

Interring the Nondelegation Doctrine

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A large academic literature discusses the nondelegation doctrine, which is said to bar Congress from enacting excessively broad or excessively discretionary grants of statutory authority to the executive branch or other agents. The bulk of this literature accepts the existence of the doctrine, and argues only about the terms of its application or the competence of the courts to enforce it. In this essay, we argue that there is no such nondelegation doctrine: A statutory grant of authority to the executive branch or other agents never effects a delegation of legislative power. Agents acting within the terms of such a statutory grant are exercising executive power, not legislative power. Our argument is based on an analysis of the text and history of the Constitution, the case law, and a critique of functional defenses of the nondelegation doctrine that have been proposed by academics.

INTRODUCTION

One of the most exhaustively analyzed topics in public law is the “nondelegation doctrine,” which holds that Congress must supply an “intelligible principle” to guide its agents’ exercise of statutory authority.¹ Our excuse for writing this brief essay on delegation is that we have come to hold a far cruder, less nuanced view than any currently found in the literature. The literature, with some notable and honorable exceptions,² focuses on whether judges can successfully enforce

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¹ *J.W. Hampton, Jr., & Co v United States*, 276 US 394, 409 (1928) (holding that a delegation by Congress of the ability to adjust the rates of import tariffs did lay down an “intelligible principle” when it specified that the tariffs could be adjusted within a statutorily prescribed range in order to “equalize the . . . differences in costs of production in the United States and the principal competing country”). *Id.* at 401, quoting Section 315(a) of Title 6 of the Tariff Act of September 21, 1922, 42 Stat 858, 941.

² The honor roll of scholarship that advances serious critiques of nondelegation includes Patrick W. Duff and Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 14 Cornell L Q 168 (1928) (discussing the history and influence of the nondelegation doctrine); Kenneth Culp Davis, 1 *Administrative Law Treatise* § 2 at 76–81 (West 1st ed 1958) (reviewing delegations of power); Harold J. Krent, *Delegation and Its Discontents*, 94 Colum L Rev 710 (1994) (criticizing and praising David Schoenbrod’s work); Jerry Mashaw, *Greed, Chaos, and Governance: Using Public Choice to Improve Public Law* (Yale 1997); Peter Schuck, *Delegation and Democracy: Comments on David Schoenbrod*, 20 Cardozo L Rev 775 (1999) (criticizing David Schoenbrod’s proposal to resurrect the nondelegation doctrine); David Epstein and Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 Cardozo L Rev 947 (1999) (using political science the-

such a doctrine (either through constitutional review or through statutory interpretation) and whether judicial enforcement would produce good or bad present-day consequences.³ All this is entirely too respectful of the alleged constitutional rule limiting the scope or terms of statutory grants of authority to the executive. In our view there just is no constitutional nondelegation rule, nor has there ever been. The nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory. 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.⁴ The Court's invocation of the rule to invalidate two statutes in 1935 was nothing more than a local aberration,⁵ no more to be taken as constitutionally fundamental than, say, the original package doctrine,⁶ the doctrine of irrebuttable presumptions,⁷ or any of a myriad other constitutional eccentricities

ory and statistical tests to derive a theory to determine variations in the amount of authority granted to the executive branch); David B. Spence and Frank Cross, *A Public Choice Case for the Administrative State*, 89 Geo L J 97 (2000) (using public choice theory to argue that the administrative state promotes democracy). None of these scholars, however, provides the comprehensive formal and functional critique of the doctrine that we provide here. Moreover, as we discuss at various points below, it's not always clear whether these scholars would dispense with the doctrine entirely, as we propose to do. An intermediate case is Cass Sunstein, who provides trenchant criticisms of the nondelegation doctrine, but ultimately suggests that the aims of the doctrine might nonetheless be pursued through appropriate canons of statutory interpretation. See Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 321–22 (2000). See also Daniel A. Farber and Philip P. Frickey, *Law and Public Choice: A Critical Introduction* 81–82 (Chicago 1991). We address that view below, in Part III.C.

³ For a notable recent defense of the nondelegation doctrine on originalist grounds, see Gary Lawson, *Delegation and Original Meaning*, 88 Va L Rev 327 (2002). We respond to Lawson's arguments, and to those of other proponents of the nondelegation doctrine, at various points below.

⁴ See *Marshall Field & Co v Clark*, 143 US 649, 692 (1892) (claiming that Congress cannot delegate legislative power to the president, but stating that the act in question “is not inconsistent with that principle”).

⁵ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495 (1935) (invalidating the fair-competition provisions of the National Industrial Recovery Act); *Panama Refining Co v Ryan*, 293 US 388 (1935) (invalidating the hot oil provisions of the National Industrial Recovery Act). See also *Carter v Carter Coal*, 298 US 238 (1936) (invalidating the labor provisions of the Bituminous Coal Conservation and Recovery Act as an unconstitutional delegation to private parties).

⁶ For the original package doctrine, see *Brown v Maryland*, 25 US 419, 441–42 (1827) (announcing that states may not tax goods in interstate or foreign commerce while said goods remained in their “original packages” and had yet to “become incorporated and mixed up within the mass of property in the country”), repudiated by *Michelin Tire Corp v Wages*, 423 US 276, 282–83 (1976) (overturning *Low v Austin*, 80 US 29 (1872), and rejecting the “original package” doctrine as a substantive rule).

⁷ For the doctrine of irrebuttable presumptions, see *Cleveland Board of Education v LaFleur*, 414 US 632, 645–46 (1973) (holding that “conclusive presumptions” embodied in rules such as mandatory maternity leave violate the Due Process Clause of the Fourteenth Amendment), abandoned by *Weinberger v Salfi*, 422 US 749, 770–72 (1975) (holding that the irrebuttable pre-

that few now bother remembering. The existing literature is insufficiently critical of the nondelegation doctrine's constitutional pretensions, and thereby perpetuates the doctrine's undead state.⁸ We hope to lay the doctrine to rest once and for all, in an unmarked grave.

To be clear about our thesis, we agree that the Constitution bars the "delegation of legislative power." In our view, however, the content of that prohibition is the following: 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. What we argue, in contradiction of the usual view, is that a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power. A statutory grant of authority to the executive isn't a *transfer* of legislative power, but an *exercise* of legislative power. Conversely, agents acting within the terms of such a statutory grant are exercising executive power, not legislative power. There is nothing in the usual sources of formal constitutional argument that changes that simple conclusion, nor does it run afoul of any plausible argument from social welfare or democratic values.

Our argument is *not* that the courts lack the competence to enforce a nondelegation doctrine. The excessive attention paid to that question in the literature has led many to believe that the Constitution does limit congressional grants of statutory authority, and that the Supreme Court's failure to enforce nondelegation since 1935 represents a failure of nerve or of institutional capacity. That combination of views creates a sort of guilt complex for constitutional law—the nagging assumption that the current pattern in public law of sweeping statutory grants to the executive isn't really constitutional but is an inevitable compromise with the necessities of modern government and with the courts' limited capacities. We hope to offer a course of therapy that will relieve constitutional law of its neurotic burden by showing that the Constitution just doesn't contain any nondelegation principle of the sort the standard view supposes. Courts shouldn't enforce a nondelegation doctrine for the simple reason that there is no constitutional warrant for that doctrine.

The argument is structured as follows. In Part I we will explicate our naïve view of the delegation issue, contrast it with the standard view in the literature, and then show that the standard view lacks any constitutional justification. On the standard view, the Constitution limits the authority that Congress may grant to the president by statute, even within the scope of Congress's constitutional powers, on the

sumptions doctrine does not apply to noncontractual claims).

⁸ Consider *Synar v United States*, 626 F Supp 1374, 1384 (1986), *affd as Bowsher v Synar*, 478 US 714, 721 (1986) (“[W]hile the delegation doctrine may be moribund, it has not yet been officially interred by the Court.”).

ground that a grant conferring “excessive” discretion upon the executive “amounts to” or “resembles” a delegation of legislative power. On the naïve view, by contrast, any authority that the executive enjoys pursuant to the terms of a duly enacted federal statute is simply executive authority in an unproblematic sense. To say that a federal statute resembles a delegation of “legislative” authority because it confers excessive discretion on the executive is to employ a metaphor, one that lacks constitutional roots, whatever its literary merit. None of the standard sources of formal constitutional argument supports such an idea.

In Part II we rebut the consequentialist and functional justifications for a nondelegation rule. Nondelegation proponents commonly advance not only formal constitutional arguments, but consequentialist claims that a nondelegation rule will promote welfare-enhancing governmental policies, advance democratic norms, or enforce the structural design of federal lawmaking embodied in Article I, § 7. We argue that none of these considerations justifies a nondelegation rule. In each case, the justification is equally compatible with a regime in which statutory grants of authority to legislative agents are not subject to any nondelegation constraint.

In Part III we apply the analysis of Parts I and II to various settings in which some form of nondelegation analysis is widely thought appropriate—settings in which even opponents of the nondelegation doctrine turn queasy. The first setting involves the so-called nondelegable powers of Congress or its constituent houses, such as the impeachment power. The second setting involves delegation to agents outside the executive branch, such as private parties, states, or international organizations. The third setting involves the use of nondelegation as a subconstitutional canon of statutory interpretation.

In all of these settings we will deny that the nondelegation idea adds any constitutionally meritorious content to the relevant debates. First, the claim that there are “nondelegable powers” is at best an imprecise shorthand for the valid claim that the separate houses of Congress, or individual members of Congress, each possess certain distinctive powers that the Congress as a whole may not authorize the executive branch to exercise. Second, a legislative grant of statutory authority to nonexecutive agents is constitutional in and of itself, although of course particular grants may in particular settings violate other constitutional restrictions, such as the Appointments Clause or the constitutional vesting of the “executive Power” in “a President of the United States.” Finally, discussing work by Sunstein and Manning, we argue that nondelegation canons in statutory interpretation must be justified, if at all, solely on nonconstitutional grounds; they cannot be justified as applications of the canon of avoidance of constitutional ques-

tions, because in the delegation setting there is no underlying constitutional question to avoid. A brief conclusion follows.

I. TWO VIEWS OF NONDELEGATION

A. The Naïve View

Consider an ordinary, duly enacted federal statute, and imagine that this statute grants the president (or any other executive officer or independent agency)⁹ the authority to enact rules further specifying legal relations within the statute's scope. Statutes of this kind are ubiquitous in federal legislation. In what sense could such a statute ever be said to "delegate legislative authority" to the executive?

The naïve view of delegation holds that there just is no such sense, no understanding of delegation that can be invoked to make the idea coherent. On the naïve view, the authority that the president exercises pursuant to a statutory grant is executive authority in the core sense. The president is simply executing the statute according to its terms, and in obedience to the constitutional obligation to "take Care that the laws be faithfully executed."¹⁰ That is why the Supreme Court correctly and emphatically denied, in *INS v Chadha*,¹¹ that an executive officer exercises legislative power when performing duties, including rulemaking, pursuant to a statutory mandate.¹² On this view, the president can be said to exercise legislative power only when creating binding legal rules *without* constitutional or statutory authority.¹³ Cre-

⁹ Nothing in our account turns on the identity of the delegate; indeed, we argue below that delegations to parties outside the federal government altogether are objectionable, if at all, solely on grounds other than nondelegation. In this Part, we will refer to "the president" only for convenience and to track the literature, in which delegations to the president are the core case.

¹⁰ See US Const Art II, § 3.

¹¹ 462 US 919 (1983).

¹² See *id.* at 953 n 16 (1983) ("To be sure, some administrative agency action . . . may resemble 'lawmaking.' . . . [H]owever, '[in] the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.") (citations omitted). This simple conception has deep roots in American public law. See, for example, *United States v Grimaud*, 220 US 506, 521 (1911) ("[T]he authority to make administrative rules is not a delegation of legislative power."); *Railroad & Warehouse Commission v Chicago, Milwaukee & St Paul Railroad Co*, 38 Minn 281, 37 NW 782, 788 (1888) (distinguishing impermissible delegation from valid grants of rulemaking authority, which constitute "an authority and discretion, to be exercised in the execution of the law, and under and in pursuance of it"). Note that *Chadha's* position is in some tension with the rationale of *Humphrey's Executor v United States*, 295 US 602 (1935), which sustained the constitutionality of an independent agency by describing the agency's activities, pursuant to a statutory delegation, as "quasi-legislative" rather than purely executive. *Id.* at 628. But rejecting the rationale of *Humphrey's Executor* needn't cast doubt on the constitutionality of the independent agencies. Even if those agencies exercise executive power, it is a separate question whether every official exercising executive power must be removable at will by, or subject to the direction of, the president. For references on that question, see note 133.

