, in my view, is the difficulty of applying it correctly. . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text.”
– Justice Antonin Scalia²

“[Montesquieu’s] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted.” – James Madison³

“I’m an originalist; I’m a textualist; I’m not a nut.”
– Justice Antonin Scalia⁴

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¹ THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).

² Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

³ THE FEDERALIST NO. 47, *supra* note 1, at 251 (James Madison) (emphasis in the original).

⁴ Jeremy Telman, *Explication Du Texte: “I’m An Originalist; I’m A Textualist; I’m Not A Nut”*, 50 VAL. U. L. REV. 629, 629 (2016).

I. INTRODUCTION

The originalist defenders of the nondelegation doctrine, the purported constitutional rule that Congress cannot delegate its legislative rule-making power to federal agencies, have constructed an elaborate myth to justify that doctrine, which is found nowhere in the Constitution. According to the originalist myth, John Locke articulated that doctrine in his *Second Treatise of Government* of 1689⁵ and so influenced the Framers of the Constitution that they somehow worked it implicitly and invisibly into the Constitution. And hence the Constitution's original meaning includes the nondelegation doctrine. Such nondelegation defenders assert that the Constitution strictly limits the delegation of legislative power by Congress, even if it does not prohibit it entirely, and that there is a veritable trove of evidence showing that the nondelegation doctrine was firmly established at the Founding. Some treat James Madison as the patron saint of the separation of powers and argue that the fact that Madison unsuccessfully attempted to include the nondelegation doctrine in the Constitution shows that it is somehow inherent in that document.

None of that myth is true. Or rather, the available historical evidence strongly indicates that the myths asserted by such defenders of the nondelegation doctrine are false. Locke's greatest influence on the colonists came before the Revolution, at a time when the colonists were considering whether to revolt from Britain. Once the Revolutionary War started, Locke's influence in the colonies plummeted. At the Constitutional Convention, Locke had little apparent influence, and even that seems to have been on the Anti-Federalists, rather than with the Framers. The drafters and ratifiers of the Constitution little discussed the delegation of legislative powers, let alone what limits there should be to such delegation. Madison was far more concerned, even fearful, that Congress would encroach on the powers of the Executive and the Judiciary than he was about Congress excessively delegating its powers. Madison even urged including in the Constitution provisions that would have mandated that some legislative policy-making power be delegated to the Executive and the judiciary, in the form of a Council of Revision, a council made up of the Executive and selected members of the national judiciary to exercise what was then called the revisionary power.

⁵ JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 141 (C.B. Macpherson ed., 1980).

When a nondelegation provision was proposed at the Constitutional Convention, it was rejected. When an amendment was proposed to the Constitution as part of the Bill of Rights that would have prohibited each branch of the government from employing the powers of another branch, it was rejected by the Senate. Congress, since its inception, has delegated legislative power with relative abandon, and doing so was not held unconstitutional until 1935 and never again after that year.

Why would originalists push such obvious and unconvincing myths? How could a supposed “constitutional doctrine” rejected for the Constitution and which has been meaningfully employed only twice even be said to exist in any meaningful way? Worse yet, why does it appear that, to seize greater control of America’s governance, the now starkly conservative Supreme Court may well use originalism to justify creating a brand new and robust version of the long dormant nondelegation doctrine? This novel creation would be, some originalists argue, justified by then-secret debates at the Constitutional Convention, by a pre-Revolutionary War pamphlet arguing that Parliament should recognize the legislative power of colonial legislatures, by a personal letter written decades later about the influences on the Revolution, by a hoary misunderstood agency maxim that seems to have sprung from a medieval printing error, by one of Locke’s writings that little influenced the drafters of the Constitution, by early legislation that actually delegated legislative power, and by court cases well after the Founding that permitted legislative delegation, among other unconvincing sources.

To explain why originalist defenders would defend a nondelegation doctrine unsupported by evidence at the Founding, this article examines another myth, that of originalism itself, the idea that the “intentions of the founders” as a group of drafters or ratifiers or that the original public meaning of words in the Constitution can be ascertained in such an accurate and meaningful way that they should determine the meaning of the Constitution. This article also criticizes the idea that the Supreme Court should rely on its own judgement of arcane and disputed historical facts and the complex context in which they occurred as a basis to overturn centuries of its own precedent in interpreting the Constitution. These two myths, the myth of the nondelegation doctrine and the myth of an originalist method valid enough to breathe life into it, wind around and support each other. The nondelegation doctrine would remain dormant if not dead but for originalism. A revived nondelegation doctrine would be originalism’s greatest triumph, as it would give an originalist Supreme Court a self-created, ill-defined, and

virtually uncontrollable license to overturn any regulatory legislation that the Court disfavored for policy reasons.

A revived nondelegation doctrine would transform the Supreme Court into a far more powerful version of the rejected Council of Revision, a proposal that was scrapped at the Convention because it would have turned judges into legislators, violated the separation of powers, and upset the balance of those powers. A new robust nondelegation doctrine would go even further, as no one could override the veto power that the Supreme Court would give itself anytime Congress directed federal agencies to craft regulations and make decisions that the Court decides Congress should make for itself. The Court would not have to share this mighty veto power with the President, nor could Congress override the Court's veto. The Court would be granting itself an awesome policy power that would be almost impossible for Congress to resist or the people to remove, because the doctrine would be considered an implicit constitutional doctrine that must be enforced both on Congress and on the Executive Branch. And it is hard to imagine that the Constitution would be amended to remove the nondelegation doctrine, something that is not even there.

If the Supreme Court creates a robust nondelegation doctrine, it would seize the power to control the size of the administrative state and the scope of regulatory legislation in a way not authorized by the Constitution, rejected by the founders when they rejected the Council of Revision, and virtually untouchable by the people themselves or the members of Congress who represent them. Originalism would have seized power for a "Government by Judiciary," the very danger which was the original basis for originalism and was the title of the "manifesto of originalism," Raoul Berger's 1977 book that helped spark the originalist movement, a book warning of the grave peril of the Supreme Court Justices seizing such policy-making power and imposing their will on the nation by revising constitutional mandates to fit their policy preferences.⁶

This article uses the current debate about delegation at the Founding and the new evidence uncovered, including evidence that this article brings to this debate, to examine whether the original intent or original public meaning at the Founding should be a deciding factor in a court's decision about the nondelegation

⁶ See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 417 (1977) ("Among the most fundamental [principles of the Constitution] is the exclusion of the judiciary from policymaking.").

doctrine. To the debate over delegation or nondelegation at the Founding, this article adds a comprehensive analysis of Madison's changing and contradictory views on the separation of powers and the usefulness and effect of an express nondelegation doctrine in the Constitution, his grave fear that Congress would usurp the powers of the other branches, and his support of a proposed Council of Revision, which would have constitutionally mandated the delegation of some legislative power to a council made up of the Executive and a group of judges.

Madison at various times attempted to add an express nondelegation or alternatively a non-encroachment doctrine to the Constitution, the latter of which would have forbidden one branch of government from usurping the powers of the other branches.⁷ Madison also argued that express doctrines in constitutions are ineffective protections against the accumulations of the various powers in one branch. At least once, he also asserted that limitations on delegation are mandated by the Constitution despite their absence from the Constitution.

The Article also uses decades of work by historians to disprove a central claim of originalists that Locke and his *Second Treatise* were a great influence on the drafting of the Constitution. The consensus view among historians now seems to be that Locke's influence in America plummeted with the start of the Revolutionary War and that his *Second Treatise* had little influence on the drafting or ratification of the Constitution. Without the crutch of Locke's *Second Treatise*, originalists have virtually no evidence that the Constitution was intended to contain an implicit nondelegation doctrine.⁸ The Article further argues that the Court enforcing a robust nondelegation doctrine would constitute judicially amending the Constitution to include restrictions and principles not only absent from the Constitution but also that the Framers and the First Congress expressly rejected.

This Article uses the nondelegation debate as a lens to see whether originalism as it is currently practiced is a useful or dangerous tool of constitutional interpretation. It builds on existing criticisms of originalism and how it has morphed largely from a theory of judicial restraint into an antimajoritarian call to judicial action, urging "judicial fortitude," the conservative term

⁷ CAROL BERKIN, *THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA'S LIBERTIES* 152 (2016).

⁸ Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021).

for judicial activism and the idea that the Court should actively assert its judicial power in an effort to rein in the administrative state.⁹ Justice Gorsuch, in a recent dissent, argued that the Court should exhibit “fortitude” in reviving the nondelegation doctrine,¹⁰ very different from the judicial restraint Justice Scalia applied to nondelegation. Many have noted that originalism can be used as a mere cloak to hide courts’ asserting their policy preferences in the guise of honoring the intent of the Founders, and that while originalists once urged judicial restraint, now many applaud a now conservative Supreme Court striking down legislation enacted by Congress. However, this Article makes a separate point, that the “judicial fortitude” some originalists encourage directly violates the limited and non-policy-making role of the Court as expressed in the Founding Era.

This Article proceeds as follows. Part I examines the history of the nondelegation doctrine, its absence in the Constitution, the various theories designed to explain its existence, and the mere lip service it has received from the Court, other than during a single year. It then discusses Madison’s various efforts to include both a nondelegation doctrine and a non-encroachment amendment in the text of the Constitution, as well as his support for the creation of a Council of Revision, which would have delegated some legislative power to the Executive and a group of judges. Locke’s nondelegation mandate and historians’ assessment of what little influence it seems to have had on the Framers is also discussed, as well as other explanations and justifications for a constitutional nondelegation doctrine.

Part II recounts the origins of originalism, its initial emphasis on judicial restraint and on the avoidance of interfering in legislative policy-making. Then, it discusses how originalism’s initial focus on the framers’ original intent was rejected by many originalist theorists and replaced, first with the understanding of the ratifiers of the Constitution and then with the original public meaning of the words of the Constitution. The Article discusses the unworkable difficulty of putting modern originalism into practice. It also discusses how the many forms and mutations of originalism allow judges to choose how to apply originalism to achieve their favored policy results.

⁹ See generally PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 109–36 (2018) (asserting the importance of a revived nondelegation doctrine to control the power of federal agencies).

¹⁰ *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting).

Part III examines how originalism works in practice in justifying and discussing the nondelegation doctrine. It reviews the originalist concurrences and dissents regarding nondelegation that some Supreme Court Justices have authored in recent decades, applying a flawed, primitive form of originalism sometimes based on historical error or lack of context. Then the Article concludes with an analysis of originalist scholars' attempts to justify the nondelegation doctrine and what their attempts show about the flaws and challenges of employing originalism as a method of constitutional analysis.

II. THE NONDELEGATION DOCTRINE, ITS MYSTERIOUS HISTORY, AND THE STAKES OF THE CURRENT DEBATE

The nondelegation doctrine was succinctly stated by Justice Harlan in 1892: "That congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution."¹¹ This assertion has been often repeated, even recently by Justice Scalia in a unanimous decision by the Supreme Court, stating "'Article I, § 1, of the Constitution vests '[a]ll legislative Power herein granted . . . in a Congress of the United States' . . . [and] permits no delegation of those powers."¹² Defenders of the nondelegation doctrine typically use three arguments in their defense: "the separation of powers, public accountability, or the text of the U.S. Constitution."¹³ Reasons given for the associated separation of powers doctrine are governmental efficiency, keeping government powers in balance, and assuring that law is made for the common good.¹⁴ If the nondelegation doctrine is vital to the structure of government, it serves as "a prophylactic measure against tyranny. . ."¹⁵ To these should be added the claim that the original intent of the Framers mandates a nondelegation doctrine, absent even words in the Constitution expressly stating that.

The nondelegation doctrine appears nowhere in the Constitution, leading to questions about whether it is in fact a constitutional mandate. Julian Davis Mortenson and Nicholas Bagley boldly assert:

¹¹ *Field v. Clark*, 143 U.S. 649, 692 (1892).

¹² *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting U.S. CONST. art. I, §1).

¹³ Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1004 (2016).

¹⁴ John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994 (2011).

¹⁵ Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 383 (2019).

“The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can’t be both.”¹⁶ Posner and Vermeule make the straightforward claim that the “nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory.”¹⁷ Why do we have the nondelegation doctrine, then? Their reply: “Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn’t clearly adopted by the Supreme Court until 1892, and even then only in dictum.”¹⁸

As the Supreme Court is now filled with Justices with an originalist bent, a fraught question or a great opportunity, depending on whom you ask, is whether the Court will finally set in place a stricter, more robust nondelegation doctrine. A strict nondelegation doctrine could, as Elena Kagan noted, render most of government unconstitutional, “dependent as Congress is on the need to give discretion to executive officials to implement its programs.”¹⁹ As a law professor, now-Justice Amy Coney Barrett and her co-author stated, “Adherence to originalism arguably requires, for example, the dismantling of the administrative state. . . . Originalists have been pressed to either acknowledge that their theory could generate major disruption or identify a principled exception . . .” explaining why judges should not be bound by the Constitution’s original public meaning.²⁰

Some originalists and others opposed to expansive nature of the administrative state harbor hopes that if a majority of the Court adopt an originalist view of the nondelegation doctrine, they will decide that it must be more strictly applied and so trim what they perceive as the dangerous power of federal agencies. For example, Peter Wallison argues that, without a stricter nondelegation jurisprudence, “forcing Congress to do the difficult work of legislating, we are headed ultimately for a form of government in which a bureaucracy in Washington – and not Congress – will make the major policy decisions for the

¹⁶ Mortenson & Bagley, *supra* note 8, at 282.

¹⁷ Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002).

¹⁸ *Id.* (citing *Field v. Clark*, 143 US 649, 692 (1892)).

¹⁹ *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

²⁰ Amy C. Barrett & John C. Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 1–2 (2016). The authors, though, emphasize “We do not ourselves undertake to examine how any of the precedents we mention would fare under an originalist analysis.” *Id.* at 2 n.1.

country.”²¹ Wallison calls such strong measures “judicial fortitude,”²² a term much more palatable to originalists than judicial activism.

The recent dissent of Justice Gorsuch in *Gundy* indicating interest in revitalizing the nondelegation doctrine has kicked up the interest in an originalist approach to the doctrine into a fever pitch.²³ Justice Gorsuch attempting to revive the nondelegation doctrine should have come as no surprise since he had twice discussed the doctrine while serving on the 10th Circuit.²⁴ Justice Alito, concurring in *Gundy*, also indicated interest in reviving the nondelegation doctrine.²⁵ Gary Lawson noted in 2019, “And while you never count your votes until they are cast, it is very hard to read *Gundy* and not count to five under your breath.”²⁶ With new Justice Amy Comey Barrett, the number might well be six.

The nondelegation doctrine has been one of the main battlegrounds “upon which the constitutionality of the growth of federal regulatory authority was tested”²⁷ and that battle is now heated. Justice Gorsuch’s *Gundy* dissent²⁸ raises the question of whether a now much more conservative Court will restrict Congress’s ability to draft the kind of regulatory legislation that is dependent on delegating significant rule-making authority to federal agencies. Advocates for a stricter nondelegation doctrine have argued that an unchecked administrative state without restrictions like a robust nondelegation doctrine would be “in the Framers’ eyes, tyrannical and illegitimate,”²⁹ and that the nondelegation doctrine could check what C. Boyden Gray called

²¹ See WALLISON, *supra* note 9, at 114.

²² *Id.* at 166.

²³ See *Gundy*, 139 S. Ct. at 2116.

²⁴ See *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring). See also *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (en banc) (Gorsuch, J., dissenting from denial of rehearing en banc). In *Nichols*, then-Judge Gorsuch in a dissent stated, “There’s “[t]here’s ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people’s liberty.” *Id.*

²⁵ See *Gundy*, 139 S. Ct. at 2131 (2019) (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

²⁶ Gary Lawson, “*I’m Leavin’ It (All) Up To You*”: *Gundy* and the (Sort-Of) Resurrection of The Subdelegation Doctrine, 2018–2019 CATO SUP. CT. REV. 31, 33 (2019).

²⁷ Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989).

²⁸ *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting).

²⁹ D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 94 (2017) (“Administrative law will continue to sit uneasily with our legal and constitutional traditions and remain, in the Framers’ eyes, tyrannical and illegitimate.”).

the “unprecedented expansion of the administrative state.”³⁰ A more robust nondelegation doctrine could change the United States’ policy on a myriad of issues, including environmental protection, financial services oversight, and occupational health and safety.³¹ It could strike cost containment strategies in Medicare and under Obamacare,³² parts of economic relief programs like the Troubled Asset Relief Program (TARP)³³ and financial regulation like Dodd Frank.³⁴

However, there is a gigantic sticking point to the originalist push to revive the nondelegation doctrine. Originalists assert that the meaning of the Constitution was fixed at its ratification (and the meaning of each amendment fixed at the time it was passed). Hence, originalists must prove that the Constitution contained a rule against delegation when it was ratified. However, the Constitution is silent on whether Congress can delegate its legislative power, and even originalists disagree whether it can.³⁵ How can the Constitution mean something it is silent about? One of the strongest defenses of originalism is based on the fact that the Constitution is a written text, and that originalism is somehow mandated by it being a written constitution.³⁶ How can originalism then purport to justify a doctrine not written in the Constitution?

If the Framers had wanted to limit Congress’s delegation of its legislative powers, they had several choices. One option is that they could have included the nondelegation doctrine as an express term in the Constitution or an early amendment thereto. This was proposed and rejected during the Constitutional Convention and a similar non-encroachment clause, forbidding each branch from using powers of another branch, was rejected

³⁰ C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 646 (2015).

³¹ *Id.* at 620–21 (“Correcting those misconceptions [about the nondelegation doctrine] is crucial, not just for abstract constitutional debate, but more importantly, for the regulatory policy choices the United States government now faces.”).

³² Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 DRAKE L. REV. 1085, 1093 (2012).

³³ *Id.* at 1098–99.

³⁴ *Id.* at 1109–10 (referring to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

³⁵ See, e.g., Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 905–06 (2009) (“Congress may, in the exercise of its assigned powers, delegate whatever discretion it likes, pursuant to whatever strict or lax standards it chooses, to administrative agencies within the executive branch. So long as Congress retains the authority to undo the delegation, delegation is a form of exercise of its legislative power, not a relinquishment of it.”).

³⁶ KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 47 (1999).

as part of the Bill of Rights, as is discussed in Part A which follows. A second option is that the Framers, by vesting the Legislative, Executive, and Judicial powers in separate branches, could have trusted that the separation of powers, along with other defensive tools, would cause and allow each branch to zealously guard its own powers and delegate them only when they could limit and control the delegation, and when the delegation furthered the branch's purpose. Madison described the separation of powers and associated defensive means as "the great security against a gradual concentration of the several powers in the same department," as the ambition of each department would prevent it from giving too much of its power to another branch.³⁷ A third option is that the Framers could have intended, in addition to or as a result of the separation of powers, that an implicit nondelegation doctrine exist somehow in the fabric or penumbra of the Constitution even though they did not publicly discuss this during the drafting or ratification of the Constitution and rejected it for the text. There were no doubt other options, but this last one seems highly unlikely. If the Framers thought that the nondelegation doctrine were at all important, they likely would have included it in the Constitution's text, not leave it as a doctrine written in air. And this option is also the least effective, given the long dormancy of the nondelegation doctrine and the ongoing debate about whether it even exists as a constitutional mandate.

Seen in this light, originalists' efforts to create a new, more stringent nondelegation doctrine would not return the Constitution to its original meaning but rather would force into the Constitution terms that were rejected at the Founding. Originalists would have the Supreme Court amend the Constitution to include the terms and principles the Framers and First Congress rejected. Worse yet, a robust nondelegation doctrine would undermine the separation of powers as set by the Constitution, as the Court would be giving itself an ill-defined, uncontrollable license to overturn even long-standing regulatory legislation with which a majority of the Court disagrees. A robust nondelegation doctrine would empower the Court to overturn major policy decisions by Congress, both current and decades old, regarding the scope and method of environment protection, health care and insurance regulation, financial services regulation, and a myriad of other policy choices that should be left to Congress.

³⁷ THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison).

A. Madison, the Nondelegation Doctrine, and the Separation of Powers in the Constitution

The nondelegation doctrine is found nowhere in the Constitution.³⁸ However, Madison was involved in two attempts to insert into the Constitution clauses intended to prevent one branch of government from using the powers of another branch. Madison also was a proponent of adding to the Constitution a Council of Revision, which would have blended the separate powers and enabled a council made up of the President and members of the federal judiciary to review every act of Congress and give the Council of Revision a tool to revise legislation and a qualified veto of Congressional legislation on policy as well as constitutional grounds.³⁹

Early during the Constitutional Convention while considering a very weak executive power, Madison's notes indicate the proposal to fix the powers of the Executive to be "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers *not Legislative nor Judiciary in their nature,*' as may from time to time be delegated by the national Legislature."⁴⁰ In other words, Congress could delegate non-legislative powers to the Executive, but not legislative powers. The words "not legislative nor judiciary in their nature" were added to this proposed amendment, Madison indicated, "in consequence of a suggestion by Genl. Pinckney that improper powers might otherwise be delegated."⁴¹

However, General Charles Cotesworth Pinckney's second cousin, Charles Pinckney, moved that the limitation on delegation be stricken, saying "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'" Madison's notes indicate that he "did not know that the words were absolutely necessary. . . He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions."⁴² Madison's notes indicate his own thoughts and how he equivocated about the necessity of including in the Constitution an express nondelegation clause. This is hardly a

³⁸ Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 89 (2010) ("The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers.")

³⁹ See BERGER, *supra* note 6, at 300–11.

⁴⁰ THE RECORDS OF THE FEDERAL CONVENTION OF 1787 65 (Max Farrand ed., Yale Univ. Press 1911) (emphasis added).

⁴¹ *Id.*

⁴² *Id.*

stirring endorsement of a nondelegation doctrine or strong evidence that Madison thought the doctrine definitely should be included explicitly in the Constitution.

Charles Pinckney's motion to strike was based on the argument that the object of the added words was already included, though what exactly that means is not entirely clear. It could mean that the purpose of a bar on nondelegation was already achieved through other means or that the Executive power somehow already carried a limitation on using delegated legislative power in it, depending what the "object" is.⁴³ At this point, the drafters were undecided on what form the Executive should take, unitary or plural,⁴⁴ and the drafters were focused on defining the reach of Executive power.⁴⁵ This bar on delegation may have stricken as redundant because at that point in the Constitution's drafting, the powers of the Executive were much more sharply limited than they later would be in the final Constitution and "were confined to appointment and execution. . ."⁴⁶ When the Executive powers were broadened, however, no express nondelegation clause was inserted. The nondelegation provision may have been defeated because it was viewed as unnecessary, which to Posner and Vermeule "suggests, if anything, that legislative delegation to the executive was viewed as unproblematic."⁴⁷

Madison was also a proponent of a proposal at the Constitutional Convention that would have blended the powers of the Executive and Judicial branches with that of the Legislative by establishing a Council of Revision, a body of the Executive and "a convenient number of the National Judiciary" to weigh in on laws as they were drafted to help Congress make better laws by participating in their revision, and with a power of veto qualified by the fact that it could be overridden by the legislature.⁴⁸ The

⁴³ *Id.*; see also Aaron Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718, 743 (2019) (observing that Charles Pinckney, who moved to strike the phrase, and Edmund Randolph, who seconded the motion, both "felt that this limitation was inherent in the executive's power to 'carry into effect' the laws . . .").

⁴⁴ For example, Governor Edmund Randolph argued that a unitary executive is "the fetus of monarchy." See Michael W. McConnell, *James Wilson's Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL'Y 23, 32–33 (2019).

⁴⁵ *Id.* at 46 ("In this connection, it is suggestive that Madison . . . (and C.C. Pinckney) sought to limit executive power by denying to the President powers 'not legislative nor judiciary in their nature' . . .").

⁴⁶ *Id.* at 36 ("The result was a mere shadow of the 'energetic' and powerful executive that Wilson and Rutledge evidently had in mind, which would eventually emerge from the Convention.").

⁴⁷ Posner & Vermeule, *supra* note 17, at 1734.

⁴⁸ THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 21.

Executive and the judges making up the Council of Revision would thus have both the negative legislative power of a qualified veto and also the positive legislative power to review laws and assert their opinions and suggestions for revision, opinions given weight by the threat of veto.

James Wilson supported the Council of Revision, saying that “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”⁴⁹ Wilson urged that the council have “a share in the Revisionary power” so that “they will have an opportunity of taking notice of these character[istics] of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”⁵⁰ The Council of Revision would have allowed judges and the Executive to weigh in during the legislative drafting and revising process on whether laws were good policy and with their suggestions for improvement, even if the proposed laws were constitutional.⁵¹ Thus, the Council of Revision would have given the Executive and the judicial members both qualified negative legislative power but also some positive legislative power during the drafting and revision process.⁵² “According to Madison, good lawmaking required the input of judicial minds at the outset.”⁵³ Madison noted that some might object that the Council of Revision might “give too much strength either to the Executive or Judiciary” or would constitute a violation of the separation of powers as “a union of the Judiciary & Executive branches in the revision of the laws...”⁵⁴ but was not concerned about the other branches gaining such legislative power. “Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions. . .”⁵⁵ Madison’s great concern was not the risk of excessive legislative delegation by Congress but rather the likelihood of excessive encroachment by Congress on an Executive and a Judiciary unable to protect themselves. He defended the Council of Revision against the charge it would

⁴⁹ *Id.* at 73.

⁵⁰ *Id.*

⁵¹ *Id.* For this point, see also James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 250–51 (1989).

⁵² THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 73.

⁵³ Barry III, *supra* note 51, at 250.

⁵⁴ *Revisionary Power of the Executive and the Judiciary*, [21 July] 1787, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-10-02-0067> [<http://perma.cc/SL2W-TSTK>] (citing 10 James Madison, *The Papers of James Madison* 109–110 (Robert A. Rutland et al. eds., 1977)).

⁵⁵ *Id.*

breach the separation of powers by arguing that giving the Executive and the judiciary this power over Congress would be “an auxiliary precaution in favor of” the separation of powers.⁵⁶ Far from denouncing this delegation of legislative power as an assault on the separation of powers, Madison argued it would help preserve that separation.

Madison's notes show he meant this delegation of legislative power to give the Executive and the judiciary policy-making power and to protect the rights of the public: “In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable.”⁵⁷ Some originalists claim that Congress delegating legislative power could oppress the public. Madison stated that the Constitution in fact should delegate some legislative power, primarily negative but also a positive revisionary power, to the other branches to prevent Congress from encroaching on the rights of the people at large. Suppressing legislative delegation seems in direct contradiction to Madison's proposal and in opposition to Madison's fears that a too-powerful Congress would encroach on the rights of the people.

Madison went further in arguing for the delegation of legislative power to the executive and judicial branches in his 1788 observations on Jefferson's draft for Virginia's constitution.⁵⁸ There, Madison suggested that the executive and judicial branches be given a revisionary power meant as a “check to precipitate, to unjust, and to unconstitutional laws” that might be passed by the legislature.⁵⁹ Madison proposed that all bills be transmitted by the legislature to the executive and judicial branches and that: “If either of these object, let $\frac{2}{3}$, if both $\frac{3}{4}$ of each House be necessary to overrule the objection. . .”⁶⁰

If either the executive or judicial branch objects that the bill is unconstitutional, Madison's proposal would have required that

⁵⁶ *Id.*

⁵⁷ *Revisionary Power of the Executive and the Judiciary, [6 June] 1787*, FOUNDERS ONLINE: NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-10-02-0022> [<http://perma.cc/6GF4-BQPR>] (citing 10 JAMES MADISON, THE PAPERS OF JAMES MADISON 35–36 (Robert A. Rutland et al. eds., 1977)).

⁵⁸ James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia*, in THE FOUNDERS' CONSTITUTION (1788), <http://press-pubs.uchicago.edu/founders/documents/v1ch17s25.html> [<http://perma.cc/UE2E-7EJB>].

⁵⁹ *Id.*

⁶⁰ *Id.*

the bill be suspended until the next election and a repassage of the bill “by $\frac{2}{3}$ or $\frac{3}{4}$ of both Houses, as the case may be” and that upon such override, neither the judiciary or the executive could pronounce it unconstitutional.⁶¹ Madison was urging even greater delegation of legislative power, in that the judicial and executive branches each had the power to veto legislation, and that even if the legislature had the votes to overrule such veto, if the objection by either the Executive or the judiciary were that the bill was unconstitutional, no override was possible and any repassage of the bill would have to wait until after the next election, when new legislators might be seated and would reconsider.

This great power over the legislature by the judicial and executive branches would constitute a stunning breach of the separation of powers. And Madison’s odd twist that the legislature could repass the bill in a way that made it impregnable from constitutional challenge would allow the legislature to usurp the courts’ power to determine the constitutionality of such legislation. Madison had idiosyncratic ideas of how to defend the separation of powers and ones that might astonish those who would consider his intentions as a binding guide to how our government should function. If originalist Justices want to import Madison’s ideas into the Constitution, perhaps they should start with the idea that Congress can pass legislation in a way that makes it impregnable from the Court’s constitutional review. That would certainly shake up the separation of powers.

Opponents to the Council of Revision complained that judges should not be legislators, interfere in legislative business, or meddle in politics.⁶² The Convention voted twice on the proposal for a Council of Revision, and it was twice voted down.⁶³

Madison was involved in another attempt to insert something akin to the nondelegation doctrine into the Constitution through an amendment explicitly stating that no branch of the national government could exercise powers delegated by the Constitution to another department. Madison initially proposed this as an amendment to the text of the Constitution.⁶⁴ When Madison’s proposed textual amendments

⁶¹ *Id.*

⁶² See BERGER, *supra* note 6, at 302.

⁶³ Barry III, *supra* note 51, at 257.

⁶⁴ BERKIN, *supra* note 7, at 152. Madison’s proposed amendments stated, “Eighthly. That immediately after article 6th, be inserted, as article 7th, the clauses following, to wit: The powers delegated by this Constitution are appropriated to the departments to

were transformed into a proposed bill of rights to be appended to the Constitution, it included as a Sixteenth Amendment:

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.⁶⁵

Wurman refers to this as the “Nondelegation Amendment.”⁶⁶ This is not a nondelegation amendment, but rather a non-encroachment amendment, in that it does not forbid delegation explicitly, but only prevents each branch from exercising and hence encroaching on powers vested in another branch. How significant that difference is of course is open to dispute. Madison’s non-encroachment amendment seems part of Madison’s continuing effort to prevent Congress from usurping the powers of the other branches, rather than an attempt to prevent legislative delegation, especially given Madison’s failed effort to create a Council of Revision that would have delegated some legislative power to the other branches in order to prevent Congress from encroaching on executive or judicial turf.

Representative Sherman objected to Madison’s non-encroachment amendment as “altogether unnecessary, inasmuch as the Constitution assigned the business of each branch of the Government to a separate department.”⁶⁷ Sherman’s objection could well indicate that he thought a ban on encroachment was unnecessary, as the branches would use the constitutional means at their disposal to guard their powers out of self-interest, which Madison stated in Federalist 51 was the “great security” against the concentration of powers in one branch, as will be discussed.⁶⁸

Madison agreed with Sherman’s objection, possibly in recognition of the “great security” provided by each branch’s jealous protections of their powers combined with their constitutional means of defense, but also “supposed the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the

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.” *Id.*

⁶⁵ 1 ANNALS OF CONG. 453 (1789) (Gales & Seaton eds., 1834).

⁶⁶ Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 15, 16–17 (2020).

⁶⁷ 1 ANNALS OF CONG., *supra* note 65, at 760.

⁶⁸ THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison).

construction of the Constitution.”⁶⁹ Madison seemed to indicate he thought that his amendment would add something to the Constitution, but exactly what is not clear. Another representative condemned the amendment as “subversive of the Constitution,” which seems to indicate the idea that an express non-encroachment clause would cause significant damage to the structure of the Constitution.⁷⁰ While the non-encroachment amendment passed the House of Representatives, it was struck in the Senate,⁷¹ the records of which give no indication of reasons for editing or rejecting any of the proposed amendments.⁷²

Some originalists argue that these failed attempts to include the nondelegation doctrine or a non-encroachment clause in the Constitution indicate somehow that it is already there.⁷³ Ilan Wurman argued that Madison included the nondelegation doctrine to be “doubly sure.”⁷⁴ Clearly, Madison and at least a few others thought at various times that either a nondelegation or a non-encroachment doctrine should be included in the Constitution and were concerned that the some might think that the separation of powers would not be sufficient to prevent delegation of legislative powers. However, the Senate rejecting the non-encroachment doctrine is evidence that the nondelegation doctrine did not make it into the Constitution, not proof that it was already there. If the Court were now to read into the Constitution a strict nondelegation doctrine, it would in essence be amending the Constitution to include terms similar to the proposed amendment to the Constitution rejected during its drafting or to some extent akin to Madison’s proposed Sixteenth Amendment to the Constitution rejected by the Senate.

Madison wrestled with how to prevent the legislative branch from encroaching on the Executive and Judicial Branches, at times advocating a nondelegation or non-encroachment doctrines to be included in the Constitution, at times supporting a proposal to allow the Executive and Judicial Branch to be empowered to participate in legislative power, at other times arguing the

⁶⁹ 1 ANNALS OF CONG., *supra* note 65, at 453.

⁷⁰ *Id.* at 760–61 (statement of Representative Livermore).

⁷¹ Wurman, *supra* note 66, at 17.

⁷² ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER 162 (1997) (“The stark reportage of the Senate Journal provides not the slightest clue to the Senate’s reasons for these deletions. . .” including striking the sixteenth article on nondelegation.)

⁷³ Wurman, *supra* note 66, at 16–17. *See also* Gordon, *supra* note 43, at 743–44.

⁷⁴ Wurman, *supra* note 66, at 16 (“Here are two prominent representatives, both key players in the Constitutional Convention, arguing that a nondelegation amendment was unnecessary. Madison further argued that it was better to be doubly sure and make the principle explicit.”).

ineffectiveness of such a rigid, express separation of powers and defending its absence in the Constitution, and at least once indicating that he thought some limits on delegation were included in the Constitution. Madison discussed delegation extensively in the Federalist Papers arguing for the ratification of the Constitution. In Federalist 47, Madison addressed the criticism that the Constitution did not sufficiently separate the powers of government, which he called “[o]ne of the principal objections inculcated by the more respectable adversaries to the Constitution. . . .”⁷⁵ Madison noted the importance of the separation of powers, stating that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”⁷⁶

To address these concerns about the separation of powers, Madison said “The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. . . [who] has the merit . . . of displaying and recommending it most effectually to the attention of mankind”⁷⁷ Madison failed even to mention Locke, however, showing Locke’s striking unimportance. Montesquieu, Madison asserted, “appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty” and so Madison examined the British system of separation of powers, to determine whether the Constitution fell short. Madison noted that the powers were not strictly separated under the Constitution of England, and that part of the legislative branch acts as a “great constitutional council to the executive chief” and is “invested with the supreme appellate jurisdiction.”⁷⁸

From such examples, Madison concluded that Montesquieu did not advocate a strict separation of powers, and that “it may clearly be inferred that, in saying ‘There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,’ . . . [Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other.”⁷⁹ Madison seems to be asserting that under Montesquieu’s principles, Congress could, without undue risk, make the Executive Branch Congress’s agent, with Congressional control. Some of the

⁷⁵ THE FEDERALIST NO. 47, *supra* note 1, at 249–55 (James Madison).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

defenders of the nondelegation doctrine claim that the original meaning of the Constitution mandates that Congress, as the agent of the people, cannot delegate its powers to the Executive Branch as its sub-agent,⁸⁰ but Madison's words seem to refute that.

Madison states what he takes to be Montesquieu's asserted limits on delegation: "[Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted."⁸¹ The improper delegation then was that of the whole legislative power, not a limited and directed delegation. Madison gave as an example of excessive concentration of powers in one branch "if the king, who is the sole executive magistrate, had possessed also the complete legislative power. . ." and thus read Montesquieu as not advocating a complete separation of powers, "but rather in favor of a modified, incomplete, separation of governmental powers."⁸²

Madison noted that some states had express separation of powers clauses in their state constitutions preventing each branch from encroaching on the powers of the other branches, but those did not effectively prevent the admixture of powers among the branches. Madison specifically addresses the Massachusetts state constitution, which stated: "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."⁸³ Madison indicates that such a declaration "goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted."⁸⁴ Madison then notes the failure of such express language in state constitutions to prevent the admixture of powers. "If we look into the constitutions of the several States, we find that, notwithstanding the emphatical

⁸⁰ THE FEDERALIST NO. 47, *supra* note 1, at 251 (James Madison) (emphasis in original).

⁸¹ *Id.*

⁸² Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 34 (1990).

⁸³ THE FEDERALIST NO. 47, *supra* note 1, at 254 (James Madison).

⁸⁴ *Id.*

and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.” and “in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.”⁸⁵ In defending the Constitution’s lack of express lines drawn between the branches from critics complaining about that absence, Madison points out how even state constitutions that had express bars on branches using other branches’ powers did not achieve a full separation of powers.

Madison returned to this subject in Federalist 48, stating that what is impermissible is when one branch’s power is “directly and completely administered by either of the other departments. . .” and that the legislature is the great danger, given that any “projects of usurpation by [the other branches] would immediately betray and defeat themselves.”⁸⁶ Congress delegating specific legislative powers under its direction and control clearly would not constitute its legislative power being “directly and completely administered” by federal agencies, and so appears to receive Madison’s blessing. Madison also asserted that appeals to the populace would not effectively prevent the accumulation of power in one branch of government.⁸⁷

After determining that neither an express constitutional prohibition on branches using other branches’ powers nor an appeal to the people was sufficient to prevent encroachment by one branch on the other, Madison, in Federalist 51, asserts that only one method would be effective, a structure of government with a separation of powers, so that “each department should have a will of its own” and that each branch will keep the others “in their proper places.”⁸⁸ Madison concluded that the “great security” against the accumulation of powers in one branch is neither an express bar on branches using other branches’ powers nor an appeal to the people, but rather, “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”⁸⁹ Once that structure is put in place, the people running each

⁸⁵ *Id.*

⁸⁶ See generally THE FEDERALIST NO. 48, *supra* note 1 (James Madison).

⁸⁷ THE FEDERALIST NO. 49, *supra* note 1, at 257 (James Madison).

⁸⁸ THE FEDERALIST NO. 51, *supra* note 1, at 267 (James Madison) (“The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”).

⁸⁹ *Id.*

branch would be driven to jealously protect their powers by their own ambition. "Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place."⁹⁰ In other words, the object of a nondelegation or non-encroachment doctrine, to prevent the accumulation of powers in one branch, is better accomplished simply by the separation of powers and giving each branch constitutional tools to resist encroachment, because the ambition of the people in each branch will prevent the accumulation of powers in any branch. By comparison, the nondelegation doctrine would give the Court an offensive tool against both Congress and the Executive, and allow the Court to interfere in the cooperation between the two other branches. The power to delegate gives Congress a defensive tool against the Executive Branch, in that Congress can dictate to federal agencies and assign them tasks, including rule-making. The nondelegation doctrine would strip this defensive power from Congress. After Congress passes a law and the President does not veto it, why should the Court interfere in how they cooperate? The nondelegation doctrine is not a defensive tool for the Court, as its judicial powers are not threatened by congressional delegation to the Executive Branch. Instead, the nondelegation doctrine would simply an offensive weapon for the Court improperly to seize power from both Congress and the Executive Branch.

Madison spoke again about delegation as a Virginia Representative during the Post Roads Debate during the Second Congress, in which members discussed whether they should set the locations of post roads and post offices, a power vested in them by the Constitution, or should delegate that task to the President, as one motion proposed.⁹¹ The motion to delegate failed, as the members debated whether the House had the duty to set the locations of post roads and post offices, given that the Constitution assigned the House that task and power.⁹² Madison argued against the amendment, stating that "there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation

⁹⁰ *Id.*

⁹¹ David P. Currie, *The Constitution in Congress: The Second Congress*, 90 NW. U. L. REV. 606, 629 (1996) ("Representative Sedgwick moved to replace the detailed specification of routes in the House bill with a direction that the mail should be carried between Wiscasset, in the district of Maine, to Savannah, Georgia, 'by such route as the President of the United States shall, from time to time, cause to be established.'" (citing 3 ANNALS OF CONG. 229 (1791) (Gales & Seaton eds., 1849)).

⁹² *Id.* at 628–32.

of the Constitution.”⁹³ From this, Christine Kexel Chabot argued that Madison may have had necessity in mind as a necessary justification for delegation.⁹⁴ However, she also noted that not everyone agreed with Madison’s “‘necessity’ test” for delegation.⁹⁵

Madison may have been commenting that by delegating that power to the President, the House would lose it permanently, because once the post roads and post offices, or any significant number of them, were built, it would be impracticable for Congress to undo the presidential plan. However, even despite this objection, the House did eventually delegate to the President the discretion to establish other roads as post roads.⁹⁶ and delegated to the Postmaster General the power to determine where the post offices should be.⁹⁷ As Mortenson and Bagley note, “Far from demonstrating the force of Madison’s constitutional objection, the statute as enacted expressly conferred the open-ended authority that Madison had claimed was unconstitutional during debate.”⁹⁸ David Currie, after noting extensive delegation to the Executive Branch regarding the postal issues, indicated that a constitutional objection to delegation may not have been the driving element in this debate, stating, “Despite all the crocodile tears, one is tempted to attribute the House’s zest for detail more to a taste for pork than to a principled concern for the virtues of representative government.”⁹⁹

When deciding how to repay the enormous national debt, much of which was incurred to fund the Revolutionary War,¹⁰⁰ Congress debated whether it could delegate its borrowing power provided under Article I, Section 8. Chabot stated, “It is no surprise that Madison referred to the borrowing law as a delegation of ‘great trust’ that left key terms of loans and ‘execution of one of the most important laws’ to the President.”¹⁰¹ Though one might imagine that discussion of delegation would have “consume[d] the entire debate” in the House of Representatives, this did not happen.¹⁰²

⁹³ 3 ANNALS OF CONG. 239 (1791) (Gales & Seaton eds., 1849).

⁹⁴ Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (manuscript at 43) (forthcoming 2021), <https://ssrn.com/abstract=3654564>.

⁹⁵ *Id.* (manuscript at 41–42).

⁹⁶ *Id.* (manuscript at 42).

⁹⁷ *Id.* (manuscript at 43).

⁹⁸ Mortenson & Bagley, *supra* note 8, at 353.

⁹⁹ Currie, *supra* note 91, at 631.

¹⁰⁰ Chabot, *supra* note 94 (manuscript at 20).

¹⁰¹ *Id.* (manuscript at 4) (quoting LLOYD’S NOTES FROM MAY 19, 1790, *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: APRIL–AUGUST 1790, at 1349).

¹⁰² *Id.* (manuscript at 21).