¹³ See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 585 (1952) ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitu-

ating rules pursuant to valid statutory authority isn't lawmaking, but law execution. So according to the naïve view a statute that, for example, vested the president with statutory authority to make rules for the regulation of interstate commerce, or to make rules of naturalization, or indeed to make rules on any subject within the enumerated powers of Congress, would not be objectionable on delegation grounds.

The naïve view, however, does *not* say that it is meaningless to speak of a delegation of legislative power. A delegation of legislative power, in one universally recognized sense of that phrase, would arise if Congress or its individual members attempted to cede to anyone else the members' *de jure* powers as federal legislative officers, such as the power to vote on proposed statutes. As Justice Scalia recognized in *Mistretta v United States*,¹⁴ "legislative powers have never been thought delegable" *in the sense that* "Senators and Members of the House may not send delegates to consider and vote upon bills in their place."¹⁵ The reason for that prohibition is that the Constitution creates a detailed process for selecting federal legislators and carefully specifies who the resulting officeholders are; delegation from other federal legislators is not a component of the constitutionally specified process.¹⁶ The naïve view accepts this narrow sense of the nondelegation rule. All that the naïve view denies is that law-execution pursuant to an otherwise valid grant of statutory authority can ever amount to an exercise of legislative power. The power that executive agents wield pursuant to a statutory grant is simply executive power in the core sense.

B. The Delegation Metaphor

Against the naïve view is a more sophisticated account that is often advanced to justify a constitutional nondelegation rule. On this account, sometimes a duly enacted statute can indeed be said to "delegate legislative power" by granting authority to the president. A delegation of legislative power in this broader, more diffuse sense is com-

tion itself"). We say nothing in this Article about when courts should find that the delegate is or is not acting within the bounds of delegated statutory authority. That is a question of statutory interpretation, one that must be answered whether or not one also believes that there is a further question about the constitutional validity of the delegation. One who subscribes to the nondelegation position might, of course, hold that statutory delegations should be narrowly construed to avoid the constitutional question of the delegation's validity; but since we don't subscribe to the nondelegation position, we don't think that statutes should be narrowly construed on that ground, although there might be other reasons for doing so. See notes 137–41 and accompanying text (discussing the canon of avoidance and its relationship to the nondelegation doctrine).

¹⁴ 488 US 361 (1989).

¹⁵ *Id.* at 424–25 (1989) (Scalia dissenting).

¹⁶ Consider *Powell v McCormack*, 395 US 486, 550 (1969) ("[I]n judging the qualifications of its members Congress is limited to the standing qualifications prescribed in the Constitution.").

monly said to occur when the statutory grant of authority lacks an “intelligible principle” that provides a sufficient degree of direction in the exercise of statutory authority. At bottom this is a metaphor: When an intelligible principle is lacking, so that the degree of executive discretion is too great or the scope of authority is too broad,¹⁷ rulemaking in execution of the statute resembles or is akin to legislation, so that the statute “in effect” delegates legislative power to the executive.¹⁸

The source of the delegation metaphor is obscure. Most commonly, proponents of the delegation metaphor point to an argument of Locke’s:

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.¹⁹

But Locke’s epigram is fully consistent with the naïve view and its account of the constitutional bar on delegating legislative power; indeed

¹⁷ In the view of nondelegation proponents, either excessive discretion or excessive breadth, or a combination of the two, may trigger the metaphor. On discretion, see, for example, *Synar v United States*, 626 F Supp 1374, 1387 (1986) (“The search for adequate standards to restrict administrative discretion lies at the heart of every delegation challenge.”); Laurence H. Tribe, 1 *American Constitutional Law* 982 (Foundation 3d ed 2000) (“The open-ended discretion to choose ends is the essence of legislative power; it is *this* power which Congress possesses but its agents necessarily lack and with which its agents could not be endowed by mere legislation.”); Gary Lawson, *Who Legislates?*, 1995 Pub Int L Rev 147, 152 (arguing that a statute effects an improper delegation if “the agency’s discretion is too large . . . so that its authority partakes more of what traditionally would be viewed as legislative power rather than executive power”). On breadth, see, for example, *Whitman v American Trucking Associations*, 531 US 457, 474 (2001):

In the history of the Court we have found the requisite “intelligible principle” lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring “fair competition.”

See also *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 538–40 (1935) (objecting to the economy-wide scope of presidential authority under the National Industrial Recovery Act).

¹⁸ Compare *Zemel v Rusk*, 381 US 1, 7–8 (1965) (upholding against nondelegation challenge a statute providing that “the Secretary of State may grant and issue passports . . . under such rules as the President shall designate and prescribe”), with *id* at 20–22 (Black dissenting) (“It is plain therefore that Congress has not itself passed a law regulating passports; it has merely referred the matter to the Secretary of State and the President in words that say *in effect*, ‘We delegate to your our constitutional power to make such laws regulating passports as you see fit.’”) (emphasis added).

¹⁹ John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* 267, § 141 at 363 (Cambridge 1988) (Peter Laslett, ed). For judicial citations, see, for example, *Bank One Chicago, N.A. v Midwest Bank & Trust Co*, 516 US 264, 280 (1996) (Scalia concurring) (“It has always been assumed that [legislative] powers are nondelegable—or, as John Locke put it, that legislative power consists of the power ‘to make laws, . . . not to make legislators.’”); *Industrial Union Department, AFL-CIO v American Petroleum Institute*, 448 US 607, 672–73 (1980) (Rehnquist concurring) (quoting John Locke).

it is more redolent of the naïve view than of the delegation metaphor. Locke's basic distinction is between "making legislators," on the one hand, and "making laws," on the other. This is exactly the distinction drawn in the naïve view, between the delegation of legislative power by ceding legislative offices to nonmembers of Congress (unconstitutional) and the enactment of statutory grants that vest rulemaking authority in executive agents (constitutional). The former impermissibly "makes legislators," in Locke's terms, while the latter merely "makes laws." The standard view simply overreads the Lockean proviso on delegation.

If the standard, casual citation to Locke doesn't justify the delegation metaphor, what constitutional basis does it have? It is important to note that the delegation metaphor carries a heavy analytic burden. By definition, it can be invoked only to invalidate statutes that fall within Congress's enumerated constitutional powers, including the Necessary and Proper Clause,²⁰ and that make otherwise unobjectionable statutory grants of authority. It is irrelevant that there is no express enumerated power to "delegate." On the naïve view, again, a statutory grant of authority is *not* a delegation.

The burden on nondelegation proponents, then, is to show that the Constitution contains some implicit principle that constrains the

²⁰ US Const Art I, § 8, cl 18 ("Congress shall have Power . . . To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). Gary Lawson argues that the word "proper" in the Necessary and Proper Clause (which he calls the "Sweeping Clause") itself embodies the delegation metaphor. See Lawson, 1995 Pub Int L Rev at 152 (cited in note 17) (arguing that a statutory grant is "improper" if "the agency's discretion is too large"); Lawson, 88 Va L Rev at 347-48 (cited in note 3). Lawson's premise rests on an idiosyncratic reading of the Clause, one which holds that the single word "proper" incorporates structural principles of separation of powers, federalism, and individual rights as limits on Congress's affirmative authority. For a general discussion, see Gary Lawson and Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L J 267 (1993). A more plausible reading because a less dramatic one, is just that the phrase "necessary and proper" is an example, among many in the Constitution, of an internally redundant phrase. Consider other instances in Article I, § 8, such as "Taxes, Duties, Imposts and Excises" (cl 1), "Government and Regulation" (cl 14), or "organizing, arming and disciplining" (cl 16). On this view, "proper" just means "appropriate," reinforcing the Supreme Court's longstanding and capacious interpretation of the companion word "necessary" as meaning "useful" or "conducive to." See *McCulloch v Maryland*, 17 US (4 Wheat) 316, 413-15 (1819).

But even granting Lawson's premise, the conclusion of his argument doesn't follow. "Proper," as Lawson reads it, merely bars congressional authorization to violate principles embodied elsewhere in the Constitution's text, structure, or history. So Lawson's point is contentless; "proper" has no work to do unless the relevant constitutional principle can be traced to some other valid source of constitutional law. What we deny is that there is any such source for the delegation metaphor. The separation of powers won't do, because executive rulemaking pursuant to a statutory grant is just an exercise of executive power, rather than of legislative power. Nor is there any other textual or originalist warrant for the nondelegation metaphor, as we discuss below.

permissible scope or precision of otherwise valid statutory grants. This burden is heavy because constitutional interpreters are properly reluctant to find implicit restrictions on express textual grants of congressional authority. Article I, § 9 crafts an elaborate set of express restrictions, such as the ex post facto and bill of attainder clauses,²¹ suggesting by negative implication that no other limitations should be recognized. To be sure, the reluctance to find additional, implicit restrictions is just presumptive; it may be rebutted by clear evidence from text, structure, and original understanding. The significance of the burden is that it precludes justifying the delegation metaphor by reference to ambiguous inferences from text and structure, by reference to isolated snippets of originalist material, or by reference to vague generalities about the separation of powers—the sort of unwarranted inferences that nondelegation proponents have frequently drawn, as we shall see. All told, there is no clear textual, structural, or historical warrant for rebutting the presumption, and the delegation metaphor cannot carry its burden.

1. Text and structure.

A frequently invoked idea holds that the nondelegation principle is implicit in the Article I Vesting Clause, which provides: “All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.”²² Nondelegation proponents tend to argue, in conclusory fashion, that this clause establishes that statutory grants of authority to the executive can’t be too broad or afford the executive too much discretion—that the delegation metaphor is a necessary, albeit implicit, constitutional principle.

But the Article I Vesting Clause does no such thing; it simply does not speak to the point at issue. The point of contention between the naïve view of delegation, on the one hand, and the delegation metaphor, on the other hand, is the question whether an otherwise valid statutory grant of authority can ever “amount to” a delegation of legislative authority. The naïve view denies that it can; the delegation metaphor affirms that it can, if it confers excessive discretion. The disagreement is not about whether the legislative power is vested exclusively in the Congress—both views agree that it is—but about whether a statutory grant of authority can ever violate the constitutional allocation by effecting a transfer of legislative power. The Vesting Clause does not address that dispute.

²¹ See US Const Art I, § 8, cl 3.

²² US Const Art I, § 1.

A related attempt to justify the delegation metaphor appeals to an essentialist definition of “legislative” and “executive” powers. In a recent argument, Gary Lawson rejects the naïve conception of law-execution on the ground that it allows Congress to “transform law-making into execution . . . by the simple expedient of enacting a statute.”²³ On this view, the “executive Power” that is vested in the president by Article II “[has] substantive content. Something is not an exercise of executive power merely because it is carried out by an executive official.”²⁴ But the content of the “executive” power simply *is* the execution of validly enacted law, including statutes; the substantive limitation is that the executive officer must act within the legal bounds that the statute itself sets. Likewise, where law-execution is at issue it shouldn’t be surprising that Congress can trigger that authority by enacting a statute. Lawson thinks that the naïve view entails that Congress can determine all constitutional questions merely by saying so; he thinks, for example, that, on the naïve view, Congress could enact a statute denying that the Attorney General is an “Officer of the United States” for purposes of the Appointments Clause.²⁵ But that is a strange non sequitur. The naïve view does not somehow hold that Congress may define away the substance of constitutional rules; the meaning of the Appointments Clause is distinct from what Congress says it is. But because the grant of “executive power” and the injunction to the president to “take Care that the Laws be faithfully executed”²⁶ themselves provide rules about law-execution, their content is determined by the “Laws” that Congress has enacted.²⁷

Once these unsuccessful justifications for the delegation metaphor are cleared away, the surrounding text and structure of the Constitution can be seen to support the naïve view of delegation. Analo-

²³ Lawson, 88 Va L Rev at 344 (cited in note 3).

²⁴ *Id.*

²⁵ See *id.*

²⁶ US Const Art II, § 3.