Instead, debate focused more on which member of the Executive Branch should be delegated such borrowing power, with Madison asserting that it should be the President.¹⁰³ Instead of rejecting congressional delegation, House members responded to the constitutional concerns by supporting delegation “with some limitation on the amount to be borrowed.”¹⁰⁴

Another important example of delegation by Congress in its first years was the Alien Friends Act of 1798,¹⁰⁵ which authorized the President to order aliens as he deemed dangerous to depart the country. During the debates, the constitutionality of the act was debated, not regarding delegation, but instead about which of the enumerated powers of Congress justified the legislation.¹⁰⁶ Throughout the debates, only two members “voiced anything that bore a resemblance to a nondelegation argument.”¹⁰⁷ Those arguments failed and the legislation was passed.¹⁰⁸ Wurman notes that during the debate, no one argued that Congress could freely delegate—an argument Wurman claims “they surely would have been motivated to make if it were true.”¹⁰⁹ That claim seems off, since it is easy to see why only two nondelegation arguments in the course of the debates would generate no pro-delegation responses. Even so, Wurman admits, “It is certainly possible to infer that the nondelegation principle itself was rejected, but there is no way to know that with any degree of confidence.”¹¹⁰

In his Virginia Report of 1800, Madison, by then a member of the Virginia legislature,¹¹¹ returned to the topic of the Alien Friends Act and its delegation of legislative power by Congress. Madison noted, “Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law.”¹¹² Congress should, he asserted, not grant “a general conveyance of

¹⁰³ *Id.* (citing LLOYD’S NOTES FROM MAY 19, 1790, reprinted in DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: APRIL-AUGUST 1790, at 1354).

¹⁰⁴ *Id.*

¹⁰⁵ An Act Concerning Aliens, § 1, 1 Stat. 570, 571 (1798).

¹⁰⁶ Mortenson & Bagley, *supra* note 8, at 365.

¹⁰⁷ *Id.* at 366.

¹⁰⁸ *Id.*

¹⁰⁹ Wurman, *supra* note 66, at 25.

¹¹⁰ *Id.* at 26.

¹¹¹ H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 962 n.72 (1993).

¹¹² *The Report of 1800 [7 January 1800]*, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-17-02-0202> [http://perma.cc/5H5L-CWBY] (citing 17 JAMES MADISON, THE PAPERS OF JAMES MADISON 303–51 (David B. Mattern et al. eds., 1991)).

authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect. . .” because otherwise “the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws.”¹¹³

Madison stated the test of whether a law constitutes a proper delegation and hence constitutional is “whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.” And so, the question is whether the law contains enough “details, definitions, and rules” to appear to be a real law, and not just a handing off of the legislative power to another branch.

These statements by Madison are notable in that they include the claim that excessive delegation is unconstitutional. If Madison’s intent as of 1800 alone were to determine the meaning of the Constitution, then the nondelegation doctrine would be the constitutional mandate that Congress can delegate only where it has drafted a law with enough “details, definitions, and rules” to appear to be a real law, which is a far cry from the claim that Congress cannot delegate its legislative powers. Such a doctrine would have the same hazards as the current intelligibility rule, as it would not guide the courts in determining how much detail is sufficient, however. And the post-Ratification interpretation of one of the Framers, whose views on this subject varied over the years, should not determine the meaning of the Constitution.

B. The Vesting Clauses, Separation of Powers, and Silence as the Sources of the Nondelegation Doctrine

Given the absence of the nondelegation doctrine in the Constitution, those asserting its importance have struggled to determine its original basis. Any constitutional limitation of delegation would have to be implicit, but proving an implicit limitation on delegation would be a challenge “because constitutional interpreters are properly reluctant to find implicit restrictions on express textual grants” of congressional legislative power, given that the detailed express restrictions in Article I, Section 9 suggest “by negative implication that no other limitations should be recognized.”¹¹⁴

¹¹³ *Id.*

¹¹⁴ Posner & Vermeule, *supra* note 17, at 1729.

Those who seek a nondelegation doctrine with teeth search for any constitutional basis for it, despite its absence in the Constitution's text. Some claim that nondelegation is a necessary corollary to Article I, Section 1 of the United States Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."¹¹⁵ However, Article I does not specify what Congress can do with the legislative power vested in it or whether it can delegate those powers. While Article II vests Executive power in the President, few question the President's authority to delegate to federal agencies.¹¹⁶

Phillip Hamburger has argued strenuously that restrictions on legislative delegation spring directly from the Vesting Clauses, and that because the Constitution vests all legislative power in Congress, Congress cannot delegate any of that power.¹¹⁷ Hamburger asserts therefore that the nondelegation doctrine should be "put aside—not on the grounds offered by Professors Mortenson and Bagley, but because the Constitution speaks instead in stronger terms about *vesting*."¹¹⁸ In his 2014 book, Hamburger gives a fuller argument, relying heavily on the word "all" in the legislative vesting clause. In contrast to the judicial and executive clauses, which omit the word "all," Hamburger states that "when granting legislative power, the Constitution speaks of *all* legislative powers."¹¹⁹ The President can "delegate some executive power to his subordinates," Hamburger argues, because the Constitution does not vest all legislative power to the President, but "Congress cannot delegate any of its legislative powers, for they all rest in Congress."¹²⁰

Hamburger's vesting argument is an influential one, since, as he notes, Justice Gorsuch employed a vesting argument in *Gundy v. United States*, and also cites to Hamburger's work on nondelegation in his dissent.¹²¹ Few would claim that Congress cannot leave even the slightest detail to federal agencies to fill in.

¹¹⁵ U.S. CONST. art. I, § 1.

¹¹⁶ U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

¹¹⁷ Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. 88, 110 (2020) ("First, because the Constitution vests all legislative powers in Congress, Congress cannot vest any such powers elsewhere. Second, Congress cannot divest itself of the powers that the Constitution vests in it."). Hamburger notes, however, that a "full exposition of these points must await another publication. *Id.*

¹¹⁸ *Id.* at 88 (italics in original).

¹¹⁹ PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 387 (2014).

¹²⁰ *Id.*

¹²¹ See 139 S. Ct. 2116, 2135, 2140 n.62 (2019) (Gorsuch, J., dissenting) ("Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test?").

However, Congress can legislate with incredible detail and, in the early days of the Republic, frequently did.¹²² Hamburger's argument would mandate that because Congress can legislate with great detail, only it can specify such details, which would turn legislative acts into unworkable monstrosities. Such a bar would rob Congress of the power to employ the discretion and flexibility of federal agencies when Congress thought it necessary or desirable and would make government far less efficient.

Those asserting that the nondelegation doctrine can be found in the Vesting Clauses, however, should wrestle with the original meaning of the word "vest" in the Constitution and whether vesting legislative powers in Congress precludes or limits delegating those powers. Richard Epstein is rare among originalists discussing nondelegation in attempting to tease out the original meaning of the word "vest" in the Vesting Clauses, and his discussion shows the difficulty in finding a delegation bar in Article I's vesting of all legislative power in Congress. Epstein states, "The use of the term 'vested' brings back images of vested rights in the law of property; that is, rights that are fully clothed and protected, which means, at the very least, that they cannot be undone by ordinary legislative action. . . ."¹²³ From this, Epstein derives the conclusion that legislative power cannot be delegated to an agency or other branch of government or otherwise.¹²⁴

A property analogy for the Vesting Clauses weighs against the existence of a nondelegation doctrine, however, since some property interests may at times become transferable and sold only when they become vested and not before. For example, interests in a will may become transferable when they are vested, though they may not be when merely contingent.¹²⁵ If the vesting of legislative power may be analogized to the vesting of property rights, it seems that, while Congress should not be able

¹²² See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1292 (2006) ("Early Congresses also micromanaged administration . . . in excruciating detail. The 1791 statute . . . laying taxes on distilled spirits, occupies fifteen pages in the *Statutes at Large* and specifies everything from the brand of hydrometer to be used in testing proof, to the exact lettering to be used on casks that have been inspected, to the wording of signs to be used to identify revenue offices.").

¹²³ RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF ADMINISTRATIVE LAW* 36 (2020).

¹²⁴ *Id.*

¹²⁵ See *Real Property—Vested Remainders—Validity of Assignment*, 30 YALE L.J. 100, 100 (1920) (discussing that in deciding whether a property interest in an estate may be transferred, "the court avoided the necessity of determining the transferability of contingent remainders and followed the well-settled rule, to which judicial history of that very jurisdiction has long contributed, that vested remainders are fully transmissible as other species of property" (citing *In Re Whitney's Estate*, 176 Cal. 12 (1917))).

to transfer its legislative powers wholesale, it should be free to delegate their use to the Executive Branch, like a property owner vested with title may lend the use of that property to another.

Another common claim for the source of the nondelegation doctrine is that it stems from the separation of powers, itself also not directly stated in the Constitution.¹²⁶ However, the separation of powers by itself would seem to justify some legislative delegation, not forbid it. As Justice Scalia noted in *Mistretta v. United States*, absolute separation of power is impossible, and “a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action,” and therefore it is up to Congress “to determine-up to a point-how small or how large that degree shall be.”¹²⁷

Gary Lawson argues that the absence in the Constitution of text allowing delegation shows that delegation of legislative power is forbidden. To Lawson, the correct question is, “Does any clause of the Constitution expressly or implicitly permit the delegation of legislative authority?”¹²⁸ Because the Constitution creates a “government of limited and enumerated powers,” Lawson states that any claim that a branch of that government can do something must be based on an enumerated power to do so. While legislative power is vested in Congress, his argument goes: Congress can do nothing with that power not explicitly permitted elsewhere in the Constitution, and because delegation is not mentioned, it is barred.¹²⁹ This argument, however, seems to fly in the face of Article I, Section 9’s list of specific powers denied Congress. If Congress has only those powers expressly granted to it, there would be no need for a list of powers denied Congress. From the division of power in the Vesting Clauses, Lawson asserts there must be a baseline, a line past which the various branches cannot otherwise intrude into powers granted other branches. “The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise.”¹³⁰ To buttress this argument, Lawson cites to Madison and the

¹²⁶ *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government . . .” (citing *Field v. Clark*, 143 U.S. 649, 692 (1892))).

¹²⁷ *Id.* at 417 (Scalia, J., dissenting).

¹²⁸ See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002).

¹²⁹ *Id.* Douglas Ginsburg made a similar argument, asserting “Nor can the Congress confer such a lawmaking power by statute, for the simple reason that the Congress has no enumerated power to create lawmakers.” Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, HERITAGE FOUND. (Jan. 6, 2011), <https://www.heritage.org/the-constitution/report/legislative-powers-not-yours-give-away> [<http://perma.cc/5VCE-TPFR>].

¹³⁰ Lawson, *supra* note 128, at 340.

Massachusetts Constitution of 1780, but acknowledges in a footnote that the historical sources are not conclusive evidence.¹³¹

C. Locke as the Source for the Nondelegation Doctrine

Defenders of the nondelegation doctrine often credit John Locke's *Second Treatise of Government* as one of the primary sources for the that doctrine.¹³² In his *Second Treatise of Government*, Locke stated as a constraint on legislative power that it, being derived from "the People by a positive voluntary Grant and Institution, can be no other, than what that positive Grant conveyed, which being only to make Laws, and not to make Legislators, the Legislative can have no power to transfer their Authority of making Laws, and place it in other hands."¹³³

Some originalist scholars and judges treat Locke's statement as if it were incorporated implicitly into the Constitution. Aaron Gordon stated, "Locke's ideas profoundly influenced the development of America's Constitution, and there is substantial evidence that his disapproval of legislative delegation in particular was incorporated into our founding document . . ."¹³⁴ Ilan Wurman boldly states, "The nondelegation principle can be traced to John Locke's *Second Treatise*, which was deeply influential on the Founding generation."¹³⁵ Justice Gorsuch's *Gundy* dissent echoed that claim, stating without any citation of authority and, given the historical record, in all likelihood erroneously that Locke was "one of the thinkers who most influenced the Framers' understanding of the separation of powers."¹³⁶ Justice Rehnquist cited Locke for the proposition that "the legislative can have no power to transfer their authority of making laws and place it in other hands."¹³⁷ Justice Thomas cited Locke for the same proposition, and contended that Locke's and others' writing "about the relationship between private rights

¹³¹ *Id.* at 341 n.51.

¹³² Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311 (2003).

¹³³ LOCKE, *supra* note 5, at 363 (emphasis omitted).

¹³⁴ Gordon, *supra* note 43, at 739.

¹³⁵ Wurman, *supra* note 66, at 29.

¹³⁶ *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

¹³⁷ *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 672–73 (1980) ("In his *Second Treatise of Civil Government*, published in 1690, John Locke wrote that '[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.'").

and governmental power profoundly influenced the men who crafted, debated, and ratified the Constitution.”¹³⁸

The supposed influence of Locke’s *Second Treatise* over the drafters of the Constitution is thus central to originalists’ claim that the Constitution contains an implicit nondelegation doctrine. Thomas Merrill noted, “The premise here is that the Framers were familiar with and largely approved of Locke’s political philosophy. So if Locke supported the legislative monopoly position, the Framers presumably supported the legislative monopoly position.”¹³⁹ This unwarranted overemphasis of Locke’s influence is not limited to the nondelegation doctrine but rather is endemic among some “[t]heorists . . . committed to at least one version of foundational rights, [who] claim to look at the American past but see little more than John Locke.”¹⁴⁰

Claims that Locke’s nondelegation proposition or even Locke’s writings generally were a central influence on the drafting of the Constitution appear to be false. Instead, the historical record indicates, as will be discussed, that: (1) Locke’s nondelegation argument appears little mentioned in America in the years leading up to the Constitution’s drafting; (2) limitations on delegation in general seem little discussed during the drafting and ratification of the Constitution; (3) Locke’s primary influence in the colonies was in the justification of revolution and among the clergy, who were drawn to Locke’s religious preoccupations; (4) by the time the Constitution was drafted, the evidence indicates that Locke’s influence on politics had already declined dramatically in America; (5) in the 1780s, Locke was cited at times by the Anti-Federalists, but rarely if ever by the Federalists; and (6) Madison voiced wariness of Locke as a guide to separation of powers issues and, in his most extended discussion of the delegation of powers, Madison did not even mention Locke, but instead cited Montesquieu as “the great oracle.”¹⁴¹

Nondelegation advocates have turned up almost no evidence that Locke had any influence regarding nondelegation in the years immediately before the Ratification. Nicholas Parrillo notes that “the secondary literature turns up only one instance of an

¹³⁸ *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 72–74 (2015).

¹³⁹ Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2132 (2004).

¹⁴⁰ Martin Flaherty, *History ‘Lite’ in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 528 (1995).

¹⁴¹ THE FEDERALIST NO. 47, *supra* note 1.

American from 1765 through 1788 citing this point from Locke, in an anonymous newspaper essay” in discussing the states delegating their legislative powers to the Continental Congress, which is a very different subject.¹⁴²

Locke may have been influential in America before the Revolution started, but not afterwards, and his influence mostly came from his other writings, not from the *Second Treatise* relied on by supporters of the nondelegation doctrine. Few copies of Locke's *Two Treatises* reached the colonies before 1724, and those known copies that initially arrived in the northern colonies were typically part of the *Collected Works of John Locke*, “three clumsy and faintly forbidding folio volumes.¹⁴³ Only one edition of Locke's *Two Treatises* was published during the colonial period in America, in 1773, and it was not printed again in America for 164 years.¹⁴⁴ As John Dunn stated, “The story of how the *Two Treatises of Government* was causally responsible (for what other sorts of responsibility could it bear?) for the direction of American political theory in the eighteenth century is, of course, largely false.”¹⁴⁵ Pocock states that this era of Revolution and the slow emergence of republics occurred in “an intellectual scene dominated to the point of obsessiveness by concepts of virtue, patriotism, and corruption, in whose making and transmission Locke played little part”¹⁴⁶ Steven Dworetz recounts how an earlier generation of scholars wildly overestimated Locke's influence in America and that later scholars responded by underestimating Locke's influence in the colonies as they considered rebellion.¹⁴⁷ Dworetz demonstrates the influence of Locke's *Second Treatise* by showing that twenty-five lines from it were quoted, word for word, by the “Jerseymen,” a well-armed movement fighting over land rights in the late 1740s.¹⁴⁸

¹⁴² 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*, at 6 n.11 (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 20-17, 2021), <https://ssrn.com/abstract=3696902>.

¹⁴³ John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in *POLITICAL OBLIGATION IN ITS HISTORICAL CONTEXT: ESSAYS IN POLITICAL THEORY* 70 (1980).

¹⁴⁴ FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 66 (1985).

¹⁴⁵ JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE ‘TWO TREATISES ON GOVERNMENT’* 7 (1969).

¹⁴⁶ J.G.A Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 *J. INTERDISC. HIST.* 119, 127 (1972).

¹⁴⁷ STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 13–27 (1990).

¹⁴⁸ *Id.* at 74.

Dworetz is careful to note, however, the sudden and drastic decline in Locke's influence in the colonies once war started and as the colonists started turning their thoughts to "disquisitions on the design of governments and constitutions. This transition from the Revolutionary to the Constitutional era seems to have occurred around 1776; and, significantly, it coincided with, and was reflected in, a dramatic decline in Locke's 'rate of citation.'"¹⁴⁹ The Framers apparently did not consider Locke a useful guide in how to design their new government.

Noted historians Oscar Handlin and Lillian Handlin perhaps somewhat overstated the case when they claimed that "a careful reading of the Two Treatises leads to the inescapable conclusion that it was not likely that any among the Founding Fathers had read this bedrock of American political theory" but appear completely accurate when they stated that "his reputation in the colonies rested not on the treatises on government," but rather on his work on epistemology and education.¹⁵⁰ They added, perhaps missing a few counterexamples: "Locke wrote at length [in the *Second Treatise*] about two subjects that should have concerned Americans; yet as far as the record shows, his views never became subjects for conversation in the lanes of Boston or Philadelphia, or even grist for debaters, pamphleteers, and journalists."¹⁵¹

As Gary Rosen stated, "Locke was most cited during the struggle for independence, when basic matters of political right were at issue," but founders turned to other philosophers "when institutions were a primary concern."¹⁵² Locke was a large influence among the clergy in the colonies, who shared his religious preoccupations and embraced his justification for revolution.¹⁵³ James Otis, one of the few colonists who publicly mentioned Locke's views on nondelegation,¹⁵⁴ was a link between

¹⁴⁹ *Id.* at 44.

¹⁵⁰ Oscar Handlin & Lillian Handlin, *Who Read John Locke? Words and Acts in the American Revolution*, 58 AM. SCHOLAR 546, 547 (1989).

¹⁵¹ *Id.* at 548.

¹⁵² GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING 205 n.40 (1999) (citing Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984)).

¹⁵³ DWORETZ, *supra* note 147, at 32. "From the perspective of eighteenth-century colonists, the theistic Locke was most likely to have been *the* Locke. . . This is especially so with the New England clergy, [who] were demonstrably conversant with Locke's writings, and they had similar "religious preoccupations. They openly embraced Locke's political ideas—for example, the justification for revolution. . ." *Id.* (emphasis in original).

¹⁵⁴ See discussion *infra* text accompanying notes 184–88.

the clergy and revolutionary ferment.¹⁵⁵ In the 1760s, Locke was cited on politics primarily about the relationship between Britain and the American colonists, and in the 1770s to justify breaking with England and writing new constitutions.¹⁵⁶ Locke's influence in America seems to have dropped dramatically after the start of the Revolutionary War and he was rarely cited after 1781.¹⁵⁷ One study of American resistance pamphlets indicates that citations of Locke dropped off once the fighting started and that "after the fighting began in 1775, the revolutionary writers began to change their focus away from resistance theory, and direct invocation of Locke became more rare."¹⁵⁸

Locke had little influence in the drafting of the Constitution and more influence among those who opposed the final document. Locke had "relatively little to say about specific institutions."¹⁵⁹ and so it is "not surprising that his influence was . . . very indirect on those writing the Constitution."¹⁶⁰ Locke's *Second Treatise* ends with a chapter entitled "Of the Dissolution of Government" and, as Forrest McDonald notes, "As to what legitimately follows the dissolution of government, however, the chapter is ambiguous."¹⁶¹

Locke was rarely publicly cited by the Federalists during the 1780s, at least in ways that show up in the historical record.¹⁶² During the 1780s, Locke was cited more often, however, by the Anti-Federalists, so his influence during the drafting period seems to have been primarily with those opposing the Constitution as drafted.¹⁶³ Anti-Federalists were drawn to Locke's natural-rights individualism.¹⁶⁴

¹⁵⁵ DWORETZ, *supra* note 147, at 54 ("Otis, to be sure, was not a man of the cloth. But he did have close ties to some radical and influential ministers—close enough for one prominent Tory to identify him as the driving force behind the notorious 'Black Regiment' of seditious preachers.")

¹⁵⁶ DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 143 (1988).

¹⁵⁷ Donald S. Lutz, *The Intellectual Background to the American Founding*, 21 *TEX. TECH. L. REV.* 2327, 2336 (1990).

¹⁵⁸ Alex Tuckness, *Discourses of Resistance in the American Revolution*, 64 *J. HIST. IDEAS* 547, 550 (2003).

¹⁵⁹ Lutz, *supra* note 157, at 144. *See also* John Dunn, *Consent in the Political Theory of John Locke*, 10 *HIST. J.* 153, 153–54 (1967).

¹⁶⁰ LUTZ, *supra* note 156, at 2347. *See also* Flaherty, *supra* note 140, at 546 ("[T]he constitution the Americans advanced was fully consistent with Locke, and at times augmented with Lockean references, though . . . it owed little to the philosopher directly.")

¹⁶¹ MCDONALD, *supra* note 144, at 145.

¹⁶² LUTZ, *supra* note 156, at 145.

¹⁶³ *Id.*

¹⁶⁴ Daniel Walker Howe, *Introduction: Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 *NW. U. L. REV.* 1, 2 (1989).

Merle Curti, a great defender of Locke's influence in America, stated "Treatises of Civil Government was seldom cited in the Constitutional Convention of 1787. . ." ¹⁶⁵ and Curti gives as an example of such rare citation a statement by an Anti-Federalist who later walked out of Convention without signing the Constitution.¹⁶⁶ Even Jerome Huyler, in a book chapter attempting to prove Locke's influence on the drafting of the Constitution, comes up mostly dry. Huyler points only to Locke's influence on such general topics as the sanctity of property, the importance of enlightened reason, and equal protection.¹⁶⁷ Even when Huyler points out someone in the Founding Era who was influenced by Locke, it was Samuel Adams, then an Anti-Federalist, who "frequently" quoted Locke "verbatim."¹⁶⁸

Donald Lutz, in a noted study of citations during the Founding Era, found that the observable influence of Montesquieu soared while Locke's plummeted during the drafting of the Constitution and of state constitutions.¹⁶⁹ Lutz concluded, "Locke's influence [in the design of the Constitution or state constitutions] has been exaggerated . . . and finding him hidden in passages of the U.S. Constitution is an exercise that requires more evidence than has hitherto ever been provided."¹⁷⁰

Madison himself seemed wary of trusting Locke on separation of powers issues, given how long-ago Locke had written and that Locke was writing about monarchical British government with a Parliament that ill represented the people. Writing as "Helvidius" in a 1793 newspaper debate with Alexander Hamilton, Madison argued that for separation of powers issues, "our own reason and our own constitution, are the best guides" since "a just analysis" of "the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid

¹⁶⁵ Merle Curti, *The Great Mr. Locke: America's Philosopher, 1783-1861*, 11 HUNTINGTON LIB. BULL. 107, 135 (1937) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 437 (Max Farrand ed., 1911)).

¹⁶⁶ *Id.* at 135 n.1 ("Luther Martin cited Locke to prove that individuals, under primitive conditions, are equally free and independent, and that the case was the same with states until they surrendered their equal authority."). "A strong anti-Federalist opposed to the plan for a strong central government, Martin displayed his disapproval of what the Convention produced by walking out without signing the Constitution." *Luther Martin*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Luther-Martin> [<http://perma.cc/X5PN-JD5G>] (last visited Apr. 18, 2021).

¹⁶⁷ JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* 251-73 (1995).

¹⁶⁸ *Id.* at 266.

¹⁶⁹ Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984).

¹⁷⁰ *Id.* at 192-93.

to those objects, and with their eyes too much on monarchical governments.”¹⁷¹ Madison seemed to recognize that with a democratically elected president, the Founders would be creating a very different government than Locke’s England, so they should not trust Locke’s analysis.

Madison added that Locke and Montesquieu “are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.”¹⁷² Madison clearly distrusted Locke’s teachings about how governments should be structured, given Locke’s “warped” regard. Locke’s paltry influence during the drafting of the Constitution, almost all with the Anti-Federalists, should not be allowed magically to insert a nondelegation doctrine into the Constitution and hence overrule the decisions of the Framers and the First Congress. reject. For the Court to adopt a robust nondelegation doctrine absent in the Constitution and based on Locke’s outdated dictum would be akin to the Court siding with the Anti-Federalists and their allegiance to Locke in rejecting the Framers’ decisions.

As evidence of Locke’s purported deep influence on the drafting of the Constitution, Wurman cites a book by Bernard Bailyn on the ideological foundations of the American Revolution,¹⁷³ not on the drafting of the Constitution, two fundamentally different eras and enterprises and influences in one might have nothing to do with the other. Bailyn’s book indicates that Locke was cited before the Revolutionary War on justifications for revolt, such as natural rights and the “social and governmental contract,” but nowhere indicates that Locke was a significant influence in the drafting of the Constitution.¹⁷⁴ Bailyn instead notes that it was writers like “Grotius, Pufendorf, Burlamaqui, and Vattel” who were cited “on the principles of civil government.”¹⁷⁵ As noted by Steven Dworetz, Bailyn’s book

¹⁷¹ “*Helvidius*” Number 1, [24 August] 1793, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-15-02-0056> [http://perma.cc/X66L-U6KY] (citing 15 JAMES MADISON, THE PAPERS OF JAMES MADISON 66–74 (Thomas A. Mason et al. eds., 1985)).

¹⁷² *Id.*

¹⁷³ Wurman, *supra* note 66, at 29 n.146 (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27–30 (1992)).

¹⁷⁴ *Id.* at 27.

¹⁷⁵ *Id.* (“In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”).

argues “that the politics and political thought of the American Revolution had been decisively conditioned and constrained by an essentially non-Lockean ideological tradition.”¹⁷⁶

Wurman then cites to a book by Alan Gibson that argues that “the Lockean variation of the principles of classical liberalism” is at “the core of the Founders’ political thought,” but this tells us nothing about Locke’s *Second Treatise* or nondelegation.¹⁷⁷ Moreover, Gibson’s new edition of this book states that the work of noted historian J.G.A. Pocock “has led scholars to direct attention away from the influence of the political thought of John Locke in the eighteenth century and particularly in the American Founding.”¹⁷⁸ Gibson also discusses how American colonists in the 1780s turned away from the radical Whiggism exemplified by Locke to “profoundly reconsider the set of assumptions that they held about republican government.”¹⁷⁹ This provides yet another explanation for the precipitous decline of Locke’s influence in America when the Revolution started. Wurman’s last basis for his foundational claim regarding Locke’s influence on the Constitution is a law review article by Jack Rakove, which states the Founders were “eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone” in a long list of similar influences, including among many others “European authorities as Grotius, Pufendorf, and Delolme” and “the legacy of Newtonian science. . .”¹⁸⁰ Rakove’s long list hardly gives Locke’s influence primacy of place in influencing the drafting of the Constitution in general, let alone delegation in particular.

Aaron Gordon claims that “Locke’s condemnation of legislative delegation was frequently cited by statesmen and commentators in late-Eighteenth and early-Nineteenth Century America. . .”, but his only sources from the Founding name Locke for this point appear to be a 1763 political pamphlet by James Otis discussing Locke’s argument and an 1818 John Adams letter in

¹⁷⁶ DWORETZ, *supra* note 147, at 17–18.

¹⁷⁷ Wurman, *supra* note 66, at 29 n.146 (quoting ALAN GIBSON, INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC 13–21 (2006)).

¹⁷⁸ *Id.* at 35. For an extended discussion of whether the Founding Generation adopted Lockean ideals, see *supra* pp. 13–18.

¹⁷⁹ *Id.* at 47 (describing the disagreement between Wills and Jayne).

¹⁸⁰ Jack N. Rakove, *Fidelity through History (Or to It)*, 65 *FORDHAM L. REV.* 1587, 1598 (1997). Rakove helpfully provides a list of historians to consult on the influences on late eighteenth-century political thinking in America, including the above-mentioned Bernard Bailyn, John Dunn, “and, of course, J.G.A. Pocock . . .” *Id.* at 1598 n.32.

which Adams, then in his 80s, in tracing the sources of the Revolution, copied part of the Otis pamphlet from more than a half-century earlier.¹⁸¹ That Gordon's only apparent evidence naming Locke is the text of the same pamphlet in two different forms, one from the pre-Revolutionary era and the other from more than thirty years after the drafting, indicates how very little influence Locke had on the drafting of the Constitution, especially given Gordon's obviously meticulous research to dig up even the slightest shred of evidence of nondelegation at the Founding.

Moreover, the Otis pamphlet cited by Gordon actually undercuts his nondelegation argument, since it constitutes the argument that Parliament can delegate legislative power to subordinate legislatures, and that the legislatures of the colonies should not be easily stripped of their legislative powers, subordinate though they were, because of the natural and equitable rights of the colonists.¹⁸² Otis stated: "The supreme national legislative cannot be altered justly 'till the commonwealth is dissolved, nor a subordinate legislative taken away without forfeiture or other good cause."¹⁸³ Otis argued that Locke's assertion that a legislature's "whole power is not transferable" should not prevent the recognition of colonial legislatures.¹⁸⁴ Doing so would not transfer the whole power of Parliament but rather a limited power to legislate on subjects pertinent to the colonies. In doing so, Otis was not following Locke's dictum against delegation designed to protect Parliament's power from the King, but rather completely changing it. Otis took Locke's principles, "which were designed originally to support claims to parliamentary supremacy in late seventeenth-century England, and refashioned these principles to provide theoretical justification for the legitimacy of colonial assemblies as autonomous institutions" despite Parliament's supremacy.¹⁸⁵ Otis was not citing Locke to condemn legislative delegation but rather to request it for the colonies.

¹⁸¹ Aaron Gordon, *Nondelegation Misinformation: A Rebuttal To "Delegation At The Founding" And Its Progeny* (April 30, 2021), <https://ssrn.com/abstract=3561062> (manuscript at 19 n.114) (citing JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1763) and *Letter to William Wirt* (Mar. 7, 1818), in *WORKS OF JOHN ADAMS* 293 (Charles Francis Adams ed., 1856)).

¹⁸² JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1763) ("[C]olonists will have an equitable right notwithstanding any such forfeiture of charter, to be represented in Parliament, or to have some new subordinate legislature among themselves. It would be best if they had both.").

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Lee Ward, *James Otis and the Americanization of John Locke*, 4 AM. POL. THOUGHT 181, 182 (2015).

Gordon also relies for nondelegation at the Founding on an 1818 letter from John Adams, which Gordon claims “likewise expressed agreement with Locke’s disapproval of legislative delegation.”¹⁸⁶ However, the text is evidence that Locke was influential before the Revolution, but that his influence declined dramatically thereafter. In the letter, Adams described the Otis pamphlet as one of the influences of the Revolution and something he had been very familiar with back then but it appears he had not seen it since.¹⁸⁷ That Gordon refers to the same pamphlet in two different forms, the pamphlet itself decades before the ratification of the Constitution and a copying out of some of the pamphlet decades after, undermines his claim that Locke’s condemnation of delegation was much discussed at the Founding.

Gordon also claims as evidence instances where colonists complained about Parliament’s delegation of power to the King, including a 1774 tract by Thomas Jefferson objecting to delegation of power in England to the King¹⁸⁸ However, in his other examples, he does not state that Locke was even mentioned, which indicates Locke’s waning influence in the colonies. Also, Parliament as representative of the people (however poorly) delegating to a royal monarch is very different than Congress delegating to an elected President, so criticizing Parliament’s delegation of power to a monarch does not show how Americans would feel about Congress delegating to a democratically elected president.

Locke recognized the necessity of delegating legislative power and allowed that the Executive would share some legislative power. Lee Ward noted that Locke’s theory of delegated powers is “sufficiently comprehensive to provide for the establishment of a system of laws that would provide independent constitutional authority for both the supreme legislative power and a supreme Executive power that holds some share of the legislative power.”¹⁸⁹ Merrill asserted that Locke himself seems to have thought that Parliament could

¹⁸⁶ Gordon, *supra* note 43, at 740–41.

¹⁸⁷ *From John Adams to William Wirt, 7 March 1818*, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-6863> [<http://perma.cc/BQ2A-TVBX>] (citing JOHN ADAMS, THE ADAMS PAPERS (early access document to forthcoming final authoritative source), <https://founders.archives.gov/content/volumes#Adams> [<http://perma.cc/72BE-7RZA>]).

¹⁸⁸ Gordon, *supra* note 43, at 741 (citing THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), in 1 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 112–13 (Thomas Jefferson Randolph ed., 1829)).

¹⁸⁹ Ward, *supra* note 185, at 193.

delegate legislative power to the King under certain circumstances and that Locke “believed the executive had inherent authority to act with the force of law, subject to being overridden by subsequent action of the legislature.”¹⁹⁰ Merrill also showed that Locke may have allowed for delegation of legislative power where the supreme legislative body had given its sanction. Locke asserted that no edict of any other entity can have “have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed.”¹⁹¹ Merrill notes that this could mean that “the legislature does have the power to confer authority on other persons to act with the force of law, provided it gives its ‘sanction’ to this outcome. . .”¹⁹²

Locke’s position restricting legislative delegation was far from universal, even in England in his day. Philip Hamburger noted that Locke’s position was one that “Englishmen of whiggish views tended to argue. . .”¹⁹³ Hamburger further describes how the Whigs themselves arguably violated the principle described by Locke by passing the Septennial Act, which replaced triennial elections with elections every seven years, against the objection of the Tories.¹⁹⁴ “Taking up whiggish arguments, Tories complained that Parliament had reconveyed its power.”¹⁹⁵ According to Hamburger, neither political party in England had so fixed a position on delegation that they were “unwilling to shift gears when it suited them.”¹⁹⁶

It is important to note that the Framers rejected England’s form of government and constructed a system of government far different from that of Locke’s England. In Britain in the 1680s, legislative power was held by a combination of the King, Lords, and Commons, while the “king alone was supreme in the monarchical functions.”¹⁹⁷ While Parliament was hardly a completely democratic institution, the monarchy was not at all democratic. Locke’s views on delegation is an aspect of the fact that “the deep structure of Locke’s account of politics is

¹⁹⁰ Merrill, *supra* note 139, at 2133 (“The principal complication is that Locke in fact was not opposed to all sharing of legislative power in the functional sense, because he endorsed the concept of the executive prerogative.”).

¹⁹¹ *Id.* at 2134 (quoting JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 356 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

¹⁹² *Id.*

¹⁹³ HAMBURGER, *supra* note 119, at 381.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 382.

¹⁹⁶ Hamburger, *supra* note 117, at 97.

¹⁹⁷ Suri Ratnapala, *John Locke’s Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 218 (1993).

profoundly democratic.”¹⁹⁸ And so it makes sense that Locke would in general condemn delegation of legislative power from an at least partially representative Parliament to an unelected monarch.¹⁹⁹ However, the Framers might not have thought that such condemnation would apply to America’s Congress delegating to the Executive Branch. Further, the delegation notorious in Locke’s day was “The Statute of Proclamations”, passed to give legislative authority to proclamations of Henry VIII in 1539. This delegation was completely unlike Congress’s delegation to federal agencies today, in that it gave Henry VIII as king-in-council power to create law on almost any topic, unconnected from the policy dictated by or the direction of Parliament, and with few limitations.

Defenders of the nondelegation doctrine have argued that it is foundational.²⁰⁰ However, nondelegation was not a significant issue in the drafting or ratification of the Constitution. Nicholas Parrillo, after an exhaustive search, stated, “Legislative delegation was not an object of sustained constitutional discussion.”²⁰¹ The few references he did find give little indication of the contours of any proposed bar on delegation, Parrillo notes, “because the references that speak to such issues appear to have been rejected by majorities of their audiences, or involved types of delegations categorically different from those that Congress makes to an agency.”²⁰² Posner and Vermeule combed the ratification debates for discussion of delegation and found “nothing of any real relevance.”²⁰³ If the nondelegation doctrine were a foundational element of the Constitution as some claim, surely more than just a passing mention of nondelegation would appear somewhere in the vast records of the multitude of debates at the Convention and during ratification, many about constitutional meaning. However, as Mortenson and Bagley assert, “there is trifling evidence of a nondelegation doctrine even being argued for by aggressive legal innovators, let alone broadly accepted by the Founders as a group.”²⁰⁴

¹⁹⁸ Ian Shapiro, *John Locke's Democratic Theory*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 309, 310 (Ian Shapiro ed., Yale Univ. Press 2003).

¹⁹⁹ Ward, *supra* note 185, at 193.

²⁰⁰ Redish, *supra* note 15, at 366 (“Without enforcement of the nondelegation doctrine, the foundational precepts of the American system of government are seriously undermined.”).

²⁰¹ Parrillo, *supra* note 142 (manuscript at 7 n.12).

²⁰² *Id.* at 8.

²⁰³ Posner & Vermeule, *supra* note 17, at 1734 (“A search for references to delegation in the ratification debates of Massachusetts, Connecticut, New Hampshire, New York, Pennsylvania (including the Harrisburg Proceedings), Maryland, Virginia, North Carolina, and South Carolina turned up nothing relevant.”).

²⁰⁴ Mortenson & Bagley, *supra* note 8, at 293.

Another theory argues that nondelegation is an essential part of agency theory, and that as an agent of the public, Congress is prohibited from delegating the powers granted to it. This is supposedly derived from the common law maxim *delegata potestas non potest delegari*—one with delegated authority lacks the power to delegate it further.²⁰⁵ Sotirios Barber noted that this maxim is primarily seen in the common law of agency, though has been applied as a rule of constitutional law, and argues that both may be mere applications of “the general principle of nondelegation which attaches to any delegated power” without expressed contrary provisions.²⁰⁶ Where this general principle resides, Barber does not say.

The *Delegata* maxim and the associated agency doctrine seem to be a *post hoc* explanation justifying the nondelegation doctrine, not an influence on the Framers. The *Delegata* maxim does not appear much discussed in the Founding Era and neither it nor any variant appears 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 . . .”²⁰⁷ and did not show up in any form in the United States federal and state case reports until 1794.²⁰⁸ Mortenson and Bagley note a fundamental flaw in the proposition that agency rules govern constitutional meaning: those making that proposal “cannot point to any evidence that the private law agency analogy should govern constitutional interpretation.”²⁰⁹

More importantly, it appears that the *Delegata* maxim, as understood in the Founding Era, would permit the delegation of the power to do specific acts, and only bar the transfer of the whole powers of a governmental officer or entity. For example, the Pennsylvania Supreme Court in the case *Respublica v. Duquet* upheld the delegation of legislative power by the state to the City of Philadelphia, and in the 1809 case *Hunt v. Burrel*, the court held that an undersheriff could validly delegate the power to execute a writ.²¹⁰ The court held that the *Delegata* maxim is correct “when

²⁰⁵ See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010) (stating “Locke developed the nondelegation doctrine out of an elementary maxim of the law of agency, *delegata potestas non potest delegari*—delegated powers cannot be further delegated.”).

²⁰⁶ SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 26–27 (1975).

²⁰⁷ Mortenson & Bagley, *supra* note 8, at 297.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799); *Hunt v. Burrel*, 5 Johns. 137 (N.Y. Sup. Ct. 1809).

duly applied; for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power, which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a servant, or bailiff, to do a particular act.”²¹¹

In other words, as understood in the early years of the Republic, the *Delegata* maxim would not prohibit Congress from a limited delegation of its legislative power to a federal agency, but rather would only bar a delegation of its whole legislative power to another entity.

The *Delegata* maxim has many exceptions that “give away the game,” in the words of Posner and Vermeule.²¹² They cite the exceptions listed by Justice Story, an early explicator of that maxim: from the express language, or from fair presumptions, from the particular transaction, or through the usage of trade.²¹³ If Congress’s legislation must be built on explicitly enumerated powers, such as the Necessary and Proper Clause, they argue that “[n]ondelegation proponents must explain why those enumerated powers don’t represent just the sort of provision that, in Story’s framework, create a ‘fair presumption’ that the delegate may redelegate its powers as necessary or appropriate.”²¹⁴

Justice Story explained the bar on an agent delegating her powers in his *Commentaries on the Law of Agency*. “One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger . . .”²¹⁵ Justice Story himself, though, notes the limits of the *Delegata* maxim, stating that “there are cases, in which the authority may be implied; as where it is indispensable by the laws, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode, in which the particular business would or might be done . . .”²¹⁶ Duff and Whiteside tartly note, “In other

²¹¹ *Id.*

²¹² Posner & Vermeule, *supra* note 17, at 1733.

²¹³ *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY §§ 14–15 (Charles P. Greenough ed., Little, Brown & Co. 9th ed. rev. 1882)).

²¹⁴ *Id.*

²¹⁵ Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 16 CORNELL L.Q. 168, 168 (1929) (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13 (C.C. Little & J. Brown 2nd ed. rev. 1839)).

²¹⁶ *Id.* at 169 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 14 (C.C. Little & J. Brown 2nd ed. rev. 1839)).

words, delegated authority cannot be re-delegated unless there is some reason why it should be.”²¹⁷ Even under agency law at the time the Constitution was drafted, then, Congress could have delegated its legislative power in order to accomplish the purposes of legislation. Also, delegation by Congress has been the norm since the Founding,²¹⁸ so it is clearly customary by now and understood as a significant part of how government functions.

Furthermore, the *Delegata* maxim itself seems to have arisen originally from a printer's error. In 1929, Duff and Whiteside conducted an extensive search for the origins of the *Delegata* doctrine, tracing it back from its use by American and English sources and to a misprinted Medieval document. They concluded that instead of asserting that delegated power cannot be itself delegated, the original meaning was that the power of the King cannot “be so delegated, that the primary (or regulating) power does not remain with the King himself” and so the *Delegata* doctrine owes “its vogue in the common law to the carelessness of a sixteenth century printer.”²¹⁹ Under the doctrine's original meaning, Congress would be permitted to delegate legislative power to federal agencies so long as it retains the primary and regulating power to legislate itself, something that would virtually always be true in a system where Congress's laws take precedence over federal agencies' regulations.

D. The Nondelegation Doctrine's Brief Life and Long Dormancy in the Supreme Court

As has been often noted, the Supreme Court's history of applying the nondelegation doctrine in any meaningful way started well after the Founding and it did not invalidate legislation based on that doctrine until 1935, and not after that year. The first mention of the nondelegation doctrine, indirectly, was in the *Cargo of the Brig Aurora v. United States*, when the Court did not respond directly to the nondelegation argument and then in *Wayman v. Southard* in 1825, Chief Justice Marshall's opinion seems to indicate that Congress cannot delegate powers purely legislative except when it can, and the line between important subjects which cannot be delegated and other subjects which may be delegated is difficult to draw.²²⁰

²¹⁷ *Id.*

²¹⁸ See generally Chabot, *supra* note 94.