²⁷ Similar problems afflict Michael Rappaport’s critique of the naïve view of delegation. See 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 Tulane L Rev 265, 305–12 (2001). Rappaport appeals in part to statements from Locke, Montesquieu, and others about the separation of legislative and executive power. See, for example, *id.* at 306 (citing Montesquieu’s assertion that “there is no liberty” when “legislative power is united with executive power in a single person”). But as previously discussed, banalities about the separation of powers are too general and abstract to cut between the naïve view and the standard view. The naïve view, like the standard view, holds that the legislative and executive powers are constitutionally separate and must remain so; the difference is that, on the naïve view, rulemaking pursuant to delegated statutory authority does not constitute an exercise of legislative power. Rappaport also attempts to justify the delegation metaphor by appealing to constitutional principles of bicameralism and presentment, federalism, and checks and balances. See *id.* at 307–09. We critique these arguments below, in response to similar arguments by John Manning. See notes 102–06 and accompanying text.

gous delegation problems arise under Article III, but the Supreme Court case law conspicuously lacks any suggestion that the delegation metaphor or the concomitant intelligible principle test constrains congressional delegations to the judges rather than the executive. Consider *Sibbach v Wilson & Co.*,²⁸ which upheld the statute granting the Supreme Court “the power to prescribe, by general rules,” procedural rules for the federal district courts.²⁹ The Court sustained the statute with barely a nod to the nondelegation idea, stating brusquely that “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.”³⁰ It looks very much as though Congress may delegate legislative authority “with virtually no legislative standards at all,” as David Currie puts it,³¹ so long as the delegation runs to the courts. This is a grievous puzzle for the standard view; if Congress has illicitly given away legislative power, why should it matter who the recipient is?

To be sure, nondelegation proponents might be able, with enough pushing and squeezing, to shoehorn *Sibbach* into the line of cases that relax the intelligible principle test when the delegate enjoys a measure of independent constitutional authority over the subject matter.³² Here the suggestion would be that courts enjoy inherent constitutional power over their internal procedures. But vague substantive statutes like the Sherman Act and the Labor Management Relations Act have also been held to delegate broad lawmaking authority to the judges, and surely the judiciary has no inherent constitutional authority to make antitrust law or labor law.³³ In any event the great advantage of the naïve view of delegation is that it dispenses entirely with the need

²⁸ 312 US 1 (1941).

²⁹ *Id.* at 7.

³⁰ *Id.* at 9–10.

³¹ David P. Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* 218 (Chicago 1990). To be sure, the Rules Enabling Act at issue in *Sibbach* limited the scope of the court’s discretion by providing that the judicially-promulgated rules could not “abridge, enlarge, nor modify the substantive rights of any litigant.” 48 Stat 1064 (1934), codified at 42 USC § 151 et seq (2000). Once that side-constraint was satisfied, however, the statute provided no intelligible principle to guide judicial rulemaking within the area of delegated statutory authority.

³² See *Loving v United States*, 517 US 748 (1996) (upholding a delegation to the president of powers related to the constitutional duties of the Commander-in-Chief); *United States v Curtis-Wright Corp.*, 299 US 304 (1936) (upholding a delegation to the president of powers related to constitutional authority in international affairs).

³³ For the Sherman Act, see *National Society of Professional Engineers v United States*, 435 US 679, 688 (1978) (stating that the Sherman Act invites courts to “shape” the statute by “drawing on common-law tradition”). For the Labor Management Relations Act, see *Textile Workers Union v Lincoln Mills*, 353 US 448, 450–51 (1957) (interpreting the Act to confer on the federal courts delegated authority to fashion a common law of national labor relations).

for this sort of troublesome theoretical epicycle. On the naïve view, the only question is precisely the question posed by the *Sibbach* Court: whether the delegate has complied with applicable statutory and constitutional restrictions. If that analysis is good enough for statutory delegations to the courts, it's good enough for delegations to the executive as well.

Finally, we might count as a structural idea the claim that constitutional restrictions on the scope or precision of statutory grants are necessary to ensure that reviewing judges can keep executive agents within the bounds of their authority—or, as the Court put it in *Touby v United States*,³⁴ “the purpose of requiring an intelligible principle is to permit a court to ascertain whether the will of Congress has been obeyed.”³⁵ Although this idea has floated around in constitutional law for a long time, occasionally surfacing in Supreme Court opinions³⁶ and treatises,³⁷ it's hard to see it as anything other than conceptually incoherent. David Currie supplied the refutation by observing that “judicial review is not an end in itself but a means of enforcing [constitutional and statutory] limitations on executive authority; if there are no limitations there is nothing to review.”³⁸ The judicial review justification for the delegation metaphor begs all the relevant questions. If there is no constitutional requirement of an intelligible principle, the legal question for judicial review would be simply whether the agent had complied with the terms of the statutory grant—and that too would amount to “ascertain[ing] whether the will of Congress had been obeyed.”

2. History and precedent.

If the delegation metaphor lacks textual or structural underpinnings, what of its pedigree in originalist sources and in legislative and judicial precedent? We aren't aware of any comprehensive professional treatment of the history of the nondelegation doctrine, so both the historical claims of nondelegation proponents and our discussion here should be taken as tentative and revisable. On the current state of knowledge, however, it looks as though the delegation metaphor lacks roots in history, tradition, and legislative or judicial precedent.

³⁴ 500 US 160 (1991).

³⁵ *Id.* at 168.

³⁶ See, for example, *id.*; *Yakus v United States*, 321 US 414, 426 (1944) (“Only if we could say that there is an absence of standards . . . so that it would be impossible in a proper proceeding to ascertain whether the will of Congress has been obeyed, would we be justified in overriding its choice of means for effecting its declared purpose.”).

³⁷ See Tribe, 1 *American Constitutional Law* at 985 (cited in note 17).

³⁸ David P. Currie, *The Constitution of the Federal Republic of Germany* 131 (Chicago 1994).

a) *Original understanding and early practice.* The earliest expression of a legal rule restricting delegation is the maxim *delegata potestas non potest delegari*—he who holds a delegated power lacks the power to delegate it [in turn].³⁹ This was, at common law, a default rule or interpretive canon for construing agency agreements and other instruments; it forms the basis for Justice Story’s dictum, in a private law case, that “the general rule of law is, that a delegated authority cannot be delegated.”⁴⁰ But it’s an error to think that this common law background supports the modern nondelegation idea.

For one thing, the maxim came with major, ill-defined exceptions built in. As Story himself put it in his commentaries on agency law, “the true doctrine” is that “[delegated] authority is exclusively personal, unless, from the express language used, or from the fair presumptions, growing out of the particular transaction, or of the usage of trade, a broader power was intended to be conferred on the agent.”⁴¹ As far as the constitutional question is concerned those exceptions give away the game. A basic precondition for the delegation question to arise at all is that the relevant statutory grants of executive rule-making power are otherwise authorized by Congress’s explicitly enumerated powers, including the Necessary and Proper Clause. Nondelegation 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. But the more important point is that the *delegata potestas* maxim is just too abstract to cut between the naïve view of delegation, on the one hand, and the standard delegation metaphor, on the other. Both of those views hold in common that the legislature may not redelegate the powers delegated to it by the people, so both views accord with the maxim’s base presumption. The disagreement is over what counts as an illicit delegation, and on that question the common law provides no assistance.

What of the canonical originalist sources: the records of the constitutional convention, the ratification debates, *The Federalist*, and early governmental practice? From the standpoint of the modern obsession with the delegation metaphor, there’s remarkably little evidence that the Framers envisioned such a constraint on legislative authority. But that shouldn’t be surprising: The Framers’ principal concern was with legislative aggrandizement—the legislative seizure of powers belonging to other institutions—rather than with legislative

³⁹ See Duff and Whiteside, 14 Cornell L Q at 168–69 (cited in note 2) (attempting to discover “how the maxim came into existence” and its application in the nineteenth century).

⁴⁰ *Shankland v Washington*, 30 US 390, 395 (1831).

⁴¹ Duff and Whiteside, 14 Cornell L Q at 169 (cited in note 2), quoting Joseph Story, *Commentaries on the Law of Agency* § 14 at 14–15 (Little, Brown 9th ed 1882).

grants of statutory authority to executive agents.⁴² The convention debates contain one mention of delegation, a motion by Madison that the president be given power “to execute such other powers, not Legislative nor Judiciary in their nature, as may from time to time be delegated by the national Legislature.”⁴³ The motion was defeated,⁴⁴ giving rise to the usual problem of discerning the grounds on which the proposal was rejected. A common view is that it was rejected as unnecessary,⁴⁵ the authority being already implicit in the constitutional scheme; if so, then the disposition suggests, if anything, that legislative delegation to the executive was viewed as unproblematic.

The other canonical sources either provide less guidance or affirmatively undermine the delegation metaphor. The ratification debates contain nothing of any real relevance.⁴⁶ *The Federalist* contains nothing but a passing reference, an irrelevant discussion of the delegability of *presidential* powers.⁴⁷ And provisions of contemporaneous state law treated delegation as constitutionally unproblematic.⁴⁸ The overall picture is that the founding era wasn't concerned about delegation. As we shall see, the delegation metaphor flowered only much later in the nineteenth century.

The only remotely relevant originalist evidence that nondelegation proponents can muster is a handful of isolated quotations from the post-ratification period. Besides an occasional objection to expansive delegations raised by members of Congress,⁴⁹ about which more below, there is only a single quote from Madison, to the effect that “[i]f nothing more were required, in exercising a legislative trust, than a general conveyance of authority—without laying down any precise rules by which the authority conveyed should be carried into effect—

⁴² See James O. Freedman, *Delegation and Institutional Competence*, 43 U Chi L Rev 307, 309 (1976) (reviewing the Framers' beliefs about legislative delegations).

⁴³ Max Farrand, ed, 1 *The Records of the Federal Convention of 1787* 67 (Yale 1911).

⁴⁴ See *id.* at 67–68.

⁴⁵ See Freedman, *Delegation* at 308 (cited in note 42) (“The motion was defeated as unnecessary.”); Davis, 1 *Administrative Law Treatise* § 2.02 at 79 (cited in note 2) (“[Madison's motion] was defeated as unnecessary.”). But see John L. FitzGerald, *Congress and the Separation of Powers* 35–37 & n 88 (Praeger 1986) (questioning the conventional view, but failing clearly to specify an alternative account).

⁴⁶ 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.

⁴⁷ See *Federalist* 42 (Hamilton), in Benjamin Fletcher Wright, ed, *The Federalist* 473–75 (Belknap 1961).

⁴⁸ See Davis, 1 *Administrative Law Treatise* § 2.02 at 79 n 14 (cited in note 2) (“Delegation by legislatures before 1787 was common.”).

⁴⁹ See David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 256 (Chicago 1997) (describing objections to the proposed Alien Act by Representative Edward Livingston on the ground that the bill “would grant the President a combination of legislative, executive, and judicial powers”).

it would follow that the whole power of legislation might be transferred by the legislature from itself.”⁵⁰ The problem is that the Madison quote wasn’t delivered until 1799, and even then not in the Congress or any other federal forum; it was delivered in a debate on the Alien Acts in the Virginia House of Burgesses. By that time, consistent early practice had already decisively established the permissibility of statutory grants to the president unchecked by any apparent intelligible principle. Consider the following statutes enacted by the First or Second Congress:⁵¹

- A statute providing for military pensions “under such regulations as the President of the United States may direct.”⁵²
- A statute authorizing executive officers to license “any proper persons” to trade with Indian tribes “under such rules and regulations as the President may prescribe.”⁵³
- A statute authorizing the courts to “make and establish all necessary rules for the orderly conducting of business in the said courts, provided such rules are not repugnant to the laws of the United States.”⁵⁴
- A statute authorizing the Attorney General and the Secretaries of State and War to issue patents “if they shall deem the invention or discovery sufficiently useful or important.”⁵⁵
- A statute authorizing presidential commissioners to “purchase or accept such quantity of land on the eastern side of the [Potomac] . . . as the President shall deem proper . . . and according to such plans as the President shall approve, the said commissioners . . . shall . . . provide suitable buildings for the accommodation of Congress and . . . for the public offices of the government of the United States.”⁵⁶
- A statute authorizing the Secretary of the Treasury to “mitigate or remit fines and forfeitures in designated circumstances, without requiring him to mitigate or remit.”⁵⁷

⁵⁰ Jonathan Elliot, ed, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 560 (Burt Franklin 1888).

⁵¹ We have compiled this list of statutes from the extremely thorough discussions in Krent, 94 *Colum L Rev* at 738–39 (cited in note 2) (recounting early delegations) and Kenneth Culp Davis, *A New Approach to Delegation*, 36 *U Chi L Rev* 713, 719–20 (1969) (same).

⁵² Act of September 29, 1789, 1 Stat 95. See also Act of March 3, 1791, 1 Stat 218 (reauthorizing pensions to be paid out of the treasury “under such regulations as the President of the United States may direct”).

⁵³ Act of July 22, 1790, 1 Stat 137, 137. David Currie describes this statute as “startling from the perspective of the late twentieth century” by virtue of “the breadth of rulemaking power given to the President.” Currie, *The Constitution in Congress: The Federalist Period* at 86 (cited in note 49).

⁵⁴ Act of September 24, 1789, 1 Stat 73, 83.

⁵⁵ Act of April 10, 1790, 1 Stat 109, 110.

⁵⁶ Act of July 16, 1790, 1 Stat 130, 130.