²¹⁹ Duff & Whiteside, *supra* note 215, at 173.

²²⁰ *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). The statute in question authorized the president to lift a statutory embargo if he determined that the countries involved either had indicated respect for the commerce of the United

In their extensive analysis of the history of the nondelegation doctrine, Whittington and Iuliano noted, “[t]he Court had remarkably little to say regarding the delegation of legislative power from the late Marshall Court through the remainder of the nineteenth century” and “avoided serious engagement with the principles and standards of nondelegation”²²¹ It was not until the *Field v. Clark*²²² in 1892 that the Court addressed nondelegation more directly. There, the court considered a statute that delegated to the President the ability to trigger higher tariff rates for countries that failed to participate in reciprocal free trade. In response to the argument that this inappropriately delegated legislative powers to the President, the Court stated, “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”²²³ Still, the Court upheld the delegation in the statute at issue, finding that it did not give the President legislative power.²²⁴

The Court followed that with a 1904 case concerning whether Congress could delegate to the Secretary of the Treasury authority to prevent adulterated tea from entering the American market.²²⁵ The Court found that “Congress legislated on the subject as far as was reasonably practicable” and that preventing delegation of further discretionary decision-making denying to Executive officials with discretionary power would in essence declare “that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.”²²⁶ Hence, the practical necessity of Congress delegating some decisions to accomplish its goals justified the delegation. The Court further justified delegation to an agency to fill in the details of a statute in the Grimaud case in 1911, noting its use since the Founding,

States. The Supreme Court did not respond to this argument directly but merely noted, “we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the [law allowing trade], either expressly or conditionally, as their judgment should direct.” *Id.* at 388. In *Wayman v. Southard*, 23 U.S. 1, 43, 6 L. Ed. 253 (1825), Chief Justice Marshall’s opinion added little clarity on what legislative delegation is permitted, stating, “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.” *Id.*

²²¹ Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 396 (2017).

²²² 143 U.S. 649 (1892).

²²³ *Id.* at 692.

²²⁴ *Id.*

²²⁵ *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

²²⁶ *Id.* at 496.

and that when Congress “indicated its will” with legislation, it could delegate the “power to fill up the details” by the establishment of administrative rules and regulations.²²⁷

The Court created a more explicit rule regarding what delegation is permitted in the case *J.W. Hampton, Jr. v. United States*, where it held that Congress could delegate so long as it lay down an “intelligible principle” to guide the Executive Branch, which would render it “the mere agent of the law-making department”²²⁸ The “intelligible principle” rule remains the primary standard by which courts determine whether delegation is constitutionally permissible.²²⁹ The Court broadly approved delegation for a period thereafter. “By the Progressive Era, the Court was willing to characterize almost any action that a government official performed as nonlegislative.”²³⁰

The Court approving every congressional delegation came to a screeching, albeit brief, halt in 1935, in the cases *Panama Refining Co. v. Ryan*²³¹ and *A.L.A. Schechter Poultry Corporation v. United States*,²³² both concerning the National Industrial Recovery Act (“NIRA”). In *Panama Refining*, the Court struck down the delegation to the President of power to prohibit transportation of petroleum and its products in excess of state permission upon the Court’s finding that “Congress has declared no policy, has established no standard, has laid down no rule.”²³³ In *Schechter*, the Court objected to legislation authorizing the President to approve those “codes of fair competition”²³⁴ that were submitted to him by trade associations regarding such issues as labor practices and minimum wages.²³⁵ In his concurring opinion to *Schechter*, Justice Cardozo stated, “[t]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant”²³⁶

²²⁷ *United States v. Grimaud*, 220 U.S. 506, 517, 521 (1911).

²²⁸ 276 U.S. 394, 409, 411 (1928).

²²⁹ *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (listing the broad delegations the Court has permitted).

²³⁰ *Whittington & Iuliano, supra* note 221, at 399.

²³¹ 293 U.S. at 388 (1935).

²³² 295 U.S. at 495 (1935).

²³³ 293 U.S. at 430.

²³⁴ 295 U.S. at 529.

²³⁵ 295 U.S. at 541–42 (“In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”).

²³⁶ 295 U.S. at 551 (Cardozo, J., concurring).

These are “the only two cases in which the Supreme Court has struck down a federal law for violating the nondelegation doctrine.”²³⁷ The nondelegation doctrine has been virtually dormant, at least at the Supreme Court level, since 1935, leading to Cass Sunstein’s famous quip that the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).”²³⁸

Since 1935, the Supreme Court has continued to worry over the nondelegation doctrine, returning to it on occasion never to revive it, but also never quite willing either to declare it defunct. While it purports to enforce the requirement of an intelligible principle to permit delegation, even when Congress’s direction to the Executive Branch is less than intelligible, “the Court usually merely interprets the authorizing statute to avoid the difficulty.”²³⁹ In the recent case, *Whitman v. American Trucking Ass’ns*, the Court continued to uphold the intelligible principle test.²⁴⁰ There, Justice Scalia writing for a unanimous Court, indicated that permitting delegation where there is an “intelligible principle” limiting and guiding the exercise of delegated power was, in the words of William K. Kelley, “both a sound way to implement the Constitution and simultaneously judicially unenforceable.”²⁴¹

III. THE DEVOLUTION OF ORIGINALISM AND ITS GROWING ATTACK ON REPRESENTATIONAL DEMOCRACY

A. Original Originalism

Despite its long dormancy and only one year of life, the nondelegation doctrine has remained a constant topic among legal scholars debating whether it still exists in any meaningful way and why or why not. While some have proclaimed regularly that the nondelegation doctrine is dead, opposing professors often respond, in the words of Phillip Hamburger, “as if in a Monty Python skit. ‘Not dead yet!’”²⁴² Some originalist scholars and others interested in curbing the power of the administrative state have done their best to resuscitate the doctrine. Suzanna Sherry asked, “[h]ow many ways can conservatives spin an originalist

²³⁷ See Mortenson & Bagley, *supra* note 8, at 283–84.

²³⁸ Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

²³⁹ HAMBURGER, *supra* note 119, at 378.

²⁴⁰ 531 U.S. 457, 465 (2001).

²⁴¹ William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2112 (2017).

²⁴² HAMBURGER, *supra* note 119, at 378.

tale to support their deregulatory, small-government vision? The answer is apparently infinite.”²⁴³

That originalists would urge courts to be more active in overturning Congress’s legislation and setting such basic policy as the size of government and its regulation is a direct assault on the foundations of originalism, in that originalism was originally conceived as a justification for judicial restraint and as protection for Congress’s legislative power from judicial activism. Originalism was first designed to prevent “Government by Judiciary,” the title of an enormously influential “originalism manifesto,”²⁴⁴ but now some originalists want the courts to seize the wheel of government and engage in judicial activism.²⁴⁵ Originalists first complained that activist judges were using their judicial power to amend rather than interpret the Constitution, but now some would have the Court create as a robust constitutional mandate the nondelegation amendment that was rejected for the Constitution.²⁴⁶ Explaining this sea change in the nature and purpose of originalism requires a review of how dramatically originalism has mutated since it was first conceived.

Originalism as a movement began in the early 1970s among conservatives fighting back against the liberal decisions of what they viewed as an “activist” Warren Court.²⁴⁷ While some earlier court decisions had had an originalist bent, of course,²⁴⁸ judges rarely did much historical research to determine the original intent of the Framers or the original meaning of the

²⁴³ Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J. L. & PUB. POL’Y 441, 442 (2019).

²⁴⁴ ERIC J. SEGALL, ORIGINALISM AS FAITH 60 (2018).

²⁴⁵ Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1083 (2005).

²⁴⁶ See *supra* text accompanying notes 40–47.

²⁴⁷ James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997). James Fleming called originalism “a conservative ideology that emerged in reaction against the Warren Court” but “did not exist” before that time.

²⁴⁸ For example, see Chief Justice Taney’s words in *Dred Scott*:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 22 (2009) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1856) and these words as an example of “strong originalism”). *But see* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 407 (2011) (“Taney’s self-conscious embrace of originalism even when it leads to moral depravity . . . was bad originalism. . . . These errors raise a suspicion that Taney’s aggressive positivism was but a façade for his abject racism.”).

Constitution, and instead “cherry-picked evidence of original meaning to suit their purposes.”²⁴⁹

The introduction of originalism is often credited to Robert Bork, who as a law professor in 1971 published a law review article that lamented how far he thought the Warren Court had strayed from the Constitution’s text and original meaning.²⁵⁰ Bork declared that in cases of constitutional interpretation, “[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights.”²⁵¹ Doing so protects Congress and state legislatures and their setting of policy, Bork argued, and he asserted that “courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”²⁵² Bork’s view of judicial restraint, that courts should accept legislation unless it is clearly unconstitutional, is akin to, though weaker than, that of Harvard law professor James Bradley Thayer, who in an influential 1893 law review article, urged that courts should invalidate a statute only if its unconstitutionality is “so clear that it is not open to rational question.”²⁵³

Though originalism has since evolved into a veritable smorgasbord of conflicting approaches and interpretations, two essential elements of most originalism approaches are the following. First is the idea that the meaning of the Constitution became fixed at its drafting or its ratification (or perhaps when the meaning is liquidated through practice).²⁵⁴ The second central pillar is the claim that the meaning of the Constitution once fixed should be a restraint on its interpretation unless or until the Constitution is amended.²⁵⁵

Originalism has been defended on both positive and normative grounds. Among the positive grounds is the assertion that it

²⁴⁹ Jeremy Telman, *Originalism as Fable (Reviewing Eric Segall, Originalism as Faith)*, 47 HOFSTRA L. REV. 741, 748 (2018)).

²⁵⁰ Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

²⁵¹ *Id.* at 8.

²⁵² *Id.* at 10–11.

²⁵³ James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). For a discussion of Thayer’s thesis, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012).

²⁵⁴ See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) (“The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the Fixation Thesis. This thesis is one of two core ideas of originalist constitutional theory: the other is the Constraint Principle, which holds that the original meaning of the constitutional text should constrain constitutional practice.”).

²⁵⁵ *Id.*

provides the most accurate understanding of the meaning of the Constitution.²⁵⁶ Among normative grounds is the claim that jurisprudence based on originalism “facilitates the realization of a political system grounded on popular sovereignty.”²⁵⁷ Keith Whittington argued that originalism protects the effectiveness of the popular will that created the Constitution and that judges who fail to employ originalism could, through their rulings, set that will aside.²⁵⁸ Randy Barnett argued that originalism best protects substantive ideas of justice by protecting “background natural rights retained by the people” as a “constitutional assumption that is hard-wired into the meaning of the Constitution itself.”²⁵⁹ McGinnis and Rappaport argued that the Constitution should be given its original meaning because only doing so will preserve the beneficial effects of the supermajoritarian process of the Constitution’s enactment and amendment, which affords “deep deliberation” and creates “the consensus and nonpartisanship necessary for fostering allegiance to a constitution that desirably regulates politics and society.”²⁶⁰

The opposing view to originalism is living constitutionalism, perhaps most broadly defined as “simply in opposition to originalism.”²⁶¹ Living constitutionalism is distinguished by incorporating “contemporary values and attitudes into the judicial ‘understanding’”²⁶² of the Constitution, and treating it as “an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions.”²⁶³ Originalism at first focused on the intent of the drafters of the Constitution and so what has been

²⁵⁶ JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 117 (2013).

²⁵⁷ KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999).

²⁵⁸ *Id.* at 156.

²⁵⁹ Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 652–53 (2009).

²⁶⁰ MCGINNIS & RAPPAPORT, *supra* note 256, at 33.

²⁶¹ Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 514 n.240 (2010).

²⁶² Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 295 n.46 (2010).

²⁶³ G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 299 (2000) (quoted in Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1259 (2019), which discussed the varied definitions of living originalism).

called “the most important of originalist sources”²⁶⁴ is *The Federalist*, “which explained the Founders’ intent.”²⁶⁵

In 1977, Raoul Berger published his originalism manifesto, *Government by Judiciary*, which asked, “[w]hy is the ‘original intention’ so important? . . . A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier.”²⁶⁶ Berger offered this bulwark to defend the majoritarian power of Congress from “the tendency of legal liberalism to undermine legislative power and the rule of law.”²⁶⁷ Berger’s book thus had a “majoritarian, restraintist thrust” as it was designed to protect legislative power from activist judges.²⁶⁸ Because Berger argued that courts should follow the intent of the founders, Berger was labeled as a “strict intentionalist” by Paul Brest,²⁶⁹ who in 1981 coined the word “originalism.”²⁷⁰ By coining the word, Brest formalized originalism as a concept.²⁷¹

Berger’s book had an entire chapter devoted to the fact that the Framers explicitly excluded the judiciary from policymaking, rejecting the idea of judges’ participation in a Council of Revision of legislation, and citing the Framers in support.²⁷² Nearly all who spoke on this subject at the Convention or during the ratification process agreed that judges should not be part of policy-forming in the legislative process.²⁷³ Given the Framers’ strident opposition to judicial policy-making, originalists should fiercely oppose judicial activism, even by originalist judges, and reject giving judges the power to construct a nondelegation doctrine that would enable them to act as a Council of Revision to overturn regulatory legislation they disagree with.

²⁶⁴ Frank B. Cross, *Originalism—the Forgotten Years*, 28 CONST. COMMENT. 37, 38 (2012) (citing Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329 (2005)).

²⁶⁵ Edwin Meese III, *Challenges Facing Our System of Justice*, 3 AVE MARIA L. REV. 303, 307–08 (2005). See discussion of this point in Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 38 (2012).

²⁶⁶ BERGER, *supra* note 6.

²⁶⁷ JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 126 (2005).

²⁶⁸ *Id.* at 129.

²⁶⁹ Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1089 (1981).

²⁷⁰ Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

²⁷¹ Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9 (2018) (“Only after Brest invented the term ‘originalism’ did originalists adopt the label and defend it.”).

²⁷² BERGER, *supra* note 6, at 300 (“The Judiciary Was Excluded from Policymaking”).

²⁷³ *Id.* at 302 (citing BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 18, 244 (1942)).

Berger argued that what the Supreme Court was actually doing was far more radical than merely formulating novel interpretations. The Court instead was engaged in “what Justice Harlan described as the Supreme Court’s ‘exercise of the amending power,’ its continuing revision of the Constitution under the guise of interpretation.”²⁷⁴ Berger said that his book was designed to “demonstrate that the Court was not designed to act, in James M. Beck’s enthusiastic phrase, as a ‘continuing constitutional convention’ . . .”²⁷⁵

Berger’s book stimulated such “an explosion of academic interest in the framers’ intent,” that “responding to Berger’s thesis has become somewhat of a cottage industry in constitutional scholarship.”²⁷⁶ Originalist scholarship in the 1980s, influenced by Berger, also followed his lead and typically argued that “the liberal reformist use of modern judicial power threatened the rule of law and the formulation of public policy in legislatures.”²⁷⁷ Hence, judicial restraint and the protection of legislative power were the primary goals of early originalism.

B. Attacks on Intentionalist Originalism

With the advent of originalism, criticisms, sometimes harsh, were inevitable. However, even before originalism was conceived as a distinct method of constitutional interpretation, the use of history and original intent to determine the meaning of the Constitution had been harshly criticized. In his 1965 article “Clio and the Court: An Illicit Love Affair,” Alfred H. Kelly identified two almost inevitable problems with courts employing original intent to determine the meaning of the Constitution.²⁷⁸ One was the problem of “law office history,” where the courts pull out selective quotes from the Framers or elsewhere that buttress their points, without engaging in sufficient historical investigation to see the entire historical picture, then consider and cite only their favored authorities and texts while ignoring the rest.²⁷⁹ Kelly argued that the Court used this tool to engage in “extreme political activism, involving extensive judicial intervention in contemporary political problems” and as a

²⁷⁴ BERGER, *supra* note 6, at 1 (citing *Reynolds v. Sims*, 377 U.S. 533, 591 (1964)).

²⁷⁵ *Id.* at 2.

²⁷⁶ Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 753 (1983) (footnote omitted).

²⁷⁷ O’NEILL, *supra* note 267, at 135.

²⁷⁸ Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

²⁷⁹ *Id.* at 122 n.13 (“By ‘law-office’ history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”).

“precedent-breaking instrument” so that by purporting “to return to the aboriginal meaning of the Constitution” the Court could “declare that in breaking with precedent it was really maintaining constitutional continuity.”²⁸⁰

A second hazard Kelly identified is how the Supreme Court, by stating and relying on their particular restatement of constitutional history, reifies that history, so that lesser courts must accept as true the Court’s account of history, however inaccurate. And even the Court itself must accept that reified history to some extent because of the principle of *stare decisis*. Kelly condemned the “creation of history a priori by what may be called ‘judicial fiat’ or ‘authoritative revelation’”²⁸¹ Kelly further noted “In a sense, by quoting history, the Court made history, since what it declared history to be was frequently more important than what the history might actually have been.”²⁸²

While early originalists had very different purposes than those of the courts that Kelly chastised, they faced similar critiques. An early attack came from Professor Paul Brest, who asserted, among other things, that it is difficult to determine the “intent” of a group of people, that doing so for the drafters or the ratifiers is almost impossible, and that even if that could be done, translating that intent to modern problems is another fraught challenge.²⁸³ Furthermore, there are considerable reasons to reject being governed by intentions from the Founding Era, when women and racial minorities were excluded from governmental decision-making.²⁸⁴ Larry Simon argued, “The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today . . .”²⁸⁵ Other critics piled on, objecting to modern Americans being ruled by an unchangeable (except through amendment) intent from centuries ago, the often-discussed “dead hand of the past.”²⁸⁶

²⁸⁰ *Id.* at 125.

²⁸¹ *Id.* at 122.

²⁸² *Id.* at 123.

²⁸³ Brest, *supra* note 270, at 214–15.

²⁸⁴ *Id.* at 230.

²⁸⁵ Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499 (1985).

²⁸⁶ Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) (“The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.”).

A notable early critic of the originalism project was Professor Jefferson Powell, who argued that the “vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders” and that applying the Constitution to questions it does not answer requires any interpreter to “use some process of generalization or analogy to go beyond what history can say.”²⁸⁷ Powell also attacked the idea that the Framers of the Constitution intended or even expected that their intentions, sometimes stated in secretly conducted debates, govern the meaning of that document. Instead, Powell asserted that the “framers shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.”²⁸⁸

Madison himself counseled against using the intentions of the Framers as a guide to the meaning of the Constitution, saying that that the sense of the Framers “could never be regarded as the oracular guide in expounding the Constitution.”²⁸⁹ That the Framers did not intend that their intentions govern the meaning of the Constitution is evidenced by the fact that they kept secret their journals of the convention’s secretly conducted debates, at least until after the Constitution had been ratified.²⁹⁰ As C.A. Lofgren notes, “[t]his strongly hints that the delegates feared that if the journals were published, they could affect subsequent interpretation.”²⁹¹

C. Original Understanding Originalism

These criticisms had teeth, and even Bork himself came to reject original intent originalism, saying no “even moderately sophisticated originalist” holds that interpretative weight should be given the subjective intent of the Framers.²⁹² Some originalists then shifted their focus to the meaning of the Constitution held by the ratifiers instead.²⁹³ Since it was the ratification of the

²⁸⁷ H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 664–65 (1987).

²⁸⁸ H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04 (1985).

²⁸⁹ 5 ANNALS OF CONG. 776 (1849).

²⁹⁰ Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 81 (1988).

²⁹¹ *Id.* at 82.

²⁹² ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 218 (1990).

²⁹³ Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1137 (2003) (“The shift to original understanding was part of an increased recognition that it was the action of the

Constitution, not its drafting, that conferred on the Constitution its legitimacy to govern the public, it is the intention of the ratifiers, not the drafters, that matters, according to this theory. And, some argued, the intent of the ratifiers is not mere evidence of the Constitution's meaning but rather determines that meaning, or as Charles Lofgren stated, "how the ratifiers understood the Constitution, and what they expected from it, defines its meaning."²⁹⁴

Original understanding originalism, however, retrospectively assigns the ratifiers a completely different task than the one they actually performed. The ratifiers did not need to understand all the various terms of the Constitution, as their focus was on a single question: should the Constitution be ratified?²⁹⁵ While the meaning of individual terms collectively mattered in that decision, the ratifiers never had to reach any group consensus on what any Constitutional term meant. Furthermore, determining the ratifiers' collective understanding of the Constitution is impossible. The debates over ratifying the Constitution were a "cacophonous argument" and so are no valid guide to any consensus understanding of its terms.²⁹⁶ With such diverse and often contradictory sources, originalists can derive a host of perhaps contradictory yet plausible interpretations, "few conclusively verified or falsified."²⁹⁷ With "the extraordinary diversity of the polemics the campaign produced, and the decentralized, unfocused nature"²⁹⁸ of the ratifiers' discussions and debates, Jack Rakove concludes that it is almost impossible to "disaggregating a collective intention to ratify the Constitution into original understandings of particular clauses"²⁹⁹ rendering original understanding originalism unworkable.

Constitution's Ratifiers—state ratifying conventions in the case of the original document and state legislatures in the case of the amendments—whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention and the Congresses proposing the amendments.”).

²⁹⁴ Lofgren, *supra* note 290, at 112.

²⁹⁵ JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17 (1996) (“The only understanding we can be entirely confident the majority of ratifiers shared was that they were indeed deciding whether the Constitution would ‘form a more perfect union’ than the Articles of Confederation . . .”).

²⁹⁶ *Id.* at 132 (“That debate took the form not of a Socratic dialogue or an academic symposium but of a cacophonous argument in which appeals to principle and common sense and close analyses of specific clauses accompanied wild predictions of the good and evil effects that ratification would bring.”).

²⁹⁷ *Id.* at 133.

²⁹⁸ Rakove, *supra* note 180, at 1597.

²⁹⁹ *Id.*

D. Original Meaning Originalism

Since original understanding originalism shared the same flaws as original intent originalism, some originalists created a new vision of originalism, one that would focus instead on the supposedly objective original public meaning of the text of the Constitution. Bork explained, “The search is not for a subjective intention. . . . [W]hat counts is what the public understood. . . . The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.”³⁰⁰ Original public understanding originalism therefore tries to step away from the subjective meaning that those involved in the process may have intended and instead turns to a supposedly objective meaning to be gleaned from all sorts of documents from the time. Original public understanding originalism thus turned originalism into “an empirical investigation of linguistic usage.”³⁰¹

The grave hazard of original public meaning originalism is that it strips words out of their context in the text of the Constitution and potentially allows any uses of those words during the Founding to be used to interpret the Constitution. Original meaning originalists “continue to cherry pick quotes and present this amateurish research as systematic historical inquiry. In this method there is no serious attention to establishing the relative influence of particular texts.”³⁰² Seeking a single original public meaning at the Founding for many of the most important terms used in the Constitution is impossible.³⁰³ This search will too often fail on critical issues and so on many of the most important issues would be a misbegotten method.³⁰⁴

E. A Panoply of Originalisms

Other varieties of originalism include libertarian originalism, typically based on the idea that the Constitution’s

³⁰⁰ BORK, *supra* note 292, at 144.

³⁰¹ Barnett & Bernick, *supra* note 271, at 10.

³⁰² Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 625, 627 (2008).

³⁰³ Mark Tushnet, *Heller and the New Originalism*, 69 OHIO STATE L. J. 609, 617 (2008) (“The new originalism seeks the original public meaning of constitutional terms, but there is (was) no single such meaning, again at least for interesting constitutional terms.”).

³⁰⁴ James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1808 (2013) (“The quest for the original public meaning is misconceived because on most important provisions there will not be a definitive original public meaning that will be useful in resolving our disagreements, much less in resolving hard cases.”).

legitimacy is based on its protection of liberty and natural rights, rather than the consent of the governed,³⁰⁵ and progressive or “Living Originalism,” the idea that the Framers intended future generations to be free to interpret the standards and principals of the Constitution and so avoid a static and unworkable Constitution. Then there is original methods originalism, which calls for the meaning of the Constitution to be gleaned “using the interpretive methods that the enactors would have deemed applicable to it.”³⁰⁶ However, there was no agreed-on set of interpretive rules, given the conflicts and divisions of the Founding Era, “including a deep rift separating Federalists from Anti-Federalists and an even larger divide between popular and elite approaches to constitutional texts.”³⁰⁷

This panoply of alternative and often conflicting originalist methods gives judges cart blanche to choose whichever method and sources best serve their personal preferences. Originalist judges regularly cite to Madison and/or Hamilton in *The Federalist Papers*, which indicates they are still focused on a primitive form of original intent in which they pick quotes from a few favored sources, choosing those from the Founding they would likely agree with.³⁰⁸ The biases of originalist judges are shown by which Founding Era texts they rely on. As Jamal Greene noted, “Discounting the views expressed by Brutus or the Federal Farmer in favor of those expressed by Publius is difficult to explain on the logic of original-meaning originalism.”³⁰⁹

Far from originalism being a constraint on judges, the vast smorgasbord of originalist options frees them to rule as they like and justify their decision based on the originalist method that leads to their personal desired result. Worse yet, originalist judges regularly use originalist methods when doing so suits their purposes but ignore them when it does not.³¹⁰ Political scientists who have researched the

³⁰⁵ See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). Ilan Wurman labels Barnett’s position “Libertarian Originalism” and argues that “Richard Epstein takes essentially the same view of constitutional legitimacy as Barnett.” Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 *BYU L. REV.* 819, 825–26 (2014).

³⁰⁶ MCGINNIS & RAPPAPORT, *supra* note 256, at 116.

³⁰⁷ Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 736 (2013).

³⁰⁸ Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 *COLUM. L. REV.* 1389, 1429 (2013).

³⁰⁹ *Id.* at 1430 (footnotes omitted).

³¹⁰ Scott Lemieux, *Antonin Scalia and the Death of Originalism*, *NEW REPUBLIC* (Feb. 24, 2016), <http://newrepublic.com/article/130408/antonin-scalia-death-originalism> [<http://perma.cc/WQQ2-76GS>] (“Before and after Scalia, justices will use history when they believe it supports their *ex ante* conclusions and ignore it when they believe it doesn’t.”).

Supreme Court regularly assert that the Justices' personal and political values hold more sway over their decisions than precedent, text, and other positive law.³¹¹ Jamal Greene has argued that "in the great battles between Justices Black and Frankfurter and Justices Breyer and Scalia, the originalist position has indeed become as much 'rhetoric as decision procedure.'"³¹² With different originalisms as *ala carte* options, originalism no longer is a unified decision procedure, leaving it a mere rhetorical cloak hiding that judges are merely following their own personal predilections.

F. The Challenges of Originalisms

A great flaw of originalism is that lawyers, judges, and even legal scholars are often inadequate or even terrible historians and "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers."³¹³ The historical records originalists rely on are distressingly incomplete.³¹⁴ Because the record is "incorrect in some places, has gaps in others, and contains tensions in still others," it may, as noted by Lee Strang, cause judges to "misperceive the original intent or create a false original intent."³¹⁵

Justice Scalia gave perhaps the best description of the nearly impossible challenge an originalist faces in seeking the Constitution's original meaning:

Properly done, the task requires the consideration of an enormous mass of material . . . for example, . . . the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it 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.³¹⁶

³¹¹ SEGALL, *supra* note 244, at 156.

³¹² Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 85 (2009).

³¹³ Martin S. Flaherty, *supra* note 140, at 525.

³¹⁴ James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) ("The purpose of this Article is to issue a caveat about Convention records, to warn that there are problems with most of them and that some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment.").

³¹⁵ Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1192 (2017).

³¹⁶ Scalia, *supra* note 2, at 856–57.

Such effort would be too difficult and time-consuming for almost all judges, and would likely lead them to cherry-pick meaning from a few favored sources and engage in “law-office linguistics.”³¹⁷ Consulting dictionaries from the Founding Era will not resolve ambiguities, because dictionaries, especially old ones, are designed to designate “linguistically permissible” meanings, not indicate which meanings are most likely to apply best to constitutional questions.³¹⁸ Further, dictionaries define words, not phrases and do not provide context. Finding dictionaries that exactly capture the meaning of the Founding Era is challenging because “dictionaries from the Founding Era are often based on Samuel Johnson’s Dictionary, which heavily relied on earlier sources.”³¹⁹

To solve these problems, some argue that a more robust method would be to use a massive database of documents of the Founding Era and undertake what are termed corpus linguistics searches of hundreds of thousands of texts to determine how the public would likely have understood the meaning of the Constitution’s various terms.³²⁰ However, this “Big Data” approach can give a false sense of objectivity, as those searching the corpus can affect their results, inadvertently or not, by how they construct their searches or how they subjectively interpret the results of their searches.³²¹ Judges would hard-pressed to judge the accuracy of such searches, and so would likely just accept whichever results match their personal policy preferences.

A great challenge for originalists is how to address vagueness, ambiguity, or gaps in the Constitution that is not resolved by resorting to texts from the Founding Era or teasing out the original meaning of the terms. Originalists have proposed various strategies, including the use of presumptions, searching for liquidation of meaning, and the use of the “Construction Zone” to resolve vagueness, ambiguity, or gaps in the Constitution. Presumptions can guide judges when they are in the “Construction Zone,” a territory posited by some originalists as where meaning has run out, and yet courts must still construe the terms after they have exhausted their efforts to interpret it

³¹⁷ James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760-1799*, 59 S. TEX. L. REV. 181, 187 (2017).

³¹⁸ James C Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 20, 22 (2016).

³¹⁹ *Id.*

³²⁰ Donald L. Drakeman, *Is Corpus Linguistics Better Than Flipping A Coin?*, 109 GEO. L.J. ONLINE 81, 82 (2020).

³²¹ *Id.* at 85.

and decide a case.³²² Others argue that there is no real “Construction Zone,” and that construction is just an aspect of interpretation.³²³

The original originalists argued for judicial restraint and a presumption of constitutionality³²⁴ and Bork stated that courts should defer to the legislature’s value judgment “unless it clearly runs contrary to a choice made in the framing of the Constitution”³²⁵ and that democracy is impossible without such judicial restraint.³²⁶ Originalists have increasingly rejected the presumption of constitutionality and the judicial restraint it provides.³²⁷ Randy Barnett, for example, argues instead for a “general Presumption of Liberty,” based on the Ninth Amendment and the Privileges or Immunities Clause, “which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom.”³²⁸ Rather than being presumed constitutional, legislation that restricts individual liberty would be presumed unconstitutional unless the government can “show why its interference with liberty is both necessary and proper”³²⁹ Such a shift in presumptions would transform originalism from a system of judicial restraint to one of judicial activism. It would transform the Supreme Court into a Council of Revision, enforcing deregulation policy by casting out legislation libertarians and anti-regulation Conservatives that disagree with and so strike against the administrative state. Originalists are torn between two contradictory forms of originalism, and the “central challenge . . . is over who is right: Professor Barnett, who claims that originalism leads to judicial activism on behalf of a

³²² Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 795 (2020).

³²³ Barnett & Bernick, *supra* note 271, at 14 (“First, some critics have simply denied the distinction exists. This was the tack taken by Justice Scalia and Bryan Garner in their 2012 book *Reading Law*. In that volume, Scalia and Garner contended that the interpretation-construction distinction was based on a linguistic misunderstanding.”).

³²⁴ Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1044 (1992) (arguing that “originalism should be understood as requiring a strong presumption of constitutionality.”).

³²⁵ Bork, *supra* note 250, at 10–11.

³²⁶ *Id.* (“If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democrat.”).

³²⁷ Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 4, 81 (2017) (“Originalists have refined their arguments in the intervening years, however, and they have abandoned the claim that one should be an originalist because originalism produces more restrained judges. Originalism has shifted from being a theory about how judges should decide cases to a theory about what counts as valid, enforceable law.”).

³²⁸ BARNETT, *supra* note 305, at 262.

³²⁹ *Id.*

libertarian state, or Justice Scalia and Judge Bork, who claim that originalism leads to judicial restraint.”³³⁰

Other originalists mix these methods, arguing that a presumption of liberty should apply when considering federal acts, while a presumption of constitutionality should apply to state acts, based on the idea that the Constitution grants the federal government enumerated, and hence limited powers, while the states retain plenary police powers.³³¹ Still other originalists argue there should be no such widespread presumptions, as the original interpretive conventions answer most constitutional questions without needing presumptions.³³² This widespread disagreement about whether any of these presumptions should be applied and, if so, which, indicates that originalism provides judges with broad latitude to have their originalist interpretations of the Constitution be guided by their personal preferences.

The theory of liquidation is the idea that the founders anticipated that judges or other government officials could determine meaning after the Ratification and “settle practically underdeterminate new law by adopting one permissible interpretation rather than another.”³³³ Liquidation should only be applied, according to this theory, if the original meaning is unsettled with multiple possible meanings, hence “underdeterminate,” and the result “must be within the range of permissible preliquidation underdeterminacy that exists after application of other appropriate interpretive conventions.”³³⁴ Originalists find an argument for liquidation in statements by both Hamilton³³⁵ and Madison.³³⁶ Philip Hamburger noted, “Although

³³⁰ Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1082 (2005).

³³¹ See ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 61 (2017) (citing Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 423–28 (1996)).

³³² *Id.*

³³³ Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142 (2016).

³³⁴ *Id.*

³³⁵ THE FEDERALIST NO. 82, *supra* note 1, at 426 (Alexander Hamilton) (“The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; . . . Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.”).

³³⁶ THE FEDERALIST NO. 37, *supra* note 1, at 236 (James Madison) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

only Madison and Hamilton appear to have descanted on the liquidation of meaning, other Federalists also argued that interpretation would resolve difficulties.”³³⁷ Other originalists, however, oppose the idea that liquidation can fix the original meaning of the Constitution. For example, Gary Lawson stated, “Past precedents do not ‘fix’ or ‘liquidate’ (to use the in-vogue Madisonian term) the Constitution’s communicative meaning.”³³⁸ Whether new “original meaning” could be created after the Constitution was ratified is a burning issue regarding the nondelegation doctrine. Because that doctrine is absent from the Constitution, any rules regarding how it is to be applied would have to be constructed by the current court either out of whole cloth or based on post-Ratification actions either by Congress or the courts. A new robust nondelegation would not be the result of settling indeterminate meaning in the Constitution, however, but rather would be the Court inserting what it thinks the Constitution should have mandated but fails to do in any recognizable manner.

Originalism has been criticized for having a significant race and gender problem, given that the Constitution was drafted and ratified by white men at a time when slavery was legal and women were denied the vote. Some have argued that originalism was redeemed from this taint by the end of slavery and the passage of constitutional amendments that largely rectified, though many think did not fully correct, the original errors in the Constitution.³³⁹ Those making this claim must wrestle with the failure of the Reconstruction Amendments, however, a topic often ignored.³⁴⁰ The narrative of originalism as restoring the original ideals, intent, and meaning of the Constitution and its amendments is difficult to reconcile with the struggles of the Civil Rights era. Jamal Greene stated, “For me, as an African-American, a narrative of restoration is deeply alienating; what America has been is hostile to my personhood and denies my membership in its political community. The only way I can call this Constitution my own is to view it through a lens of redemption, the lens that originalism rejects.”³⁴¹

³³⁷ Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 310 (1989).

³³⁸ Lawson, *supra* note 26, at 41.

³³⁹ See MCGINNIS & RAPPAPORT, *supra* note 256, at 106–12.

³⁴⁰ Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980–82 (2012) (“[T]he Reconstruction Era is painful and embarrassing to—and therefore best forgotten by—many of those whose cultural and political commitments lead them to originalism.”).

³⁴¹ Jamal Greene, *Originalism's Race Problem*, 88 DENV. UNIV. L. REV. 517, 521 (2011) (emphasis omitted).

IV. ORIGINALISM AND THE NONDELEGATION DOCTRINE DEBATE

A. Judicial Originalism and the Nondelegation Doctrine

The Supreme Court has only fitfully applied originalism to decide nondelegation questions and, most notably and thoroughly, only in dissents and concurrences. Doing so would be a supremely challenging task, given the back-breaking challenge to conduct sufficient historical research to accomplish the task. Robert Pushaw noted that “originalism requires a historian’s expertise and a vast amount of time—two resources that most lawyers and all the Justices lack.”³⁴² Even Justice Scalia, one of the Court’s great originalists, agreed, noting that the Court typically decides cases the same Term they are argued, giving Justices only a few months to engage in any necessary historical research and querying “Do you have any doubt that this system does not present the ideal environment for entirely accurate historical inquiry? Nor, speaking for myself at least, does it employ the ideal personnel.”³⁴³

Justice Rehnquist conducted a minimalist originalist analysis of the nondelegation doctrine in his concurrence in the 1980 case *American Petroleum Institute*, regarding regulations designed to address occupational exposure to benzene.³⁴⁴ The concurrence cites Locke for the proposition that “the legislative can have no power to transfer their authority of making laws and place it in other hands.”³⁴⁵ However, Justice Rehnquist’s concurrence does not indicate that Locke’s nondelegation ideas influenced the Framers. It then cites Madison for the idea that while a division of powers among the branches is a useful principle, “the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”³⁴⁶ This seems to undercut Locke’s argument. Rehnquist then stated, “It is the hard choices, and not the filling in of the blanks, which must be made by the elected

³⁴² Robert J. Pushaw, Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 PEPP. L. REV. 463, 482 (2020) (“Consequently, the Court typically cobbles together historical tidbits provided in attorneys’ briefs to justify a result—so-called ‘law office history.’”).

³⁴³ Scalia, *supra* note 2, at 861.

³⁴⁴ *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

³⁴⁵ *Id.* at 672–73 (“In his Second Treatise of Civil Government, published in 1690, John Locke wrote that ‘[t]he power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make laws, and not to make legislators, the legislative can have no power to transfer their authority of making laws and place it in other hands.’”).

³⁴⁶ *Id.* at 673.

representatives of the people.”³⁴⁷ For this proposition, which is the central point of the concurrence, Justice Rehnquist offers no authority.

Rehnquist addressed nondelegation again the next year in a case involving whether Congress could delegate to the Secretary of Labor, acting through the Occupational Safety and Health Administration, the setting of cotton dust standards to protect workers from unhealthy working conditions without explicitly requiring a cost-benefit analysis.³⁴⁸ Justice Rehnquist agreed that some delegation is permissible but would have held this delegation unconstitutional.³⁴⁹ Justice Rehnquist's reasons for doing so show why a more robust nondelegation doctrine would allow the Court to throw out legislation it disagreed with for the most nit-picky of reasons. Justice Rehnquist agreed that Congress could have constitutionally delegated the decision “to set exposure standards without regard to any kind of cost-benefit analysis.”³⁵⁰ However, because Congress did not expressly require, prohibit, or permit a cost-benefit analysis, Rehnquist thought delegating the decision on how to make a decision was unconstitutional.³⁵¹ “Require, prohibit, or permit” is the legislative equivalent to “yes, no, or maybe.” Permitting but not requiring a cost-benefit analysis would allow the agency to decide whether to do so, which appears to be the result of the vague language Congress chose, which does not direct any such choice. It is unclear why Justice Rehnquist thought that granting the agency discretion with one set of words was constitutional, while using another set of words granting same discretion was not. Justice Rehnquist would have thrown out the legislation not because of the type or amount of power and/or discretion it delegated, but rather because he did not like the specific terms Congress used to delegate that discretion.

Justice Scalia, despite being a noted originalist who addressed nondelegation on several occasions, was a staunch defender of the nondelegation doctrine.³⁵² He did not base his nondelegation opinions on an originalist analysis, perhaps in

³⁴⁷ *Id.* at 687.

³⁴⁸ *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 493 (1981).

³⁴⁹ *Id.* at 547 (Rehnquist, J., dissenting) (“I do not mean to suggest that Congress, in enacting a statute, must resolve all ambiguities or must ‘fill in all of the blanks.’”).

³⁵⁰ *Id.* at 545.

³⁵¹ *Id.* at 547.

³⁵² Kelley, *supra* note 241, at 2108 (“The Supreme Court has had no fiercer defender of the nondelegation principle than Justice Antonin Scalia, and no more deferential implementer of that principle when it came to applying it in real cases.”).

recognition that the Constitution was silent on the subject.³⁵³ As a law professor, Justice Scalia noted that the nondelegation doctrine is a self-contradictory protection of the separation of powers, as it would transfer legislative power not to agencies but instead to the courts.³⁵⁴ Worse yet, while Congress may have some control over agencies by passing new legislation or using other leverage, Congress has no power over the Court to alter the Court's decisions. A robust nondelegation doctrine would thus significantly weaken Congress under the guise of protecting it and give the Court the power to interfere in Congress's policy decisions. Then-Professor Scalia asserted that nondelegation should not generally be considered a justiciable issue and so, "except perhaps in extreme cases," should not be enforced by the Court, requiring the sorts of judgments "much more appropriate for a representative assembly than for a hermetically sealed committee of nine lawyers."³⁵⁵ As Calabresi and Lawson noted, "Because it is impossible to formulate the nondelegation doctrine in a fashion that does not leave considerable room for judicial discretion, it is not surprising that Justice Scalia effectively declared it nonjusticiable."³⁵⁶

In 1986, then-Judge Scalia joined a per curiam opinion of the three-judge court which addressed the constitutionality of delegation in the Gramm-Rudman-Hollings Act.³⁵⁷ That opinion did not challenge the laxity of enforcement of the nondelegation doctrine,³⁵⁸ and further rejected the idea that there are "core functions" of the legislative power that cannot be delegated.³⁵⁹ How such "core functions" differ from Justice Rehnquist's "quintessential legislative" choices is unclear, but it seems clear that Judge Scalia was not following Justice Rehnquist's lead on nondelegation.

³⁵³ *Id.* at 2119 ("It is indeed conspicuously absent in Justice Scalia's nondelegation jurisprudence that he never took the occasion independently to consider the original meaning of the nondelegation doctrine.")

³⁵⁴ See Antonin Scalia, *A Note on the Benzene Case*, 4 REGUL. 25, 28 (1980) ("[T]o a large extent judicial invocation of the unconstitutional delegation doctrine is a self-denying ordinance—prohibiting the transfer of legislative power not to the agencies, but to the courts themselves.")

³⁵⁵ *Id.*

³⁵⁶ Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 486 (2014).

³⁵⁷ *Synar v. United States*, 626 F.Supp. 1374, 1383–85 (D.D.C. 1986), *aff'd sub. nom. Bowsheer v. Synar*, 478 U.S. 714 (1986).

³⁵⁸ *Id.* at 1384.

³⁵⁹ *Id.* at 1385 ("We reject this 'core functions' argument for several reasons. First, plaintiffs cite no case in which the Supreme Court has held any legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status.")