⁵⁷ Davis, 36 *U Chi L Rev* at 719 (cited in note 51) (citing Act of May 26, 1790, 1 Stat 122, 123).

◦ A statute that “authorized the President to fix the pay, not more than prescribed maxima, for military personnel wounded or disabled in the line of duty.”⁵⁸

On both originalist and Burkean grounds, these and other statutes powerfully support the naïve view of delegation; they presuppose that the executive may receive statutory grants of rulemaking discretion not constrained by any further intelligible principle or congressional direction. Originalists believe that the acts of early Congresses possess or confer a special originalist imprimatur, providing important founding era evidence of the public understanding of the Constitution.⁵⁹ Burkeans believe, as did Madison, Marshall, and Frankfurter, that consistent early practice, notably including legislative precedent, can resolve constitutional ambiguities or even put controlling glosses on constitutional text.⁶⁰ On either count, the delegation metaphor finds little support in the founding era, while the naïve view finds a great deal.⁶¹

⁵⁸ *Id.* (citing Act of April 30, 1790, 1 Stat 119, 121).

⁵⁹ See *Printz v United States*, 521 US 898, 905 (1997) (Scalia) (“[E]arly congressional enactments provide contemporaneous and weighty evidence of the Constitution’s meaning.”) (internal quotations and citations omitted). For Gary Lawson’s contrary view that early congressional enactments constitute post-ratification legislative history that provides only weak evidence of contemporaneous public understanding, see note 61.

⁶⁰ For Madison, see H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv L Rev 885, 939 (1985) (“[Madison] consistently thought that ‘*usus*,’ the exposition of the Constitution provided by actual governmental practice and judicial precedents, could ‘settle its meaning and the intention of its authors.’”) (quoting a letter from Madison to John Davis, circa 1832). For Marshall, see *McCulloch v Maryland*, 17 US (17 Wheat) 316, 410 (1819):

[A] doubtful [constitutional] question . . . if not put at rest by the practice of the government, ought to receive a considerable impression from that practice. An exposition of the constitution, deliberately established by legislative acts, on the faith of which an immense property has been advanced, ought not to be lightly disregarded.

For Frankfurter, see *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 610 (1952) (Frankfurter concurring):

It is an inadmissibly narrow conception of American constitutional law to confine it to the words of the Constitution and to disregard the gloss which life has written upon them. In short, a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned, engaged in by Presidents who have also sworn to uphold the Constitution, making as it were such exercise of power part of the structure of our government, may be treated as a gloss on “executive Power” vested in the President by § 1 of Art. II.

⁶¹ Reviewing a similar list of statutes compiled by Davis, 36 U Chi L Rev at 719–20 (cited in note 51), Lawson objects generally to drawing originalist inferences from early statutes, describing them as “post-enactment legislative history” that provide “at best weak evidence of original meaning.” Lawson, 88 Va L Rev at 397–98 (cited in note 3). And Lawson objects in particular that some (although not all) of the listed statutes can be said to satisfy the intelligible principle test, so that they are consistent with the delegation metaphor anyway. See *id.* See also Rappaport, 76 Tulane L Rev at 310–11 (cited in note 27) (making similar arguments).

The general objection may or may not be methodologically sound originalism, but it’s odd to offer it in support of the delegation metaphor, for it powerfully supports the naïve view of delegation. All of the affirmative originalist evidence for the delegation metaphor—that is, the few

b) *Judicial decisions.* What is true of legislative precedent from early Congresses is also true of early judicial precedent; in the latter setting, as in the former, there is nothing to indicate that the nondelegation metaphor can boast a venerable pedigree. The modern literature occasionally suggests, incautiously, that “[f]or almost two centuries, the Supreme Court has understood [the Article I, § 1 Vesting Clause] to limit the extent to which, or the conditions under which, Congress may delegate its lawmaking power to executive or administrative officials.”⁶² That view is false. The nondelegation metaphor, rather, was a legal theory of uncertain provenance that skulked around the edges of nineteenth-century constitutionalism, and wasn’t clearly adopted by the Court until 1892.

Commentators sometimes attempt to date the judicial appearance of the standard nondelegation position to as early as 1813, in a Marshall Court decision known as *The Brig Aurora*.⁶³ But the case stands for no such proposition. A federal statute made the lifting of a maritime embargo conditional on a presidential finding that other nations were respecting American neutrality. One of the lawyers argued, without supporting references, that by making the statute’s operation contingent on subsequent executive action Congress had unconstitutionally delegated its legislative authority.⁶⁴ The Court merely observed that “we can see no sufficient reason, why the legislature should not exercise its discretion [in providing for an embargo], either expressly or conditionally, as their judgment should direct.”⁶⁵ Nothing in *The Brig Aurora* endorses the delegation metaphor; if anything, the

snippets from Madison and early legislators discussed above—is also post-ratification material. To take Lawson’s general objection seriously is to wipe out all of the affirmative founding-era evidence that nondelegation proponents possess. (Note once again that generalities about the separation of powers from Locke, Montesquieu, Madison, and other theorists don’t count; those generalities are equally consistent with the naïve view, which holds that the exercise of statutory grants of authority by executive officers is constitutionally permissible law-execution, not impermissible “legislation.”) Moreover, on the standard textualist grounds to which Lawson’s general objection appeals, isolated quotations from the early period are far less weighty than actual statutory enactments; the latter presumptively embody a judgment by the whole Congress, not just by individuals, about the permissibility of delegation.

The specific objection cuts no ice either. Nondelegation proponents may chip away at the early statutes as much as they please, adding ingenious epicycles to square the statutes with the theory, but the cumulative impression these statutes create is that early Congresses just didn’t take constitutional objections to delegation very seriously. You can’t beat something with nothing; in the absence of any affirmative evidence for the nondelegation position, that conclusion should be decisive for principled originalists.

⁶² Lisa Schultz Bressman, *Schechter Poultry at the Millennium: A Delegation Doctrine for the Administrative State*, 109 Yale L J 1399, 1403 (2000).

⁶³ 11 US (7 Cranch) 382 (1813).

⁶⁴ See *id.* at 385–86.

⁶⁵ *Id.* at 388.

Court's terse dismissal of the claim suggests the absence of constitutional limits on statutory grants to the executive.

The Court's next discussion of the nondelegation theory didn't occur until 1825, well after the founding era, in the famous case of *Wayman v Southard*.⁶⁶ Only part of the case is of interest here; that part involved the constitutionality of the Conformity Act, a statute that authorized the federal courts to adopt rules to govern their own processes, including the enforcement of judgments. The party contesting the statute's constitutionality argued that, at least as applied to matters outside the courthouse, such as the seizure of property in execution of judgments, the grant of rulemaking authority to the courts amounted to "a delegation of legislative authority which Congress . . . has not the power to make."⁶⁷ In a famous discussion, Marshall's opinion for the Court proclaimed:

It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others, powers which the legislature may rightfully exercise itself. . . . The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.⁶⁸

Modern commentators have sometimes read the last sentence of this passage as though Marshall were attempting a turgid explication of the "intelligible principle" test, and other brief asides in the opinion seem to support that view.⁶⁹ But when read in the context of the whole passage the last sentence isn't talking about the modern delegation metaphor. It is instead claiming that the powers of Congress fall into two categories: (1) "exclusive" powers and (2) powers that Congress may choose either to exercise itself or to delegate to its agents. On this account, the constitutional restriction isn't the modern nondelegation doctrine or any of its variants. The constitutional restriction is a quite different theory of nondelegable or exclusive powers, a theory that occasionally surfaces in modern treatises and lawyers' arguments only to

⁶⁶ 23 US (10 Wheat) 1 (1825).

⁶⁷ *Id.* at 42.

⁶⁸ *Id.* at 42–43.

⁶⁹ See, for example, *Wayman*, 23 US at 45 ("The power given to the Court . . . is a power to vary minor regulations, which are within the great outlines marked out by the legislature in directing the execution."); *id.* at 46 ("[T]he 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.").

be decisively rejected by the courts.⁷⁰ In this light, the last quoted sentence clearly doesn't say that the "line" courts must draw is, as the modern doctrine would have it, a line between excessively discretionary grants of authority and adequately cabined grants of authority. Rather, Marshall's line runs between powers that may not be delegated in any degree ("subjects, which must be entirely regulated by the legislature itself"⁷¹) and those that may. Nor is there any hint that, once a power has been sorted into the latter category, there exists some independent intelligible principle requirement. If there were such a separate requirement, of course, it would have been extremely odd that the Court upheld the statute, which looks very like a blank-check delegation of rulemaking authority to the federal courts.

The critical passage from *Wayman v Southard*, then, adopts a different theory than the one modern nondelegation proponents have read into it. At most the opinion as a whole is ambiguous; the upshot is that the pedigree of the modern delegation metaphor can't even be pushed back as far as 1825. Indeed, the modern view doesn't clearly surface in *any* court until state courts of the mid-century began hearing nondelegation challenges to referenda schemes and local-option laws.⁷² The doctrine's appearance in a Supreme Court opinion came as late as 1892, when dictum in *Field v Clark*⁷³ not only announced that "Congress cannot delegate legislative power to the President," but also cashed out that principle by suggesting, albeit in dictum, that statutory grants of authority might "in [a] real sense, invest the President with the power of legislation" by leaving the president undue "discretion in the premises."⁷⁴

From the standpoint of the naïve view of delegation, the objectionable move here isn't the nondelegation principle, but the way in which it is cashed out. The naïve view also holds that legislative power may not be delegated to the president, but it holds that a statutory grant of rulemaking authority never constitutes a delegation. From that perspective, *Field's* reference to delegation "in [a] real sense"⁷⁵ gives away the game. It is an admission that the statutory grant was not a delegation in the *legal* sense. After all, Congress didn't delegate to the president its own statute-enacting power; rather, it exercised precisely that power. The *Field* Court fell victim to an unexamined

⁷⁰ See Part III.A for a discussion of nondelegable powers.

⁷¹ *Wayman*, 23 US at 43.

⁷² See Louis L. Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 Colum L Rev 561, 562-66 (1947) (discussing mid-nineteenth-century nondelegation claims in the state courts); Duff and Whiteside, 14 Cornell L Q at 189-90 (cited in note 2) (discussing cases in Rhode Island and Virginia).

⁷³ 143 US 649 (1892).

⁷⁴ *Id* at 692-93.

⁷⁵ *Id* at 692 (emphasis added).

metaphor, a metaphor that continued forward into the twentieth century and eventuated in the Court's adoption of the intelligible principle test in 1928, in *J.W. Hampton, Jr., & Co v United States*.⁷⁶

It's also true that none of these cases, including *Field* and *Hampton*, actually invalidated a statute on nondelegation grounds; the first and last year in which the Court did so was 1935, so that, as Cass Sunstein notes, the nondelegation doctrine has had only one good year and over two hundred bad ones.⁷⁷ And even at the level of theory, or of dictum, the nondelegation doctrine appears in the U.S. Reports only by virtue of lawyers' arguments and dismissive judicial asides until the end of the nineteenth century. The delegation metaphor, far from being a pillar of the structural constitution, looks like a marginal constitutional theory that came and went in a few decades on either side of the turn of the twentieth century.

It's worth stepping back from the minutiae to see the picture as a whole. We have seen that the delegation metaphor lacks both an originalist pedigree and a solid footing in early precedent and tradition. Indeed, treatises of the early to middle part of the nineteenth century don't discuss it either; there's nothing about the delegation metaphor in Story, Kent, or Tucker's Blackstone, apart from generalities about the separation of powers (generalities that, as we have seen, are consistent with either the naïve view or the delegation metaphor).⁷⁸ Based on our current knowledge, pending full treatment by professional historians, the best conclusion is that the delegation metaphor looks like a constitutionally marginal theory that flourished only in the latter part of the nineteenth century, and then only until the New Deal.

That conclusion makes the legal validity of the delegation metaphor an easy question. In light of the heavy constitutional burden that

⁷⁶ 276 US 394, 409 (1928) ("If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.").

⁷⁷ Sunstein, 67 U Chi L Rev at 322 (cited in note 2). This point refutes any Burkean claim that the nondelegation doctrine is now an entrenched feature of our public law by virtue of a consistent course of judicial decisions. But see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U Chi L Rev 877, 892-93 (1996) (justifying, on Burkean grounds, a nontextualist and nonoriginalist approach to constitutional law that treats accumulated precedent as constitutive of constitutional meaning). Our tradition, or the Supreme Court's tradition, has been to (almost always) reject nondelegation challenges, while commentators repeatedly proclaim the death of the nondelegation doctrine. That is hardly a sufficiently robust and settled tradition to underwrite an implied restriction on Congress' exercise of its express textual powers.

⁷⁸ See generally St. George Tucker, *Blackstone's Commentaries with notes of reference to the constitution and laws of the federal government of the United States, and of the Commonwealth of Virginia* (Lawbook Exchange Reprint 1996); Joseph Story, *Commentaries on the Constitution of the United States* (Carolina Academic Reprint 1987); James Kent, *Commentaries on American Law 1826-1830* (Little, Brown 12th ed 1896); William Rawle, *A View of the Constitution of the United States of America* (PH Nicklen 2d ed 1829).

rests upon nondelegation proponents to justify an important implied restriction on congressional power, the striking absence of textual support and founding-era evidence for the delegation metaphor is constitutionally dispositive. The delegation metaphor can be justified, if at all, only by functional arguments about the consequences, under the conditions of modern government, of statutory grants of discretionary authority to the executive. We turn to those arguments in Part II.

3. The slippery slope.

A brief word about one of the most popular nondelegation arguments: the slippery slope, down which the horribles parade. What of the possibility that Congress might “vote all legislative power to the President and adjourn *sine die*?”⁷⁹ It wouldn’t be quite that bad, of course; the Constitution requires the Congress to assemble at least once in every year,⁸⁰ and under current constitutional assumptions any such delegation would be revocable by a subsequent statute; Congress may not bind the legislative authority of its successors.⁸¹ The president could, of course, veto the subsequent statute, so that two-thirds of both houses of Congress would be necessary to revoke the delegation, but that is true whether or not the statute contains an intelligible principle, and indeed whether or not the statute delegates authority at all, so the existence of presidential veto authority doesn’t supply a well-tailored justification for the nondelegation doctrine.

But it is true that the naïve view of delegation commits us to defending the constitutionality of, for example, a statute granting the president statutory authority to make rules on any subject within the constitutional powers of Congress. If this is too fanciful, consider the example beloved of nondelegation proponents: the Reichstag’s 1933 decision to enact a statute authorizing Adolf Hitler to rule by decree.⁸² How do we know it couldn’t happen here? (And maybe it already did, depending on how broad we take the National Industrial Recovery

⁷⁹ *Mistretta*, 488 US at 415 (Scalia dissenting).

⁸⁰ See US Const Art I, § 4, cl 2.

⁸¹ See *United States v Winstar Corp*, 518 US 839, 873 (1996) (“[A statute] is not binding upon any subsequent legislature.”), quoting *Manigault v Springs*, 199 US 473, 487 (1905). We have argued elsewhere that this assumption is erroneous. See generally Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665 (2002). Hence, we do not rely on the argument from revocability to minimize the possible consequences of legislative delegations. Those who disagree with our argument about legislative entrenchment, however, should take into account that the revocability of delegatory legislation leaches much of the starch from the sort of horrible hypotheticals commonly advanced to support a nondelegation rule.

⁸² See Currie, *The Constitution in the Supreme Court: The Second Century, 1888–1986* at 219 (cited in note 31) (comparing the 1933 legislation to the National Industrial Recovery Act).

Act, invalidated on nondelegation grounds in 1935,⁸³ to have been.) Shouldn't constitutional law hold some sort of nondelegation rule in reserve against that eventuality?

All this strikes us as a flawed form of argument on at least four grounds.

(1) It won't happen. Despite the breadth in the modern era of congressional grants of statutory authority to the executive, a dominant fact of modern government is that Congress and the president are institutional rivals along many dimensions. Distrust of executive agents frequently causes Congress to attempt to control the smallest details of executive action, as it did in the hyper-detailed environmental legislation of the 1960s and 1970s.⁸⁴ No serious person compares Roosevelt to Hitler.

(2) If it did happen, it might not be bad. The legislatures of many liberal democracies around the world have granted the executive broad rulemaking powers, of varying scope, duration, and legal effect.⁸⁵ Sometimes, of course, these practices or episodes represent executive usurpation of legislative authority. Sometimes they represent a sensible social response to some crisis—war, economic chaos, or social unrest—best resolved by executive processes. Sometimes, less dramatically, they represent a reasonable judgment by the legislature that the opportunity costs of controlling policy formulation are too high, in light of other things legislatures want to do. Even if Congress granted the president broader rulemaking powers than it already has—thereby sliding the rest of the way to the bottom of the slope—there is little reason to suppose, *ex ante*, that the grant would represent legislative abdication to an engorged presidency, rather than a desirable response to contemporary social needs. Much more could be said about this essentially empirical and predictive question; Part II amplifies the good reasons supporting delegation to executive agents. Suffice it to say here that the current literature in comparative politics finds that executive usurpation or legislative abdication is rarely the best explanation for broad legislative grants of authority to the executive.⁸⁶

(3) If it did happen, and it were bad, the nondelegation doctrine couldn't prevent it anyway. If an Adolf Hitler came within striking distance of attaining power in the modern United States, it would presumably be unwise to rely on the nondelegation doctrine, or any other

⁸³ See *A.L.A. Schechter Poultry Corp v United States*, 295 US 495, 541–42 (1935) (finding the authority conferred under the Act to be an unconstitutional delegation of legislative power).

⁸⁴ See, for example, The Clean Air Act, 42 USC § 7401 et seq (1994).

⁸⁵ See generally John M. Carey & Matthew Soberg Shugart, eds, *Executive Decree Authority* (Cambridge 1998) (collecting comparative data).

⁸⁶ See *id.* (“[T]he conventional interpretation by which [executive] decree is regarded as tantamount to executive usurpation of legislative authority has frequently been overstated.”).

esoteric legal principle, as the final barrier. Far better to rely on a countervailing power with real muscle, like an opposing political party or the army. Note that the *Schechter Poultry* decision is not a plausible example of the Supreme Court invoking the nondelegation doctrine to save the nation from a slide into executive tyranny. The National Industrial Recovery Act had already lost political support by the time the Court heard the nondelegation challenge; the Court's decision to invalidate the statute amounted to little more than piling on. There's little reason to think that the Court would ever enforce the doctrine against a nationwide majority convinced that a broad grant of statutory authority to the executive was necessary to national survival.

(4) In general, developing rules with a view to improbable political scenarios is poor constitutional design. No engineer builds a house capable of resisting a meteor strike; the house would be a bunker unusable for its primary purpose. Tailoring constitutional rules to the improbable case, rather than the usual case, has the same defects. Constitutional law should instead be tailored to the run of cases that might occur under plausible political circumstances;⁸⁷ to tailor it to the most lurid and feverish of hypotheticals is to distort its function. On both methodological and political grounds, there's no reason to fear a slide down the slippery slope, and no reason to twist the constitutional structure out of shape merely to provide against an unlikely political disaster.

II. DELEGATION IN POLITICAL AND ECONOMIC THEORY

The burden of Part I was showing that a nondelegation rule lacks any moorings in formal constitutional sources. For some, that is conclusive; nothing more need be said about the consequences of delegation or of a nondelegation rule. For others, however, constitutional argument properly includes consequentialist and functional considerations; many nondelegation proponents appeal to those considerations as well. In this Part we add a consequentialist analysis to the formal argument of Part I. We argue here that there is no successful consequentialist or functional justification for recognizing constitutional restrictions on statutory grants of authority to executive agents.

Initially, we need to clear up a terminological confusion created by the literature's metaphoric use of the word "delegation." In debates about the nondelegation doctrine, supporters and opponents alike usually use the word "delegation" to include any transfer of authority from Congress to executive agents. We have avoided this usage because under our constitutional argument a statutory grant of authority

⁸⁷ See John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 183 (Cambridge 1980).

to executive agents is formally not a delegation of legislative power under the Constitution. The executive's use of that authority is an instance of executive power, not of legislative power. In this Part, however, we will adopt the usage of the literature, for to do otherwise would require labored verbal manipulations. Thus, when we use the word "delegation," we mean to include statutory grants of authority to executive agents.

Critics of delegation argue that Congress delegates for nefarious purposes—to make transfers to interest groups and to avoid responsibility for difficult political decisions. These arguments appeal to widespread conspiratorial intuitions about government, and so before addressing the arguments directly we should emphasize the peculiarity of attacking this particular instrument of government power, whatever one's views are about the motives of elected officials.

Delegation is ubiquitous in public and private life. The most familiar example is the employment relationship. When managers delegate to employees, they expect that the employees will specialize in some area for which the managers have responsibility. Delegation is just as common in government: mayors, governors, judges, agency heads, police captains, and countless other officials delegate power to subordinates.

The ubiquity of delegation is due to the need for (a) authority and (b) division of labor, in any complex institution, whether public or private. All institutions must take direction from a person, or a small group of people, but the leader of an institution cannot possibly perform all of its tasks directly. Instead, the leader or principal delegates broad authority to agents. The principal sometimes controls agents by giving them detailed instructions but more often by giving them a vague goal—"maximize profits" or "sell lots of widgets"—and then rewarding them on the basis of an *ex post* evaluation of the agent's performance.

Although principals sometimes give bad instructions to agents, or fail to discipline them properly, no one thinks that delegation has bad effects in itself. No one argues that shareholders should not delegate; people argue about whether existing compensation packages provide the right kind of incentives for executives. No one argues that the mayor should not delegate; they argue about whether the mayor has delegated to the right people, too much or too little. The reason no one makes these arguments, except in rare cases, is that the value of delegation is too widely understood; it is simply an aspect of the division of labor that underlies both market and nonmarket institutions.

Given the self-evident value of delegation, we should not be surprised to find that the United States Congress delegates its powers—using "delegate" in the conventional sense of enacting statutes that

grant agents legal authority. The critics of delegation need to explain why delegation by Congress raises special functional objections, objections that cannot be applied generally to all congressional action, and objections that cannot be applied to the countless routine delegations that occur in any complex institution.

The critics of delegation have advanced numerous arguments, yet they collapse into two classes. One class of argument takes social welfare as its maximand: A Congress that can delegate will produce less welfare than a Congress that cannot delegate. The other class of argument focuses on democratic values: A Congress that can delegate is less democratic than a Congress that cannot delegate. We examine these arguments below.

A. Welfare Arguments

The welfarist argument by the critics of delegation boils down to the claim that social welfare would be greater if Congress made all the specific policy choices rather than delegating that power to agencies. This claim is like an argument that the owner of a corporation should design the corporation's products rather than hiring engineers and marketing experts. The owner knows that the agents might make specific choices that he would not make himself, but by rewarding the agents on the basis of an *ex post* evaluation of performance, he ensures that they act roughly in his interest while at the same time exploiting their expertise and the other benefits of a division of labor.

What makes Congress different from this corporation? One possibility is that Congress's goals are objectionable. If the corporation produces illegal products, we might want to prevent the owner from delegating power. But we really want the corporation to cease production. Similarly, if Congress's goals were wholly objectionable—if it transferred wealth to interest groups and did nothing for the public—then removing any tool at its disposal could only make the public better off. Constitutional prohibition of delegation would be justified, but so would constitutional interference with any congressional action, to the extent that we would simply want judges to refuse to enforce all statutes.⁸⁸

If we start, then, with the presumption that Congress does some good, and thus should have some power, we can justify a nondelegation doctrine only by explaining what is special about delegation, what

⁸⁸ As Mashaw points out, see Mashaw, *Greed* at 144–45 (cited in note 2), this is the problem with Peter H. Aranson, Ernest Gellhorn, and Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *Cornell L Rev* 1, 7 (1975) (proposing “a renewed nondelegation doctrine” as a tool to “deprive the legislature of its ability to shift responsibility and to create lotteries in private benefits through regulation”).

makes it especially bad? There is only one basic proposal on the table, though many variations, and it is this: When Congress delegates, it conceals political transfers from the public, making it more difficult for the public to interfere with these transfers. How does it do this? Through delegation Congress authorizes agencies to make the transfers for it. Courts and other institutions cannot interfere with the agencies' transfers because the agencies are given vague grants of authority. Citizens have no power to monitor the agencies' transfers because agencies' behavior is more secretive than Congress's, nor can they punish agencies because the agencies are insulated from the political process. Agency heads do not stand for reelection; agency staffs cannot be disciplined.