In the 1989 case, *Mistretta v. United States*, involving the delegation to a Sentencing Commission of the power to determine appropriate sentences, Justice Scalia, in his dissent, based his defense of congressional delegation on nonjusticiability, stating that while the nondelegation doctrine is “a fundamental element of our constitutional system, it is not an element readily enforceable by the courts” and that because no law can be completely precise and therefore some policy judgments must be “left to the officers executing the law and the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . .”, explaining why the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”³⁶⁰ Justice Scalia’s dissent in *Mistretta* “reflects what might be the most deferential approach to the nondelegation doctrine in the whole United States Reports.”³⁶¹ Justice Scalia did object, however, to delegation of the legislative power to determine appropriate sentences to an independent commission that performed no executive function and so the delegation was not ancillary to any Executive power.³⁶²

In *Whitman v. American Trucking Association*,³⁶³ Justice Scalia, writing for a unanimous Court, repeated his assertion that the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment” Congress can delegate to agencies.³⁶⁴ His opinion discussed limitations of the nondelegation doctrine, stating “It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”³⁶⁵ However, his discussion of the nondelegation doctrine and its limitations is based on Supreme Court precedent from the last century and not on originalist sources.³⁶⁶

Other Justices have recently fired originalist shots across the bow at congressional delegations in various concurring or dissenting opinions, with Justice Thomas firing the first shot in

³⁶⁰ *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

³⁶¹ *Kelley*, *supra* note 241, at 2116.

³⁶² *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting) (“The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law.”).

³⁶³ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

³⁶⁴ *Id.* at 474 (quoting his own dissent in *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

³⁶⁵ *Id.* at 475.

³⁶⁶ *Id.* at 472–76.

2001, writing separately in *American Trucking Association* to say that “[o]n a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”³⁶⁷ Justices Thomas³⁶⁸ and Gorsuch have led the charge. They now may be joined by Justices Kavanaugh³⁶⁹ and Alito.³⁷⁰ Justice Thomas’s originalist discussion of nondelegation has been the most lengthy. Some argue that Justice Thomas’s originalism seems driven by his policy preferences, including the argument that “. . . Justice Thomas’ frequent resort to history is almost certainly a function of his Federalist Society political and jurisprudential views”³⁷¹ He has been clear as to what he considers the source of the nondelegation doctrine, stating, “I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause.”³⁷²

In his concurrence in *Association of American Railroads*, Justice Thomas laid out an extended history of the nondelegation doctrine and its roots, tracing its origins to Greek and Roman law and the concept of the rule of law, with stops at Bracton, Locke, and Blackstone.³⁷³ He recounts the power of English kings to issue royal proclamations and King Henry VIII prevailing on Parliament to pass the Act of Proclamations in 1539, giving his proclamations the force and effect of an Act of Parliament. By basing much of the discussion on the English history and multiple citations of one of his own previous concurring opinions, Justice Thomas’s concurrence perhaps indicates how little

³⁶⁷ *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

³⁶⁸ *See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring) (“The Constitution does not permit the creation of officers exercising ‘quasi-legislative’ and ‘quasi-judicial powers’ in ‘quasi-legislative’ and ‘quasi-judicial agencies.’ No such powers or agencies exist. Congress lacks the authority to delegate its legislative power . . . Nor can Congress create agencies that straddle multiple branches of Government.” (citations omitted)).

³⁶⁹ *See Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., dissenting) (“I write separately because Justice GORSUCH’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases . . . Like Justice Rehnquist’s opinion 40 years ago, Justice GORSUCH’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

³⁷⁰ *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring).

³⁷¹ Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809, 884–85 (1997).

³⁷² *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting). Interestingly, Justice Gorsuch concurred in *Dimaya*, also on originalist grounds but finding they led him to a different conclusion than Justice Thomas’s conclusion.

³⁷³ *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 70–74, 86 (2015) (Thomas, J., concurring) (“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.”).

evidence there is of original intent at the Founding. The concurrence does cite to Madison regarding the importance of keeping the powers separate, but also as to the difficulty of doing so, in that “classifying governmental power is an elusive venture.”³⁷⁴

Justice Thomas’s concurrence was the most extensive attempt by an originalist Justice to justify the nondelegation doctrine and seems a failure as an originalist project. The concurrence points to no direct statements by framers or ratifiers or other evidence sufficient to prove that, as a group, they intended that the nondelegation doctrine be part of the Constitution, nor does it point to any original meaning of words in the Constitution that would mandate or indicate a bar on delegation. Moreover, the concurrence ignores that the nondelegation doctrine and the related non-encroachment doctrine were rejected when they were proposed for the Constitution or the Bill of Rights, respectively.

The concurrence ignores the fact that, during the Constitutional Convention, the framers refused to give the judiciary the kind of policy-making power that the nondelegation doctrine would hand today’s Court. The concurrence does not seem to involve an even-handed attempt to conduct the kind of deep and difficult historical analysis Justice Scalia asserted originalism requires or to discern the intent of the framers. While quoting Locke and claiming his influence, the concurrence displays no apparent research to determine whether the framers or ratifiers were at all influenced by Locke or his nondelegation dictum while crafting and ratifying the Constitution. Instead, it appears to be an effort to turn thin, tenuous evidence into an argument to gain the policy result Justice Thomas prefers. The other originalists on the court, Justices Scalia and Alito, did not join the concurrence, possibly because they thought it went too far.³⁷⁵

Justice Gorsuch announced the libertarian motive underlying his dissent in *Gundy* with the first line: “The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty.”³⁷⁶ Article I vests all legislative power in Congress,³⁷⁷ but

³⁷⁴ *Sessions*, 138 S. Ct. at 1245–46.

³⁷⁵ Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 63 (“[I]t is significant that neither Justice Scalia nor Justice Alito joined Justice Thomas’s concurrence in the judgment, with its startlingly broad criticism of nondelegation.”).

³⁷⁶ *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019).

does not single out those “restricting liberty.”³⁷⁸ Justice Gorsuch quickly runs into the limits of the almost nonexistent evidence of a nondelegation doctrine at the Founding. His dissent reads like an originalist’s greatest hits of asserting what the Framers of the Constitution collectively believed,³⁷⁹ knew,³⁸⁰ insisted,³⁸¹ or understood,³⁸² all without proof of any such collective intent or understanding. The dissent states, “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.³⁸³ However, to make this argument, Justice Gorsuch cites *Marshall Field & Co.*, from 1892, which is hardly good evidence of what the Framers understood.³⁸⁴ Justice Gorsuch asserts that the Framers “believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty.”³⁸⁵ This proposition about the collective Framers’ belief would be impossible to prove, goes against common current originalist rejection of the Framers’ intent as the basis for an originalist understanding of the meaning of the Constitution, and is based on the writing of only one of the Framers, James Madison.³⁸⁶

Justice Gorsuch asserts that if Congress can delegate its legislative powers “to the executive branch, the ‘[v]esting [c]lauses, and indeed the entire structure of the Constitution,’ would ‘make no sense.’”³⁸⁷ In making this assertion, Justice Gorsuch cites noted libertarian law professor Gary Larson, again showing Justice Gorsuch’s libertarian agenda not anchored in original sources.³⁸⁸ Importing modern policy concerns into the Constitution through judicial interpretation is the very thing that originalism was originally designed to prevent. As Raoul Berger noted, “A common historicist fallacy is to import our twentieth-century conceptions into the minds of the Founders.”³⁸⁹

³⁷⁷ U.S. CONST. art I.

³⁷⁸ *Gundy*, 139 S. Ct. at 2116.

³⁷⁹ *Id.* (“the framers believed.”).

³⁸⁰ *Id.* (“[t]he framers knew, too.”).

³⁸¹ *Id.* (“the framers insisted.”).

³⁸² *Id.* (“The framers understood, too”).

³⁸³ *Id.*

³⁸⁴ *Id.* at 2133 (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

³⁸⁵ *Id.* at 2134.

³⁸⁶ *Id.* (citing THE FEDERALIST NO. 48, at 309–12 (James Madison)).

³⁸⁷ *Id.* at 2134–35 (citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002)).

³⁸⁸ *Id.*

³⁸⁹ BERGER, *supra* note 6, at 306.

Justice Gorsuch boldly claims further knowledge of the Framers' understanding: "The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."³⁹⁰ Justice Gorsuch provides absolutely no basis for this claim, which goes to the heart of whether the nondelegation doctrine even exists as a constitutional mandate³⁹¹ and which contradicts Madison's statement in Federalist 51 that the great security in preserving the separation of powers lies in the self-interest and ambition of the members of each branch. The dissent fails to mention that the Framers and the First Congress both rejected adding nondelegation or a similar non-encroachment doctrine to the Constitution.

Bork condemned judges inserting their own policy preferences into the Constitution based on claims that they "are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court."³⁹² However, the dissent points to no convincing evidence that the framers shared the policy preferences that the nondelegation doctrine would achieve. As Mortenson and Bagley note, "None of the sources [in the dissent] address whether the Founders believed that a law passed by both houses of Congress and signed by the President was unconstitutional if it delegated too much authority or authority of the wrong kind."³⁹³

Justice Gorsuch then proceeds to construct his own test for impermissible delegation, even though he acknowledges that at least one of the Framers noted the difficulty of doing so, stating that "Madison acknowledged that 'no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary."³⁹⁴ Justice Gorsuch cobbles together his proposed test from various Court decisions. From the 1825 case, *Wayman v. Southard*, Justice Gorsuch gleaned the following rule: "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details."³⁹⁵ From cases starting in 1813, Justice Gorsuch

390 *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019).

391 See Mortenson & Bagley, *supra* note 8, at 16–17.

392 Bork, *supra* note 325, *passim*.

393 See Mortenson & Bagley, *supra* note 8, at 16–17.

394 *Gundy*, 139 S. Ct. at 2135 (citing THE FEDERALIST NO. 37, at 227 (James Madison)).

395 *Id.* at 2136 (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

concluded: “Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”³⁹⁶ And as a last part of the test for permissible delegation Justice Gorsuch added: “Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.”³⁹⁷ This part of the test is intended to deal with occasions where Congress’s legislative authority “overlaps with authority the Constitution separately vests in another branch.”³⁹⁸

In his dissent, Justice Gorsuch condemns what he calls the “mutated version of the ‘intelligible principle’ remark” as having “no basis in the original meaning of the Constitution in history, or even in the decision from which it was plucked.”³⁹⁹ However, he would replace more than a century of what he labels “the intelligible principle misadventure”⁴⁰⁰ with his own brand-new nondelegation test with no foundation in the original meaning of the Constitution and cobbled together from such sources as his reading of older Supreme Court cases on nondelegation. Justice Gorsuch would judicially amend the Constitution not only to include a nondelegation doctrine, but also one with the specific terms that he himself has newly created. The first originalists would likely look on such judicial activism with dismay.

Justice Gorsuch might argue that he would not change the meaning of the Constitution with his new rules on nondelegation, but rather merely its application. He has written, “Originalism teaches only that the Constitution’s original *meaning* is fixed; meanwhile, of course, new *applications* of that meaning will arise with new developments and new technologies.”⁴⁰¹ However, his creation of his own nondelegation test gets that statement exactly backwards. Justice Gorsuch would base a new meaning of the Constitution on the old judicial applications. Justice Gorsuch might assert that Supreme Court decisions well after the Founding have liquidated the meaning of the nondelegation doctrine. However, it is contradictory to assert as Justice Gorsuch said that “the Constitution’s meaning was fixed at its ratification. . .”⁴⁰² and that court decisions decades or even centuries later can fix the original meaning of the Constitution where it is vague.

³⁹⁶ *Id.* at 2136–37 (citing *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) and *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)).

³⁹⁷ *Id.* at 2137.

³⁹⁸ *Id.*

³⁹⁹ *Id.*

⁴⁰⁰ *Id.* at 2141.

⁴⁰¹ NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 111 (2019).

⁴⁰² *Id.* at 110.

While these Justices have cast their nondelegation discussions in originalist terms, it is difficult to determine what form of originalism they appear to be following. They do not specify what sources they view as trustworthy to determine the original meaning. They do not discuss the original meaning of the word “vest” and what that meaning says about the permissibility of legislative delegation. Instead, they too often engage in a primitive and discredited form of originalism in which they merely cherry-pick statements of Locke and their favored Founding Era sources and announce what the Founders understood.

Bork noted that originalism requires courts to stay their hands for “entire ranges of problems and issues” as courts “will say of particular controversies that no provision of the Constitution reaches the issues presented, and the controversies are therefore not for judges to resolve.”⁴⁰³ Here, there is no provision that contains a nondelegation doctrine or determines when it should apply. Therefore, under the original originalist approach, originalist judges should stay their hand.

B. The Academic Debate over Originalists' Claims of Nondelegation at the Founding

Legal scholars have also extensively analyzed an originalist approach to the nondelegation conundrum, with a fierce debate among academics as to whether Congress delegating rule-making authority was considered constitutional at the Founding, and if so, how much, when, and why. In the course of this debate, academics have recently unearthed a trove of new evidence about legislative delegation at the Founding.

Posner and Vermeule fired the first salvo in 2002 with an article arguing against the nondelegation doctrine by listing a number of early statutes that provide for delegation of discretionary rule-making power to the Executive Branch, including statutes regarding military pensions,⁴⁰⁴ trade with Indian tribes,⁴⁰⁵ patents,⁴⁰⁶ acquiring land on the Potomac for the Capitol,⁴⁰⁷ giving the mitigating or remitting fines and forfeitures,⁴⁰⁸ and paying

⁴⁰³ BORK, *supra* note 292, at 163.

⁴⁰⁴ Act of Sept. 29, 1789, 1 Stat. 95. *See also* Act of March 3, 1791, 1 Stat. 218 (reauthorizing pensions “under such regulations as the President of the United States may direct”).

⁴⁰⁵ Act of July 22, 1790, 1 Stat. 137, 137.

⁴⁰⁶ Act of Apr. 10, 1790, 1 Stat. 109, 110.

⁴⁰⁷ Act of July 16, 1790, 1 Stat. 130, 130.

⁴⁰⁸ *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719 (1969) (citing Act of May 26, 1790, 1 Stat. 122, 123).

wounded or disabled military.⁴⁰⁹ The argument is that if such laws were passed in America's infancy, clearly the Founding generation did not think delegating legislative power was a problem. In discussing such Federalist-era delegations, Jerry Mashaw exclaimed, "[s]ome of these delegations were so broad that one might wonder whether a twenty-first-century court would be able to find any standards guiding the exercise of administrative authority."⁴¹⁰

These statutes, along with numerous others added by various researchers,⁴¹¹ have become a battleground on which originalists' claims of nondelegation at the Founding have been fought. New evidence of delegation at the Founding has been discovered by Chabot and Parrillo. Chabot uncovered previously overlooked evidence of delegation debates in a 1790 act on handling the public debt⁴¹² which gave members of the Executive Branch broad discretion to buy national debt⁴¹³ despite the fact that such policy decisions "had enormous implications for the national economy and private creditors" and could "jeopardize the United States' ability to obtain future credit."⁴¹⁴ Chabot notes that while Congress repeatedly delegating broad powers, there was discussion of limiting the amount to be borrowed and there were "no records of qualified objections suggesting that Congress could not delegate power to resolve important questions."⁴¹⁵

Parrillo analyzed The Direct Tax Legislation of 1798 and found that it contained extensive delegation of rulemaking power that affected private property and was enacted without constitutional objection.⁴¹⁶ The legislation provided federal boards in each of the state's vast discretionary powers and, Parrillo argues, "left the principles and methods of valuation open and allowed the federal boards in the individual states to fill the gap."⁴¹⁷ Whittington and Iuliano extended the history of delegation into the nineteenth and early twentieth centuries, finding only rare invalidation of legislation on a nondelegation basis in state courts and almost none in federal courts.⁴¹⁸

409 Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121.

410 Mashaw, *supra* note 122, at 1339–40.

411 See Nicholas R. Parrillo, *supra* note 142 (manuscript at 14–16). See also Mortenson & Bagley, *supra* note 8, at 332–66.

412 Parrillo, *supra* note 142 (manuscript at 31) (citing Act of Aug. 12, 1790, ch. 47, 1 Stat. 186).

413 *Id.* (citing Act of Aug. 12, 1790, ch. 47, 1 Stat. 186 §§ 1–2).

414 *Id.* (manuscript at 32).

415 *Id.* (manuscript at 35).

416 See *generally id.*

417 *Id.* (manuscript at 54).

418 See Whittington & Iuliano, *supra* note 221, at 379.

Jennifer Mascott, in an article about early customs law, provides a useful window into how Congress and the Executive Branch maintained the separation of Legislative and Executive powers in practice immediately following the Founding, showing they could do so without the judicial maintenance of a constitutional bar on delegation.⁴¹⁹ After extensively scouring the debates over early customs law and the establishment of the Department of the Treasury for evidence of discussion on delegation, Mascott does not mention any instance where any member claimed that the Constitution limited Congress's power to delegate its legislative powers. Instead, what she reports is members scrupulously protecting the power of the House, which would render a court-enforced nondelegation doctrine unnecessary.⁴²⁰

Originalist defenders of nondelegation often deal with these early statutes with the claim that they include a smaller delegation of legislative power than Congress might have made,⁴²¹ are simply examples of Congress inconsistently following the nondelegation doctrine,⁴²² or constitute exceptions to that doctrine.⁴²³ And from Congress's early delegations, some would construct a rule limiting Congress now to delegating legislative power only in the same ways it did in its early existence. It is difficult to justify a claim that somehow the Constitution prohibits Congress from making any delegations now that are not similar to delegations it made in the early years of the Republic, especially given how dramatically changed the country and its government are. Holding today's Congress to the delegations it made in its early years is an odd form of estoppel, that by delegating only in the manner it deemed necessary at the

⁴¹⁹ See Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1394 (2019).

⁴²⁰ *Id.* at 1441 (citing DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA (4 Mar. 1789–3 Mar. 1791), reprinted in 10 DEBATES IN THE HOUSE OF REPRESENTATIVES lxi, lxi–lxiv (Charlene Bangs Bickford et al. eds., 1992) at 756). While one member stated that he took improving the revenue “to be the peculiar business of the federal legislature,” in the end, the House voted to empower the Secretary of Treasury to “digest and prepare plans for the improvement and management of the revenue.” Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

⁴²¹ See Wurman, *supra* note 66, at 23–24.

⁴²² See *id.* at 23.

⁴²³ See, e.g., Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265, 271–72 (2001) (“I argue that the nondelegation doctrine probably does not apply to various matters. . . . Thus, the formalist nondelegation doctrine can explain the exceptions for foreign and military affairs, some of the early delegations and traditional practices that appear to assume the constitutionality of delegations, such as annual appropriations and the conferral of military discretion.”).

beginning of the Republic, Congress should now be constitutionally estopped from delegating in any other manner. Estoppel, however, is typically not applied against the United States, as “the interest of the citizenry as a whole in obedience to the rule of law is undermined.”⁴²⁴

Those attacking the idea of nondelegation at the Founding have employed more theoretical tools in addition to pointing out all of the times Congress in its first years delegated its legislative power. Posner and Vermeule claim that any bar on delegation was strikingly limited: “Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other de jure powers of federal legislators.”⁴²⁵ In other words, Congress may delegate legislative powers so long as it does not allow federal agencies to vote on federal statutes. This is akin to the idea, expressed by Madison in Federalist 47, that a legislature cannot delegate its whole power of legislation, though it may give what Madison called a “partial agency” and so gain control through a more limited legislative delegation. Hence no delegation of legislative power to agencies is barred unless Congress allows them to act as legislators. Posner and Vermeule build their argument on earlier work by Harold J. Krent⁴²⁶ and Kenneth Culp Davis.⁴²⁷ Posner and Vermeule’s article was criticized by Larry Alexander and Saikrishna Prakash, who dispute this view of delegation, though do not seek to prove that the conventional nondelegation doctrine is enshrined in the Constitution.⁴²⁸ They argued, instead, that the legislative power at issue in the nondelegation doctrine is much broader than just the power to vote on legislation or act as a member of Congress. As noted by Mortenson and Bagley, Alexander and Prakash’s “evidence was heavy on citations to theorists like Locke, Montesquieu, and Blackstone, but light on concrete evidence from the Founding.”⁴²⁹

424 *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984).

425 Posner & Vermeule, *supra* note 17, at 1723.

426 *Id.* at 1735 n.51; *see also* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (gathering early statutes that provide for delegation by Congress and noting “[i]n addition, the early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine.”).

427 Posner & Vermeule, *supra* note 17, at 1735 n.51; *see also* Davis, *supra* note 408, at 719–20 (1969) (“Not only is delegation without meaningful standards a necessity for today’s governments at all levels but such delegation has been deemed a necessity from the time the United States was founded, as anyone can quickly confirm by examining the statutes enacted by the 1st Congress, which was made up largely of the same men who wrote the Constitution.”).

428 Alexander & Prakash, *supra* note 132, at 1328.

429 Mortenson & Bagley, *supra* note 8, at 285.

Mortenson and Bagley argued that Legislative and Executive power was defined much differently in the Founding Era, and what we would consider a delegation of legislative power to federal agencies would not have been considered that back then.⁴³⁰ Mortenson and Bagley assert that legislative power was defined more broadly and simply at the Founding and was, as Montesquieu explained, “no more than the general will of the state.”⁴³¹ They also state that Executive power was defined much more thinly then, simply as “the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.”⁴³² In other words, the ability to create rules that governed private behavior could be part of the legislative power if it were done in the creation of a plan or policy and also part of the Executive power if it were used at the direction of Congress to carry out legislative instructions.⁴³³ Any particular act can be either legislative, if it is done in the creation of a plan or issuing instructions to the Executive Branch, or Executive, if it is done by the Executive Branch to implement those instructions, Mortenson and Bagley argued.⁴³⁴

To make their case, originalist defenders of the nondelegation doctrine should present convincing evidence from the Founding that nondelegation was widely discussed and that the Framers and ratifiers of the Constitution understood that it included the doctrine, at least implicitly. To the extent that originalists depend on Locke's Second Treatise as justification for nondelegation, they should acknowledge and address the historians' accounts of how Locke's influence plummeted as soon as the Revolutionary War started, and that Locke's influence in America after that has been discounted generally by those who have studied it. And if they value the original meaning of the Constitution's terms, they should wrestle with the original meaning of the word “vest,” which is crucial to an analysis of Congress's ability to delegate the legislative power with which it is vested. Such efforts, however, have not yet been made.