This argument assumes, implausibly, that Congress wants to give away its power to other institutions. If, as is more likely, Congress wants to exert its power through the agencies, and retains power to discipline agencies that do not make the right transfers to the right interest groups—those that have influence on Congress—then the public can ensure that agencies act in the public interest to the same extent that it can ensure that Congress serves the public interest when Congress passes nondelegatory statutes. If citizens have the capacity to sanction politicians who make bad policy in statutes, they should also have the capacity to sanction politicians who fail to punish agencies that make bad policy, or who delegate authority to such agencies in the first place.⁸⁹ Imagine that citizens obtain all their information from the media, and journalists have only enough time and expertise to monitor congressional debates, and not enough to monitor agency decisionmaking. When Congress initially delegates authority to an agency, the media should report to the public that Congress has created a mechanism that will make transfers to interest groups. Clearly, such a statute is bad—just as bad as a statute that directly makes a transfer to interest groups—and the public should punish Congress for delegating as much as it punishes Congress for enacting the direct transfer.⁹⁰

This argument remains valid even if we accept the assumption that Congress really does not want much authority because then it has to make difficult decisions about to whom it should make transfers, when it would rather accumulate political goodwill by engaging in constituent service.⁹¹ Thus, Congress delegates authority to agencies

⁸⁹ Mashaw makes essentially this argument. See Mashaw, *Greed* at 146–47 (cited in note 2).

⁹⁰ See Farber and Frickey, *Law and Public Choice* at 81–82 (cited in note 2) (emphasizing that monitoring technology is endogenous, and should improve as agencies acquire more power).

⁹¹ See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum L Rev 452, 497 & n 204 (1989); Aranson, Gellhorn, and Robinson, 68 Cornell L Rev at 33 (cited in note 88).

without monitoring them, in effect holding a “regulatory lottery,” in the words of Aranson and his coauthors.⁹² The problem with this theory is that interest groups and constituents who pick the wrong ticket in the regulatory lottery will lobby Congress to reverse the agency’s decisions, and indeed even to retract the delegation. Those who benefit from the agency decisions will lobby Congress to maintain the status quo.⁹³ Congress will have to answer the hard question of whether to interfere with its agency, and so it cannot divest itself of the responsibility for making difficult decisions. Indeed, both the winners and the losers will realize *ex ante* that the delegation might benefit or harm them, and so they will lobby *ex ante* about the delegation as vigorously as they would about any other kind of legislation.

Critics of delegation argue that the evidence shows that delegation results in transfers to interest groups. In fact, the evidence shows that interest groups influence both nondelegating legislation produced by Congress and regulation promulgated by agencies.⁹⁴ The critics of delegation need to show that regulations benefit interest groups more than nondelegating legislation does. They have not provided such evidence.⁹⁵

Another version of the welfarist argument stresses the virtues of political competition. Robert Cooter argues that “interbranch delegation can concentrate state powers,” resulting in “political cartels.”⁹⁶ The analogy to market competition is insufficiently developed, however. Economics frowns on cartelization but not on cooperation. If the relevant “producer” in the “political market” is the politician, then the nondelegation doctrine arbitrarily bars an important form of cooperation among members of the legislative and executive branches. Cooter seems to have something else in mind, but we do not know what. When the legislature delegates power to an agency, it does give some authority to the executive, but this is nothing like firms organizing a

⁹² Aranson, Gellhorn, and Robinson, 68 Cornell L Rev at 61 (cited in note 88).

⁹³ This happens time and again: witness the response to OSHA’s ergonomics regulation. See, for example, Steve Lohr, *Administration Balks at New Job Standards on Repetitive Strain*, NY Times D1 (June 12, 1995).

⁹⁴ See, for example, David Schoenbrod, *Power without Responsibility: How Congress Abuses the People through Delegation* 4–9 (Yale 1993) (discussing the influence of SunKist on the Department of Agriculture’s regulation of the navel orange market). See generally George J. Stigler, *The Theory of Economic Regulation* in George J. Stigler, ed, *Chicago Studies in Political Economy* 209, 214–17 (Chicago 1988) (discussing interest group influence on legislation).

⁹⁵ Indeed, the evidence showing that regulation reflects interest group pressure is mixed. See Steven P. Croley, *Theories of Regulation: Incorporating the Administrative Process*, 98 Colum L Rev 1, 52–56 (1998) (finding a general lack of specific examples and empirical evidence of legislature and agency capture by interest groups). But we do not need to take a position in this debate; our more limited point is that there is no evidence that delegating legislation produces worse outcomes than nondelegating legislation does.

⁹⁶ Robert D. Cooter, *The Strategic Constitution* 89 (Princeton 2000).

cartel. A closer analogy to cartelization is the grouping together of politicians into a party. If this practice is tolerable from the perspective of political competition, then surely delegation is. The concept of political competition might play an important role in a theory of democracy, but it is too amorphous to provide guidance for evaluating the nondelegation doctrine.

B. Democratic Arguments

Some critics of delegation argue that delegation violates democratic values. Their main argument focuses on accountability. Suppose that Congress delegates certain powers to an agency. Those who want to influence policy will make arguments to the agency, not to Congress. Those who are disappointed by the agency's decisions will appeal to the agency, not to Congress. Members of Congress are thus not accountable for political outcomes under their responsibility. But in a well-functioning democracy those who are ultimately responsible for policy should be directly accountable to those who are affected by it.⁹⁷

The problem with this argument is that Congress *is* accountable when it delegates power—it is accountable for its decision to delegate power to the agency. If the agency performs its function poorly, citizens will hold Congress responsible for the poor design of the agency, or for giving it too much power or not enough, or for giving it too much money or not enough, or for confirming bad appointments, or for creating the agency in the first place. And, as noted above, Congress is accountable not only in this derivative sense. Congress retains the power to interfere when agencies make bad decisions; indeed, it does frequently.⁹⁸

David Schoenbrod's variant of this argument emphasizes the ability of Congress to claim victory over some difficult problem (for example, pollution) by enacting a vague statute that seems to tackle the problem (the Clean Air Act) but in fact delegates authority to an agency that will have to make the difficult compromises (between clean air and economic growth).⁹⁹ But as Mashaw points out, Congress can engage in happy talk about nondelegating statutes as well.¹⁰⁰ Either citizens and the media believe it or not; there is nothing special about delegation per se. If members of Congress can be taken to task at the next election for saying that welfare reductions will help poor

⁹⁷ See Theodore J. Lowi, *Two Roads to Serfdom: Liberalism, Conservatism, and Administrative Power*, 36 Am U L Rev 295, 296–98 (1987) (arguing that delegation undermines political accountability and the regulation of power, which were the Framers' main concerns); Ely, *Democracy* at 131–34 (cited in note 87).

⁹⁸ See notes 109–111.

⁹⁹ See Schoenbrod, *Power Without Responsibility* 90–93 (cited in note 94).

¹⁰⁰ See Mashaw, *Greed* at 147 (cited in note 2).

people, then they can be taken to task for saying that the Consumer Product Safety Commission will help small businesses.

Critics of delegation might argue that this response makes unrealistic assumptions about the psychology of the electorate. Anecdote and intuition tell us that a member of Congress is more vulnerable to criticism for voting in favor of a law that, say, shuts down a local polluter who employs many constituents, than for voting for a law that authorizes an agency to shut down polluters, or for not voting for a law that stops an agency that already has that authority. But this argument overlooks the price that the member of Congress pays for delegating power. The member of Congress receives less criticism because he has less control over the outcome. He shares the criticism with the president who appointed the agency officials, and the criticism is diluted to the extent that the agency otherwise does a good job.

Accountability is not lost through delegation, then; it is transformed. Congress is accountable for the performance of agencies generally, and people properly evaluate the agencies' accomplishments as well as failures when deciding whether to hold members responsible for authorizing the agency, or for failing to curtail its power, fix its mistakes, or eliminate it altogether. In a similar way, corporate managers are held responsible for the general performance of employees, not for a particular error that an employee makes, unless the error is foreseeable and egregious. Like the manager, Congress monitors its subordinates as best it can, and tries to design rewards and penalties that give them the right incentives.¹⁰¹

It should also be noted that the nondelegation doctrine restricts delegation to executive agencies but not to other agencies within the legislative branch. Epstein and O'Halloran argue that if Congress could not delegate broad powers to agencies, it would delegate more power to congressional committees and staff members.¹⁰² Whether this substitution would occur, and would not reduce accountability if it did, are difficult questions, but ones that the critics of delegation have not adequately addressed.

Manning ties the nondelegation doctrine to the Constitution by emphasizing the values underlying the bicameralism and presentment requirements of Article I, § 7:

¹⁰¹ Also emphasized by Spence and Cross, 89 *Geo L J* at 133 (cited in note 2); Epstein and O'Halloran, 20 *Cardozo L Rev* at 958-60 (cited in note 2) (purporting to provide evidence); Mashaw, *Greed* at 139 (cited in note 2); Roderick D. Kiewiet and Mathew D. McCubbins, *The Logic of Delegation: Congressional Parties and the Appropriations Process* 33-34, 232-33 (Chicago 1991).

¹⁰² See Epstein and O'Halloran, 20 *Cardozo L Rev* at 961-62 (cited in note 2).

By dividing legislative power among three relatively independent entities, that intricate and cumbersome process serves several crucial constitutional interests: it makes it more difficult for factions (or, as we would put it, “interest groups”) to capture the legislative process for private advantage, it promotes caution and restrains momentary passions, it gives special protection to residents of small states through the states’ equal representation in the Senate, and it generally creates a bias in favor of filtering out bad laws by raising the decision costs of passing any law.¹⁰³

The nondelegation doctrine prevents Congress from recombining these powers in an agency that would enjoy *de facto* legislative authority unencumbered by internal divisions or by the participation of other institutions.¹⁰⁴

Manning’s argument nicely undercuts Schoenbrod’s by emphasizing the limits on congressional accountability built into the Constitution. People with valid complaints about existing law can only with difficulty obtain a response from Congress. Any member of Congress can persuasively blame inaction on the “intricate and cumbersome process” through which legislation, under the Constitution, must pass. By contrast, people with valid complaints about existing regulations can obtain a response by appealing to the agency, which cannot blame the Constitution if it decides not to act.¹⁰⁵ When Manning observes that the bicameralism and presentment requirements serve constitutional values, he means values *other* than accountability, which is just one among many.

But Manning does not explain how delegation conflicts with these other values. (i) If bicameralism and presentment reduce the influence of interest groups, enabling Congress to serve the public interest, then Congress will have no incentive to create agencies that are themselves vulnerable to these same interest groups. (ii) If bicameralism and presentment prevent Congress from being carried away by momentary passions, then Congress will (calmly) burden agencies with procedural requirements that prevent the agencies from being carried away by momentary passions. (iii) Residents of small states can be expected to exercise their political power by blocking delegations that will disproportionately harm them or by insisting that the authorizing statutes enlarge the agencies’ ability to do good, and limit

¹⁰³ John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup Ct Rev 223, 239–40 (footnotes omitted).

¹⁰⁴ Manning reports rather than makes these arguments. He is interested in defending the doctrine’s implications for statutory interpretation, not the doctrine itself. We discuss this argument in Part III.C.

¹⁰⁵ See Schuck, 20 Cardozo L Rev at 782–83 (cited in note 2).

their ability to do harm, in small states.¹⁰⁶ (iv) Bad delegations will be filtered out because of the cost of enacting the authorizing statute.

All of the constitutional values mentioned by Manning are *formally* protected because the delegatory statute itself must go through bicameralism and presentment. The formal protection of these values puts the burden on the critics to show that as an empirical matter the values are less fully protected when delegation occurs. We have already mentioned the lack of evidence that interest groups have greater power to influence agencies than they have to influence Congress; there is also no evidence that agencies, more than Congress, are vulnerable to momentary passions, indifferent to the interests of small states, and more likely to implement bad policy.

The fourth value—the filtering out of bad laws—demands further comment, as critics of delegation frequently appeal to it. They overlook the filtering out of bad delegatory statutes and argue that delegation results in bad regulations that would, if they were instead legislation, be blocked by the bicameralism and presentment requirements. A few comments about this argument are in order.

First, even if the Framers believed that the bicameralism and presentment requirements would block bad legislation by raising decision costs, there is no reason to think that the decision cost theory is sound. If Congress passes good laws and bad laws, increasing the decision cost of legislation would interfere with both kinds of laws, not just bad laws. Indeed, if members of Congress believe that transfers to supporters are the priority, increasing decision costs will interfere only with low-priority public interest legislation and not with high-priority interest group legislation. On this view, the bicameralism and presentment requirements should be regretted rather than celebrated, and there is no reason for the Court to extend their reach to delegation. Instead, delegation should be welcomed as a useful device for evading formal constitutional requirements that serve doubtful purposes.

Second, even if the decision cost theory were plausible, it would not follow that delegations should be banned. To reproduce at the agency level the decision costs that encumber decisionmaking at the political level, the Court could randomly strike down regulations, forcing agencies to repeat the process of promulgation. Of course, this practice would be ridiculous, but it would be more faithful to the decision cost theory than wholesale prohibition of delegations; its silliness

¹⁰⁶ For examples of the influence of (mostly small) western states on authorizing statutes, see George Cameron Coggins and Doris K. Nagel, “*Nothing Beside Remains*”: *The Legal Legacy of James G. Watt’s Tenure as Secretary of the Interior on Federal Land Law and Policy*, 17 BC Env. Aff. L. Rev. 473, 492–93 (1990).

is a reflection of the logic of the decision cost theory, not our criticisms of it.

The decision cost argument might be cast in less instrumental terms. The critic of delegation might argue that bicameralism and presentment encourage Congress to deliberate about policy, and if Congress can delegate easily, then deliberative values are lost. It is democratically preferable for Congress to deliberate about policy rather than for the head of an agency to deliberate about policy, even if they would in the end choose the same policy. But a step up to the next level of generality reveals the defect in this argument. The scale of the policy choices that Congress must make is itself an appropriate topic for congressional deliberation. If Congress concludes that in light of its limited resources it should deliberate more about the general structure of government, including the delegation of powers, and less about policy minutiae, then judicial interference with this choice can hardly be thought to promote deliberation.

However the argument from democracy is understood, it cannot be used to justify the nondelegation doctrine in the absence of evidence that delegation interferes with accountability and other democratic values, and that this interference is not justified by other considerations. The critics of delegation load the dice against Congress by arguing that the absence of constant supervision of agencies shows that Congress is unaccountable,¹⁰⁷ when the absence of constant supervision is the intended consequence of delegation. Constant interference with an agency would be evidence of delegatory failure.¹⁰⁸ Besides, Congress does enact laws that reverse the decisions of agencies,¹⁰⁹ weaken their powers,¹¹⁰ and even abolish whole agencies.¹¹¹ And Congress often takes care to draft statutes to confine discretion, and give interest groups the ability to alert Congress when the agency goes astray.¹¹² One cannot in the abstract say whether the level of monitor-

¹⁰⁷ See Schoenbrod, *Power without Responsibility* at 99–105 (cited in note 94).

¹⁰⁸ See Barry R. Weingast and Mark J. Moran, *Bureaucratic Discretion or Congressional Control?: Regulatory Policymaking by the Federal Trade Commission*, 91 J Polit Econ 765, 768–70 (1983).

¹⁰⁹ An example is Congress's reversal of the FCC's low-power FM radio rules. For a general discussion, see Stewart Benjamin, Douglas Lichtman, and Howard Shelanski, *Telecommunications Law and Policy* 325–32 (Carolina 2001).

¹¹⁰ See, for example, James Q. Wilson, *Bureaucracy: What Government Agencies Do and Why They Do It* 242–43 (Basic Books 1989) (discussing examples); Terry M. Moe, *The Politics of Bureaucratic Structure*, in John E. Chubb and Paul E. Peterson, eds, *Can the Government Govern?* 267, 289–97 (Brookings 1989) (chronicling the crippling of the Consumer Product Safety Commission through reauthorizations in 1975, 1978, and 1981).

¹¹¹ See, for example, Interstate Commerce Commission Termination Act of 1995, Pub L No 104-88, 109 Stat 803 (1995); Civil Aeronautics Board Sunset Act of 1984, Pub L No 90-443, 90 Stat 1704 (1984) (terminating CAB).

¹¹² See Epstein and O'Halloran, 20 Cardozo L Rev at 954–60, nn 22–37 (cited in note 2); Kiewiet and McCubbins, *Logic of Delegation* at 206–10 (cited in note 101) (discussing congress-

ing and punishment that we observe shows that Congress remains accountable, but this just means that the nondelegation proponents have failed to carry their burden of proof.

To show that delegation has reduced accountability, one must provide a more particular kind of evidence, namely, that the agency regulates against the interests of Congress and the public or the interest groups that have influence with Congress, and that Congress does not attempt to discipline the agency. And that is only the first step. To show that this lack of accountability is due to the delegation rather than to the nature of Congress itself, one must show that when Congress does not delegate, the rules it creates reflect more closely the desires of the public or of interest groups. We have not found the kind of systematic study that could shed light on these questions.¹¹³

C. Is Delegation Special?

The welfarist and democratic arguments share a flaw, namely, that they cannot make delegation special. Congress can use its lawmaking powers for good or evil: to single out one of these powers for restriction one needs a theory that explains why this power is subject to greater abuse than others. Critics of delegation have made their case by pointing to the potential ill effects of delegation, but they have shown only that delegation is a powerful tool, and so its effects—whether good or bad—can be substantial. But we can say the same thing about Congress's power to tax. If one focuses only on the bad uses of the taxation power, one would be quite impressed, but no one argues that Congress should not have the power to tax. Both taxation and delegation can be put to good and bad uses; what makes delegation especially bad?

Someone might yet come up with an economic theory that explains why delegation should be restricted, but we are pessimistic. A theory that envisions the political process as interest group warfare will not be able to explain why delegation is worse than any other tool at Congress's disposal. A more subtle theory that focuses on the differential costs of monitoring political actors¹¹⁴ will have trouble explaining why those who monitor political actors face greater difficul-

sional oversight); Mathew D. McCubbins and Talbot Page, *A Theory of Congressional Delegation*, in Mathew D. McCubbins and Terry Sullivan, eds, *Congress: Structure and Policy* 402 (Cambridge 1987).

¹¹³ Epstein and O'Halloran's study, 20 *Cardozo L. Rev.* at 962 (cited in note 2), comes closest to this, but shows the opposite: that the amount of delegation appears to reflect legitimate policymaking concerns such as the similarity of the preferences of Congress and the agency. See also Kiewiet and McCubbins, *Logic of Delegation* at 235–37 (cited in note 101).

¹¹⁴ Farber and Frickey, *Law and Public Choice* at 81–83 (cited in note 2), seem to lean in this direction.

ties evaluating statutes that delegate, and the regulations they authorize, than statutes that do not delegate; and why these additional monitoring costs, if they exist, are likely to exceed the gains from institutional division of labor.

The problem with democratic critiques of delegation is that democratic theories are usually indeterminate at the institutional level.¹¹⁵ A flourishing democracy might be direct or representative or parliamentary; it might involve heavy reliance on committees in its representative institution; it might rely on strong parties; it might rely on appointed judges or elected judges, with or without tenure; it might be confederated or not; it might have strong libel laws or strong speech protections; and it might rely heavily on autonomous agencies or do its work through judicial enforcement of private rights of action. In their preoccupation with delegation among all the other devices used to make policy, the critics of delegation treat the nondelegation doctrine as a fetish that would ward off all the evils of representative democracy. But arguments about democratic accountability can be used to criticize all of the other devices and institutions as well. Beneath their masks, the critics of delegation are direct democrats, and they should aim their arguments at representative democracy, not at delegation, which is but a small part of it. In doing so, however, they would make clear that they are arguing against the Constitution—which is hardly a charter for direct democracy—not from it.

III. EXTENSIONS AND APPLICATIONS

In this Part we apply the preceding analysis to a range of doctrinal settings that are usually thought to pose special, and especially acute, delegation problems. Our view, however, entails that these settings aren't special at all. To the extent that these legal doctrines are rooted in nondelegation concerns, they are flawed and should be abolished; anything valuable in them turns out to be based on legal ideas independent of constitutional restrictions on delegation.

A. Nondelegable Powers

We have already mentioned the theory of nondelegable powers articulated in *Wayman v Southard*.¹¹⁶ Although consistently rejected by modern courts,¹¹⁷ it continues to garner an occasional endorsement by

¹¹⁵ See Dan M. Kahan, *Democracy Schmemocracy*, 20 *Cardozo L. Rev.* 795, 797–800 (1999) (claiming that “the concept of democracy, by itself, doesn’t uniquely determine the structure of government institutions”).

¹¹⁶ 23 US 1 (1825). See text accompanying notes 66–76.

¹¹⁷ See, for example, *Skinner v Mid-America Pipeline Co.*, 490 US 212, 222–23 (1989) (rejecting claim that the taxing power is intrinsically nondelegable); *Synar v United States*, 626 F Supp

commentators.¹¹⁸ Surely, the reasoning runs, Congress may not by statute create a federal court or agency with delegated authority to execute the House's power of impeachment, or the Senate's power to convict on a bill of impeachment, to approve treaties, or to confirm officers. Does our rejection of the delegation metaphor require accepting those hypotheticals?

No, it doesn't. The naïve view of delegation holds that a statutory grant of authority is never unconstitutional on the ground that it confers "legislative" power on the executive, although it may be unconstitutional on other grounds. Those other grounds might include, say, an attempt to grant the executive the power to regulate intrastate non-commercial activities, or the power to violate the First Amendment; in both cases Congress could not itself enact the relevant rule, so it may not confer that power upon its agents either. Congress may not confer a power that it doesn't possess in the first place. So Congress couldn't, for example, transfer to executive agents a power that the Constitution vests in some other institution, such as the Supreme Court. All this is common ground.

But a statute granting the executive the House's authority to impeach, or the Senate's authority to approve treaties, would be legally identical to a statute granting the executive the Supreme Court's power to decide cases. The reason is that Congress may exercise or confer by statute only the authority that *Congress* itself possesses; and the treaty approval power is held by the Senate as a separate institution, not by the Congress. Precedent from both the Supreme Court¹¹⁹ and Congress itself has always recognized that distinction. Consider that Congress has always denied that it possesses constitutional authority to regulate, by binding statute, the internal rules and regulations of its respective houses, precisely because the Constitution grants that power to each house separately.¹²⁰ Nor, of course, could the separate houses separately transfer their powers to the executive branch, for the houses acting alone lack the power to enact the statute necessary to trigger the president's law-execution authority. Recall that the executive must trace its authority to a constitutional or statu-

1374, 1385–86 (DC Cir 1986) (rejecting claim that the appropriations power is inherently non-delegable).

¹¹⁸ See, for example, Tribe, 1 *American Constitutional Law* at 982 (cited in note 17) (claiming that certain legislative powers are nondelegable).

¹¹⁹ See *Chadha*, 462 US at 955–56:

[When the Framers] sought to confer special powers on one House, independent of the other House, or of the President, they did so in explicit, unambiguous terms. These carefully defined exceptions from presentment and bicameralism underscore the difference between the legislative functions of Congress and other unilateral but important and binding one-House acts provided for in the Constitution.

¹²⁰ See Posner and Vermeule, 111 *Yale L J* at 1665 (cited in note 81) (collecting references).

tory grant;¹²¹ a grant pursuant to an internal rule of one house doesn't count.

The casual elision of this constitutionally critical distinction, between Congress and its separate houses, is all that explains the intuitive appeal of the hypotheticals about impeachment and treaty approval. Where Congress acting by statute grants the executive rule-making authority over a subject constitutionally granted to the whole Congress as such—the power to regulate interstate commerce, for example—it's hard to construct any hypothetical that seems equally objectionable, and the naïve view holds that the nondelegability of legislative power never bars such statutes. Certainly the courts have never seen any problem; in modern times they have refused to carry out the enterprise, initiated by *Wayman*, of constructing a “two-tiered”¹²² theory of delegation by drawing distinctions among Congress's enumerated powers. In its latest dismissal of *Wayman*'s theory of nondelegable powers, the Court held that even the taxing power could be conferred upon federal agencies, subject only to the usual intelligible principle test.¹²³

Similar reasoning disposes of other nasty hypotheticals. We have said that, on the naïve view, the constitutional prohibition of the delegation of legislative powers simply means that individual members of Congress may not cede their federal legislative offices to other persons. We have also said that law-execution pursuant to a statutory grant of authority is always just constitutionally valid law-execution; it never amounts to an exercise of “legislative power” in the constitutional sense. Could Congress, then, enact a statute granting executive officers the authority to vote on bills (an authority that would just be ordinary law-execution), and thereby “make legislators” in Locke's sense? No, because *Congress* doesn't possess that power in the first place, and Congress may not confer what it doesn't have. The power to vote on bills is possessed by individual members of Congress, not by the Congress as such; and for the reasons previously discussed the individual members may no more transfer their powers to the whole Congress than they may transfer them to anyone else. The mistake in the hypothetical is that it confuses the necessary conditions for the constitutional validity of statutory grants with the sufficient conditions for their validity. To say that statutory grants of law-execution authority never constitute a delegation of legislative power is not to say that any statutory grant of law-execution authority is constitutional.

¹²¹ See *Youngstown Sheet & Tube Co v Sawyer*, 343 US 579, 585 (1952) (“The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself”).

¹²² *Skinner*, 490 US at 220.

¹²³ See *id* at 224.