Also worrisome is the fact that the various originalist defenders of the nondelegation doctrine use radically different methods of originalism and different bases and evidence for their claims of nondelegation at the Founding, even switching

⁴³⁰ *Id.* at 294.

⁴³¹ *Id.* (citing 1 M. de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XI, ch. VI, at 201 (London, printed for T. Evans & W. Davis 1777)).

⁴³² *Id.* at 315.

⁴³³ *Id.*

⁴³⁴ *Id.*

regularly where nondelegation could be found in the Constitution. However, one senses a joy from originalists in this debate, in that the opponents of nondelegation seem to be taking originalist claims and methods seriously to argue in such detail over evidence of delegation at the Founding. Wurman seems especially happy that Mortenson and Bagley are arguing over the doctrine on originalist turf, and hence “at least recognizing that originalist work is possible.”⁴³⁵

Wurman, in his article arguing for nondelegation at the Founding, indicates that he is more an original intent originalist than an original meaning originalist, stating that “originalists usually look to text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision.”⁴³⁶ Wurman also asserts “intended meaning is often good evidence of the actual textual meaning.”⁴³⁷ He does not in his article attempt to discern the original meaning of the Constitution’s words.

Wurman’s article section on “The Positive Evidence of a Nondelegation Doctrine: Explicit Statements and Arguments” is stunning on what it omits: any mention of discussion by the Framers or ratifiers at the time the Constitution was drafted and ratified.⁴³⁸ One would think that if the Constitution embodied the nondelegation doctrine as a fundamental principle, the Framers and ratifiers would have discussed that at some length. If they did not, as Wurman’s silence indicates, that is strong evidence that they did not intend the Constitution to contain a nondelegation doctrine.⁴³⁹ By comparison, when Wurman discusses other related topics such as Institutionalism and the Separation of Powers, his text is chock-a-block with references to the Federalist, indicating that these topics were in fact widely discussed at the Founding.⁴⁴⁰ Wurman acknowledges that it is impossible to conclusively prove nondelegation at the Founding, stating “To be sure, the history is a bit messy, precluding any kind of categorical conclusion.”⁴⁴¹ Instead of discussing evidence from the

⁴³⁵ Wurman, *supra* note 66, at 5.

⁴³⁶ *Id.* at 10–11.

⁴³⁷ *Id.* at 9 n.26.

⁴³⁸ *Id.* at 14–29.

⁴³⁹ See John Harrison, *Judicial Interpretive Finality and the Constitutionality Text*, 23 CONST. COMMENT. 33, 33 (2006) (“Elephants leave traces when they pass by. That is true about the Constitution as it is elsewhere One way to tell whether the Constitution adopts a principle is thus to look for its traces, and one way to do that is to ask: If the framers had planned to include the principle, or had assumed that other decisions they had made entailed the principle, where would it manifest itself?”).

⁴⁴⁰ Wurman, *supra* note 66, at 3–38.

⁴⁴¹ *Id.* at 1.

Founding about the intent of the Framers and/or ratifiers or the original public meaning of the Constitution when ratified, Wurman instead points to “three key episodes”⁴⁴² as evidence of a nondelegation doctrine: (1) debates over a non-encroachment amendment as part of the Bill of Rights that did not pass Congress, (2) the establishment of the post roads, and (3) the Alien Friends Act. He asserts that these debates and events provide evidence of a nondelegation doctrine, but instead the non-encroachment amendment was rejected and, as demonstrated by Mortenson and Bagley, the other debates show that Congress did delegate despite a few scattered objections.⁴⁴³

Aaron Gordon published an originalist defense of nondelegation in 2019,⁴⁴⁴ and responded directly to the Mortenson and Bagley article in 2020 with similar arguments. In his 2019 article, Gordon undercuts the idea that original meaning originalism can answer whether the nondelegation doctrine exists. He states, “vague language” of the Constitution is “arguably susceptible to equally plausible readings both supporting and undermining the Nondelegation Doctrine” and so skips “textual and syntactic hyper-analysis . . .”⁴⁴⁵ Gordon forgoes any theoretical justification of the original sources he relies on, other than noting that original meaning originalism does not lead to any settled answer and that other scholars and jurists cite similar materials.⁴⁴⁶

Gordon presents as evidence of nondelegation at the Founding matters discussed previously that do not demonstrate nondelegation at the Founding, such as the debunked great influence of Locke on the Framers of the Constitution, the pre-Revolutionary Otis pamphlet urging Parliament to recognize colonial legislatures and Adams’ citing it as an influence on the Revolution, and the nondelegation amendment rejected in the Convention. To that, Gordon adds (1) nondelegation references in American editions of Rutherford’s *Institutes of Natural Law* that were published after the Constitution was ratified; (2) Hamilton’s discussions in the *Federalist*

⁴⁴² *Id.* at 26.

⁴⁴³ Mortenson & Bagley, *supra* note 8, at 282.

⁴⁴⁴ See Gordon, *supra* note 43, at 718.

⁴⁴⁵ *Id.* at 733–34.

⁴⁴⁶ *Id.* at 734–35 (“Historical materials from this period, to the extent they express views that were common and mostly uncontested at that time, are generally regarded as valid evidence of the Constitution’s original meaning, with an ideologically diverse array of commentators and jurists routinely citing sources from as late as the 1830s in making originalist arguments about constitutional provisions adopted prior to 1800, or sources similarly temporally removed from the adoption of whichever provision’s meaning is at issue.”).

about the President's pardon powers; and (3) Jefferson's complaints that Parliament had let the King decide when two wharves could be reopened.⁴⁴⁷ Tellingly, Jefferson did not claim that such delegation to the unelected monarch was not permitted, but rather that if Parliament delegated its legislative powers too often to the King, it could lead to despotism.⁴⁴⁸ In other words, Gordon presents no convincing evidence that the Framers of the Constitution, who had provided for an elected President as Executive, not an unelected monarch, intended that the Constitution include a nondelegation doctrine.

Gordon proposes his own version of the nondelegation doctrine, what he calls "a historically-grounded judicial test for identifying unconstitutional delegations: 'a statute unconstitutionally delegates legislative power when it 1) allows the agent . . . to issue general rules governing private conduct that carry the force of law and 2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency.'"⁴⁴⁹ Since Gordon is an originalist, one might think these rules would be what Gordon thinks the Constitution meant when ratified. However, his rules are all drawn from what Congress actually did after the Framing.

Gordon's 2020–2021 article presents a moving target, as it was last updated April 30, 2021. It argues with Mortenson and Bagley's definition of "legislative power," cites mid-nineteenth century treatises on agency⁴⁵⁰ and argues that because Congress was an agent it could not delegate its powers, ignoring cases in the nation's first years indicating that a legislature and government officials could delegate some aspect of their powers.⁴⁵¹ Nonetheless, it adds little additional evidence of nondelegation at the Founding.

A much more ambitious originalist defense of the nondelegation doctrine has been mounted by Gary Lawson, beginning with an article published about the same time as Posner and Vermeule's and then in a another replying directly to their article. In his article, *Delegation and Original Meaning*, Lawson attempts a full originalist defense of the nondelegation doctrine and argues for its revival.⁴⁵² Lawson, to his credit, starts

⁴⁴⁷ *Id.* at 739–41.

⁴⁴⁸ *Id.* at 741.

⁴⁴⁹ *Id.* at 781.

⁴⁵⁰ Gordon, *supra* note 181 (manuscript at 7).

⁴⁵¹ *Id.* at 3 (ignoring such cases as *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799) and *Hunt v. Burrell*, 5 Johns. 137 (N.Y. Sup. Ct. 1809)).

⁴⁵² Lawson, *supra* note 128, at 327.

with a blunt admission that “there is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power.”⁴⁵³

Lawson states that the pertinent question is what the general public would have understood “if all relevant information and arguments had been brought to its attention” and “historical sources remain relevant and probative but are inconclusive.”⁴⁵⁴ And because documents can have “meanings that are latent in their language and structure even if they are not obvious to observers at a specific moment in time . . . the role and relevance of historical sources is more attenuated.”⁴⁵⁵ Original meaning originalism, then, puts Lawson in a tight box. Unless it can be shown that a fully informed public at the time would have understood that the Constitution contained a nondelegation doctrine, then it does not matter whether some Framers or other individuals at the time thought that or acted as if it did.

A discussion of whether a fully informed public would have understood that vesting legislative power in Congress limits its delegation should naturally turn on what such a hypothetical public would understand is meant by the term “vest.” Instead, Lawson relies on his assertion that powers vested cannot be delegated unless specifically permitted, ignoring that an informed public might well have concluded that “vesting” the legislative power in Congress implies that Congress can delegate those powers.

Lawson searches for possible clauses of the Constitution that would permit delegation, stating that a “number of modern scholars have indeed invoked [the Sweeping Clause of Article I] as a possible constitutional authorization to Congress to confer broad discretion on administrators.”⁴⁵⁶ Lawson notes that the Sweeping Clause “requires all executory laws to be both ‘necessary’ and ‘proper,’ in the conjunctive” and asserts that the “term ‘proper’ would have been understood to describe “power that is ‘within the peculiar jurisdiction or responsibility of the relevant governmental actor.’”⁴⁵⁷ Delegation of legislative power, if otherwise permitted, would clearly be within Congressional jurisdiction or responsibility, however. And so, Lawson states the

⁴⁵³ *Id.* at 335.

⁴⁵⁴ *Id.* at 341 n.51.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 346.

⁴⁵⁷ *Id.* at 347 (quoting Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291 (1993)).

question is whether a “fully informed eighteenth-century audience would have viewed a statute purporting to authorize an executive agent to make laws as ‘improper’ . . .”⁴⁵⁸

Lawson does not provide a full answer that question in this article, stating that “it is impossible to give full treatment here to the extensive textual, structural, and historical arguments that justify this conclusion.”⁴⁵⁹ Instead, he argues that because of the structure of the Constitution, the Sweeping Clause would not be understood to permit delegation, as it “incorporates the basic constitutional structure; it does not offer a vehicle for circumventing it.” Lawson relies on his understanding of the Constitution rather than on good evidence of what a hypothetical fully informed public would have understood.

Lawson returned to this issue in 2005 and agreed that delegation would be authorized by the Necessary and Proper Clause if it matched Madison’s requirement that to be “necessary” there must be a definite connection between a law’s means and its ends and they must be linked “by some obvious and precise affinity.”⁴⁶⁰ Lawson acknowledged that this would provide for legislative delegation so long as Congress shows such delegation is connected to Congress’s legislative ends.⁴⁶¹ Lawson strained to find some additional meaning in the word “proper” to hang the nondelegation doctrine on, but largely fails.

In the end, Lawson was reduced to finding the nondelegation doctrine inherent in the structure of the Constitution, not justified by any of the express terms thereof or what a fully informed public would have understood from specific provisions in the Constitution. He states that the Nondelegation Doctrine “is not a principle expressly stated in the Constitution, but it is a better inference from the overall structure of the Constitution than is the contrary principle.”⁴⁶² And so, Lawson would have us infer the nondelegation doctrine not from original meaning but from our current understanding of the Constitution. Aaron Gordon, in his originalist defense of nondelegation, stated that “a grandiose, abstract case for the Nondelegation Doctrine based on arguments from constitutional

⁴⁵⁸ *Id.* at 350.

⁴⁵⁹ *Id.* at 346.

⁴⁶⁰ *Id.* at 448.

⁴⁶¹ Gary Lawson, *Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 248 (“If Congress wants to vest discretion in the President, Congress had better be prepared to show in a direct and immediate fashion how the precise scope and character of that discretion is important to the execution of federal powers.”).

⁴⁶² *Id.* at 263.

structure and accountability would be worthless unless buttressed by a wealth of historical sources. . .” demonstrating that the founders would have thought that inappropriate delegation by Congress would be unconstitutional.⁴⁶³ Lawson, however, provided no such historical sources.

Post-*Gundy*, but before the Mortenson and Bagley article, Lawson again discussed possible sources for the nondelegation doctrine in both a 2017 book with Guy Seidman⁴⁶⁴ and a 2019 article about *Gundy*.⁴⁶⁵ In his article, Gary Lawson acknowledged that he had previously asserted that the nondelegation doctrine resided in the Vesting Clauses, and at other times, in the Sweeping Clause.⁴⁶⁶ However, he stated that he had recently come to a different conclusion, laid out in both the book and article, which will be discussed jointly here, that both of his previous lines of argument are “subsumed under and superseded by a more fundamental consideration. . . The Constitution is a kind of agency, or fiduciary, instrument.”⁴⁶⁷ And that because the different branches of government are fiduciaries with their powers delegated to them by the people, they cannot subdelegate their authority because there is no express authority to do so in the Constitution, nor is there, Lawson claimed, custom or strict necessity which could justify such subdelegation.⁴⁶⁸ Furthermore, as agents, the powers of Congress and the Executive Branch must be strictly construed.⁴⁶⁹ And based on this agency analysis, Lawson boldly asserted, “The rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine.”⁴⁷⁰

A fundamental weakness in this argument, which seems a constitutional application of the *Delegata* maxim, is the dearth of evidence that the Constitution is essentially an agency or fiduciary instrument, or should be construed as such. Even Lawson noted the many alternative views as to what the Constitution is most like, including a “‘superstatute,’ a ‘compact,’ a ‘treaty,’ a ‘corporate charter’” and numerous others.⁴⁷¹ Given this wide range of

⁴⁶³ Gordon, *supra* note 181 (manuscript at 53).

⁴⁶⁴ See generally GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY” UNDERSTANDING THE FIDUCIARY CONSTITUTION 1 (2017).

⁴⁶⁵ See generally, e.g., Lawson, *supra* note 26, at 31; LAWSON & SEIDMAN, *supra* note 464, at 1.

⁴⁶⁶ Lawson, *supra* note 26, at 43.

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at 44.

⁴⁶⁹ LAWSON & SEIDMAN, *supra* note 464, at 105.

⁴⁷⁰ *Id.* at 117.

⁴⁷¹ *Id.* at 2 (citations omitted).

possibilities, why should we base our interpretation of the Constitution on Lawson's recent understanding that it is an agency or fiduciary agreement?

Lawson and Seidman's reply is that "the agency-law character of the Constitution" was "so obvious to the founding generation that it scarcely bore mention."⁴⁷² The Constitution as agency arrangement was mentioned at least once in the Founding Era,⁴⁷³ but this rare mention does not the Constitution an agency agreement make.

As Justice Scalia said, the greatest defect of originalism is the difficulty of applying it correctly and plumbing the original meaning of the Constitution's now ancient text.⁴⁷⁴ The difficulty and complexity of the historical and theoretical research that the dueling nondelegation scholars have engaged in is staggering. They have argued at great length and discord about the meaning of arcane texts by writers few lawyers and judges have even heard of. Reading their lengthy and contentious articles, one might think that whether the nondelegation doctrine even exists somehow turns on how to interpret the writings of eighteenth-century English natural law theorist Thomas Rutherford, whose *Institutes of Natural Law* with its lectures on Grotius is likely missing from most judges' chambers. Surely, the Framers did not intend that American lawyers and judges would in perpetuity require a deep understanding of Rutherford's and Locke's writings in order to know something as crucial and straightforward as whether Congress can delegate some rule-making power to federal agencies and how much. The purpose of having a written Constitution is, at least according to some originalists, to have a clear, public, and compact description of the basic rules governing the United States. Originalism would instead turn the Constitution into an inscrutable document that could be understood only with a post-graduate education in seventeenth- and eighteenth-century English and European legal and political theory and English history since the Magna Carta of 1215, with a special emphasis on the proclamations of Henry VIII circa 1539.

The dueling scholars' debate is filled with accusations of misunderstanding and mistakes in the other side's historical and theoretical analysis, with claims such as "that their misreading of European delegation theory becomes the Constitution's

⁴⁷² *Id.* at 7.

⁴⁷³ *Id.* at 3 (citing 4 THE DEBATE IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 148–49 (Jonathan Elliot ed., 2nd ed. 1907)).

⁴⁷⁴ Scalia, *supra* note 2, at 856.

delegation theory, without consideration of what the Constitution actually said.”⁴⁷⁵ Further examples abound. “It is hard to overstate the ahistoricity of this claim.”⁴⁷⁶ “The historical and logical infirmities in Mortenson and Bagley’s analysis are many. . .”⁴⁷⁷ No doubt I have made errors in my historical analysis in this Article, since I have not been trained as a historian, but should the meaning of the Constitution be determined by the results of historical research that almost all lawyers and judges and even legal scholars are likely to get at least somewhat wrong? Some originalist Justices and scholars argue that Locke’s views on nondelegation and the separation of powers were an important influence on the framers and are central element of the existence of the nondelegation doctrine as an element of the Constitution. Yet those who would rely on Locke’s influence on the framers do not provide sufficient historical evidence regarding whether Locke’s views on delegation actually influenced the Framers or ratifiers, despite the decades of historians’ study and analysis of the rise and fall of Locke’s influence.⁴⁷⁸

Justice Scalia noted the little time and less than ideal environment and personnel that members of the Supreme Court have for an “entirely accurate historical inquiry . . .”⁴⁷⁹ Justice Thomas’s and Gorsuch’s opinions demonstrate how insurmountable that challenge is. Justice Scalia tellingly did not share their views on nondelegation and might well have not agreed with their historical analysis.

V. CONCLUSION

The history of the nondelegation doctrine can perhaps be best viewed as a conversation between James Madison and Justice Antonin Scalia from centuries apart. Madison feared that Congress would usurp the powers of the Executive and Judicial branches and so become tyrannical. He was willing to hand over some legislative power and oversight to the executive and judicial

⁴⁷⁵ HAMBURGER, *supra* note 119, at 383.

⁴⁷⁶ Mortenson & Bagley, *supra* note 8, at 297.

⁴⁷⁷ Gordon, *supra* note 181 (manuscript at 2).

⁴⁷⁸ Mortenson and Bagley do spot the issue in a footnote and cite to a blog post that discusses it. Mortenson & Bagley, *supra* note 8, at 289 n.66 (citing Richard Primus, *John Locke, Justice Gorsuch, and Gundy v. United States*, BALKINIZATION (July 22, 2019), <https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html> [<http://perma.cc/2EMD-78BT>]). Philip Hamburger cites to the work of historians in a “brief sampling of the scholarship” on Locke’s influence, but does not tell readers what he learns from it, other than that Locke’s *Two Treatises* was “a crucial text for early Americans.” Hamburger, *supra* note 117, at 98 n.44.

⁴⁷⁹ Scalia, *supra* note 2, at 861.

branches to weaken the national legislature in order protect the powers of the executive and judicial branches. He therefore advocated this sharing of some legislative power with members of the other branches so that, acting in concert, they could defend their branches from encroachment by Congress. Madison would have given the Council of Revision, made up mostly of judges, great ability to set the nation's policy through its revisionary power.

Justice Scalia, on the other hand, feared that creating a robust nondelegation doctrine would allow the Supreme Court to usurp legislative powers from Congress. Justice Scalia expressed fear that an invigorated nondelegation doctrine would allow the Court to seize too much control of policy decisions, decisions that should be made by Congress as a representative assembly and not by, as Justice Scalia put it, "a hermetically sealed committee of nine lawyers."⁴⁸⁰ He recognized that the nondelegation doctrine is self-contradictory, in that the Court would be seizing legislative power in order to prevent Congress from exercising its own discretion and decide whether, when, and how much of its legislative power to delegate to federal agencies.⁴⁸¹ The Supreme Court, by creating an activist nondelegation doctrine, would make itself Congress's master by creating a rule that Congress is powerless to change.

Embracing a robust nondelegation doctrine would make the Court completely unconstrained, as it would be applying a self-fashioned doctrine completely absent from the Constitution, virtually absent at the Founding, and contrary to the practice of the First Congress. The Court would be seizing the power to determine such basic policy as the reach and function of the administrative state and the effectiveness of regulation of the environment, health care, financial services, and countless other policies that should be determined by the people's representatives in Congress, not by judges with the "fortitude" to seize power.

Under the guise of preventing the "tyranny" of delegation, the Court would be creating a government by judiciary, making The Court's Justices tyrants, the unassailable masters of the government, who in finding any messy evidence of some power in the tangled history of the Founding can construct rules not in the

⁴⁸⁰ *Id.*

⁴⁸¹ See Scalia, *supra* note 354, at 28 ("[T]o a large extent judicial invocation of the unconstitutional delegation doctrine is a *self-denying ordinance*—forbidding the transfer of legislative power not to the agencies, but to the courts themselves.").

Constitution's text to overrule Congress and the President on even the most important issues about the nation's policy and structure. Locke was concerned that Parliament as representative of the public would cede too much power to the unelected and virtually unremovable King. How ironic that an originalist Supreme Court might use Locke's words to strip legislative power from Congress and grant itself a non-constitutional, ill-defined, and unconstrained power to veto the nation's laws, no matter how longstanding, a terrifying power to be held by an unelected and virtually unremovable Court.

The Court may well not to take this step. The Justices might review the extensive evidence of delegation and the lack of evidence of a nondelegation doctrine at the Founding and conclude that neither the original intent of the framers or ratifiers nor the original meaning of the Constitution justifies such a far-reaching seizure of power over Congress by the Court, overturning centuries of precedent despite such grave doubt. The Court could reject the arguments of some originalists and go back to the original concepts that first animated originalism, that the Court should exercise judicial restraint and in doing so protect Congress's legislative powers. Only time will tell.