B. Delegation to Nonexecutive Agents

This analysis also clarifies another famous constitutional problem, that of delegation to agents other than the president or the executive branch. The classic example involves delegation to private parties. In *A.L.A. Schechter Poultry Corp v United States*,¹²⁴ the Court invalidated the National Industrial Recovery Act in part because it effectively granted lawmaking power to industry cartels; and in *Carter v Carter Coal*,¹²⁵ a plurality struck down a statute that did so *de jure*, not merely *de facto*. Since 1936 the Court has sustained broad delegation to private parties such as trade associations and producers' cooperatives.¹²⁶ But decisions in other constitutional areas have often incorporated delegation concerns with greater or lesser degrees of explicitness, as when the Court held that state replevin statutes posed increased due process concerns because they delegated law enforcement authority to private parties.¹²⁷ And the category of nonexecutive agents sweeps well beyond private parties; it includes states, international bodies, and other delegates who exercise authority pursuant to federal statute or treaty, but who are not "private" actors in any useful sense of that term. Examples are the state law enforcement officers charged with administering the Brady Act before the Supreme Court invalidated it on federalism grounds,¹²⁸ and the international body that enjoys treaty authority to search civilian sites within the United States for evidence of illegal manufacture of chemical weapons.¹²⁹

In our view, there is nothing special about such cases; neither nondelegation proponents nor nondelegation opponents should think them especially troublesome. The factor alleged to make such cases distinctive is the identity of the delegate. But the delegation inquiry, either in the narrow naïve version or the broader nondelegation metaphor, asks what Congress has given away, not who has received the gift. The delegation inquiry focuses on the abdication of Congress, the delegator, rather than on the nature of the delegate. So nothing in these cases changes the usual debate.

This is not to say that the identity of the delegate is irrelevant, only that the relevant concerns aren't about the delegation of legisla-

¹²⁴ 295 US 495 (1935).

¹²⁵ 298 US 238 (1936).

¹²⁶ See, for example, *United States v Rock Royal Co-Operative, Inc*, 307 US 533, 574–81 (1939) (upholding a delegation of regulatory authority to producer cooperatives).

¹²⁷ See *Fuentes v Shevin*, 407 US 67, 93 (1972) ("The statutes, moreover, abdicate effective state control over state power. Private parties, serving their own private advantage, may unilaterally invoke state power to replevy goods from another.").

¹²⁸ See *Printz v United States*, 521 US 898, 925–28 (1997).

¹²⁹ See Chemical Weapons Convention Implementation Act of 1998, Pub L No 105-277, 112 Stat 2681, codified at 22 USC §§ 6701–71 (2000).

tive powers. Rather they are about the allocation among potential delegates of *other* powers, notably the executive power and the power to appoint officers of the United States. Consider, for example, the question whether Congress may authorize state officials to enforce federal statutes. In *Printz v United States*¹³⁰ the Court, through Justice Scalia, suggested that such authorization would violate Article II's Vesting Clause¹³¹ by transferring law-execution authority to someone other than a federal executive officer subject to presidential control.¹³² The same theory—the “unitary executive” theory—has been urged, with little success to date, against the congressional creation of independent agencies staffed by federal officials executing statutory authority free from plenary presidential control.¹³³ Note that in all of these settings, the predicate for the unitary executive claim is precisely that the relevant delegates are exercising executive power rather than legislative power—in other words, that any nondelegation challenge has already been rejected. The question about the identity of the delegate is analytically independent of the question about delegation.

A different legal challenge to nonexecutive delegations involves the Appointments Clause of Article II, which provides that all “officers of the United States” must be appointed by one of several procedural mechanisms.¹³⁴ Where the delegate exercises “significant authority” pursuant to federal statute,¹³⁵ yet has not been so appointed, the delegate may be described as an invalidly appointed federal officer. An example involves the previously described chemical weapons treaty that authorizes members of international bodies to conduct domestic searches. John Yoo argues persuasively that the best constitutional objection to the treaty is that the international officials exercise federal law-execution authority without having been validly ap-

¹³⁰ 521 US 898 (1997).

¹³¹ US Const Art II, § 1, cl 1 (“The executive Power shall be vested in a President of the United States of America.”).

¹³² See *Printz*, 521 US at 922. The case is better known for the Court’s analytically distinct holding that Congress’s attempt not merely to authorize state enforcement, but to compel it, effected an invalid “commandeering” of state authority. *Id.* at 931–33.

¹³³ See *Humphrey’s Executor v United States*, 295 US 602, 629 (1935) (“The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot well be doubted.”); Steven G. Calabresi and Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 Yale L J 541, 549 (1994) (arguing that “the unitary Executive thesis holistically explains how the United States Constitution allocates the power of law execution and administration to the President alone”). But see Lawrence Lessig and Cass R. Sunstein, *The President and the Administration*, 94 Colum L Rev 1, 4 (1994) (“Any faithful reader of history must conclude that the unitary executive . . . is just myth.”).

¹³⁴ US Const Art II, § 2, cl 2.

¹³⁵ *Buckley v Valeo*, 424 US 1, 125–26 (1976) (holding any presidential appointee “exercising significant authority” to be an “Officer of the United States” for Article II purposes).

pointed.¹³⁶ Whether or not the Appointments Clause objection succeeds, the key point is that it is orthogonal to questions about delegation. The predicate for the objection is precisely that the delegate exercises significant authority pursuant to an otherwise valid statutory delegation.

C. Delegation and Statutory Interpretation

Several scholars have argued that courts should discourage delegation by narrowly interpreting statutes that make broad delegations.¹³⁷ This indeed has been the trend in the Supreme Court.¹³⁸ The use of a canon of avoidance to limit delegations reflects the belief that broad delegations are constitutionally troubling, but that courts can only with difficulty engage in principled constitutional review.¹³⁹ On our view, however, delegation does not violate the Constitution or threaten any constitutional value. Accordingly, using statutory interpretation to limit delegations can be justified only on the basis of an interpretive theory that licenses judges to develop clear statement rules in the absence of any underlying constitutional question.

Manning has argued that using the canon of avoidance to limit delegations is constitutionally objectionable. Indeed, he finds the canon of avoidance more objectionable than the nondelegation doctrine, about which he expresses no opinion. If, he says, delegation undermines important constitutional values—by allowing policymaking to escape the bicameralism and presentment requirements of Article I, § 7—then the Supreme Court should discourage delegations by striking down legislation rather than by interpreting legislation narrowly. Indeed, “artificially narrowing a statute to avoid nondelegation concerns is at best self-defeating.”¹⁴⁰ The reason is that when courts “interpret” statutes narrowly in order to avoid delegation concerns, they are really rewriting statutes, and thus engaging in their own legislation. This legislation violates the Article I, § 7 requirements, and

¹³⁶ See John C. Yoo, *The New Sovereignty and the Old Constitution: The Chemical Weapons Convention and the Appointments Clause*, 15 Const Comment 87, 116–30 (1998).

¹³⁷ See, for example, Sunstein, 67 U Chi L Rev at 317–18 (cited in note 2) (suggesting that the nondelegation doctrine is flawed, but the aims of the doctrine might nonetheless be pursued through appropriate canons of statutory interpretation).

¹³⁸ See, for example, *FDA v Brown & Williamson Tobacco Corp*, 529 US 120, 161 (2000) (using a nondelegation canon to hold that the Food and Drug Administration lacks authority to regulate tobacco products); *MCI Telecommunications Corp v American Telephone & Telegraph Co*, 512 US 218, 234 (1994) (using a nondelegation canon to hold that the Federal Communications Commission’s authority to “modify” rate-filing requirements does not permit it to make “basic and fundamental” changes to those requirements).

¹³⁹ Sunstein, 67 U Chi L Rev at 327 (cited in note 2) (arguing that judicial enforcement of the conventional nondelegation doctrine “would produce ad hoc, highly discretionary rulings”).

¹⁴⁰ Manning, 2000 Sup Ct Rev at 256 (cited in note 103).

therefore contradicts the values that nondelegation is supposed to serve.

This clever argument sounds like a pun. If judicial narrowing of a statute is legislative behavior, striking down a statute must be legislative behavior as well. For in a world without judicial review, both narrowing a statute and striking it down (that is, repealing it) require legislation. When courts strike down a statute, they rewrite it (so that it says nothing) in violation of the bicameralism and presentment arguments, but Manning does not object to *Marbury*-style judicial review. So why begrudge courts the more limited power to narrow? Of course, it's odd to describe judicial review as equivalent to the repeal of a law. But this is just the *reductio ad absurdum* of Manning's argument, which rests on the definitional fiat that a narrowing interpretation is equivalent to rewriting. In fact, the canon of avoidance doesn't apply, by its own terms, if the statute is clear.¹⁴¹ So "rewriting" is not only a tendentious description of the canon's application, it's an inaccurate one.

More important, Manning forgets his own argument about the values Article I, § 7 is supposed to serve. One is to protect residents of small states from exploitation by residents of big states. Another is to reduce interest group influence over policymaking. A third is to reduce the influence of passion on the legislative process. When the Court narrows a delegating statute rather than striking it down, it serves all these purposes. It makes it harder for Congress to delegate, and so it makes it harder for Congress to do the bad things that delegation supposedly permits.

Manning also appeals to an argument made by Mashaw.¹⁴² Mashaw points out that when the Court narrows a statute in order to avoid delegation problems, the original legislation survives in the narrowed form, and can be changed only with great difficulty. A majority of the House, a majority of the Senate, or the president (unless supermajorities can be obtained in both houses) can block the change. By contrast, when the Court strikes down a statute under the nondelegation doctrine, the original legislation disappears, and the House, the Senate, and the president are back to the status quo, with (presumably) similar incentives to change it. Manning concludes that the second chain of events is superior to the first on bicameralism and presentment grounds. The legislatively narrowed replacement statute must satisfy bicameralism and presentment; the judicially narrowed statute does not.

¹⁴¹ See *George Moore Ice Cream Co, Inc v Rose*, 289 US 373, 379 (1933) (facing the question of a statute's constitutionality because Congress's intent was clear).

¹⁴² See Manning, 2000 Sup Ct Rev at 257 n 172 (cited in note 103) (discussing Mashaw, *Greed* at 105 (cited in note 2)).

All this is true, but Manning argues as though having bills go through bicameralism and presentment is a good in itself and forgets his own premise that bicameralism and presentment are good only because they serve constitutional values, such as protecting residents of small states and minimizing interest group influence. If we take an *ex ante* perspective, we can understand the effects of the two rules more systematically. Under the nondelegation doctrine, Congress will enact narrow statutes in order to avoid reversal by the courts. Under the canon of avoidance, Congress will enact narrow or broad statutes but in any event will expect the broad statutes to be narrowed by the courts. In both cases, Congress knows full well what will happen, or is likely to happen, and so will craft the bills with these contingencies in mind.

Both bills will need to satisfy bicameralism and presentment, so the constitutional values, in both cases, will be met. Consider, for example, the plight of residents of small states. Under the nondelegation doctrine, they will not bother to resist broad delegations, and will lobby hard to influence narrow delegations. Their overrepresentation in the Senate will ensure that the resulting narrow delegation will be biased in their favor, thus serving the appropriate constitutional value. Under the canon of avoidance, residents might try to influence broad delegations—for fear that otherwise a court would interpret them narrowly against small state interests, but they might believe otherwise as well—and they will lobby hard to influence narrow delegations. Their overrepresentation in the Senate will ensure that the resulting delegation—whether broad or narrow—will be biased in their favor, thus serving the constitutional commitment to protecting small states. The argument applies *mutatis mutandis* to the other constitutional values that, according to Manning, are served by restriction of delegation.

We conclude that using the canon of avoidance to narrow the scope of statutory delegations is simply a weak version of the nondelegation doctrine—the conventional wisdom all along. If the Constitution prohibited delegations, then either doctrine would be a plausible way for courts to enforce the underlying constitutional values that delegation threatens. The choice between the two doctrines would then turn on the competence of courts, the existence of conflicting constitutional values, and so forth. But because, as we have argued, the Constitution does not prohibit delegations, both the nondelegation doctrine and the corresponding use of the canon of avoidance should be regarded with skepticism. Indeed, the nondelegation doctrine is a mistake. Statutory interpretation that construes delegations narrowly can be justified, if at all, only on the ground that the underlying interpretive theory lets the judges employ clear statement canons that lack constitutional underpinnings.

CONCLUSION

Delegation of powers is so common in public and private life, and has been so common since time immemorial, that critics looking for constitutional grounds for banning this practice must carry a heavy burden. Yet nothing in the language or structure of the Constitution supports their position, and the arguments from democratic theory and public choice theory are exceedingly weak—conjectures at best, backed up by anecdotes rather than systematic evidence. For these reasons, courts should finally shake off the cobwebs of the old jurisprudence and acknowledge that the nondelegation doctrine, and its corollaries for statutory interpretation, are dead.