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Towards Nondelegation Doctrines

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ABSTRACT

When discussing the nondelegation doctrine, courts and scholars frequently refer to Congress' "legislative power." The Constitution, however, speaks of no such thing. Instead, the Constitution vests a wide variety of "legislative powers" (plural) in Congress, including the powers to "regulate commerce," "declare war," "coin money," and "constitute tribunals." Shoehorning Congress' diverse array of powers into a one-size-fits-all nondelegation doctrine has necessitated the development of the vaguely worded "intelligible principle" test. Unsurprisingly, that malleable test has failed to produce a judicially manageable standard. In response, this Article proposes that the nondelegation doctrine be transformed into a series of nondelegation doctrines, each corresponding to one of Congress' distinct powers. Adopting such an approach can lessen the risk that reviving the nondelegation principle – a task the current Supreme Court has expressed an interest in taking on – will result in a complete reworking of the modern administrative state.

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I. INTRODUCTION

When discussing the nondelegation doctrine, courts and scholars frequently speak of Congress' "legislative power."[1] The Constitution, however, speaks of no such thing. Instead, the Constitution speaks of "the judicial power,"[2] "the executive power,"[3] and "[a]ll legislative powers herein granted."[4] Working from the presumption that there is a difference between a "power" (singular) and "powers" (plural), this Article argues that the nondelegation doctrine should be transformed into a series of nondelegation doctrines, each corresponding to one of the distinct powers vested in Congress.

Many of Congress' powers are enumerated in Article I, Section 8 of the Constitution.[5] There, Congress is vested with the powers to, among other things, "regulate commerce,"[6] "declare war,"[7] "coin money,"[8] and "constitute tribunals."[9] Constitutional amendments vest Congress with additional powers – for example, the "power to enforce [the voting rights granted in the Fifteenth Amendment] by appropriate legislation,"[10] and the power to "by law provide for" an orderly procedure to replace the President or Vice President in the event of removal, resignation, or incapacitation.[11] Given the wide variety of subjects covered by Congress' powers, it should come as no surprise that the quest to capture all of Congress' powers within a single nondelegation doctrine has proven to be a failure.[12]

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[1] *See, e.g.*, Gundy v. United States, 139 S. Ct. 2116, 2121 (2019) ("The nondelegation doctrine bars Congress from transferring its legislative power to another branch of Government."); United States v. Shreveport Grain & Elevator Co., 287 U.S. 77, 85 (1932) ("[T]he legislative power of Congress cannot be delegated . . . ."); Julian Davis Mortenson and Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–280 (2021) (arguing that there was no nondelegation at the Founding if "legislative power" is defined in one of four ways); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1494 (2021) [hereinafter Wurman, *Founding*] ("[M]uch of the earlier [nondelegation] literature focuses on . . . the meaning of the term 'legislative power' . . . .").

[2] U.S. CONST. art. III, § 1.

[3] U.S. CONST. art. II, § 1.

[4] U.S. CONST. art. I, § 1.

[5] U.S. CONST. art. I, § 8.

[6] U.S. CONST. art I. § 8, cl. 3.

[7] U.S. CONST. art I. § 8, cl. 11.

[8] U.S. CONST. art I. § 8, cl. 9.

[9] U.S. CONST. amend. XV, § 2.

[10] U.S. CONST. amend. XV, § 2.

[11] U.S. CONST. amend. XXV, § 4.

[12] The Supreme Court has only twice relied on the nondelegation doctrine to hold a statute unconstitutional, both times in 1935. Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 318 (2000). As one scholar put it, the

By "failure," I refer to the modern nondelegation doctrine's inability to produce a judicially manageable standard.[13] That failure is not attributable to a lack of trying – courts and scholars have undertaken Herculean efforts to provide meaning to the nondelegation doctrine's "intelligible principle" test.[14] The failure can instead be traced to the root of the modern nondelegation doctrine, which focuses not on the particular powers vested in Congress, but on the abstract conception of "legislative power" more generally.

A one-size-fits-all nondelegation doctrine focusing on "legislative power" (singular) necessitates that courts speak in vague and unhelpful terms – thus, the intelligible principle test.[15] Any effort to replace that test with another single test, such as one asking whether Congress has delegated the authority to decide "important" policy questions,[16] is an effort destined to similarly fail. The problem at the core of such tests is that they ask courts to engage in freewheeling policy considerations. Put differently, determining which policy questions are "important," or whether Congress' instructions are sufficiently "intelligible," are policy questions approaching nonjusticeability.[17]

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nondelegation doctrine "has had one good year," and over 200 "bad ones." *Id.* at 322. 200 "bad ones." Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

[13] Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting) (noting that the nondelegation doctrine "is not an element readily enforceable by the courts" as it comes down to "a debate not over a point of principle but over a question of degree"); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361 (2002) [hereinafter Lawson, *Original Meaning*] ("Justice Scalia flees from [the current nondelegation doctrine's intelligible principle test] as a vampire flees garlic."); Michael B. Rappaport, *A Judicially Manageable Nondelegation Doctrine*, THE ORIGINALISM BLOG (Dec. 17, 2020), https://originalismblog.typepad.com/the-originalism-blog/2020/12/a-judicially-manageable-nondelegation-doctrinemike-rappaport.html [https://perma.cc/GN3W-RMBF] ("While Scalia was unwilling to have the courts enforce the doctrine, advocates of a strict judicially enforced nondelegation doctrine have also admitted that it would be difficult to draw the line between constitutional and unconstitutional delegations of policymaking discretion.").

[14] *See, e.g.*, Cass R. Sunstein & Adrian Vermuele, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 415 & n.95 (2015) (collecting sources).

[15] *Infra* Part II.A.

[16] *See, e.g.*, Lawson, *Original Meaning*, *supra* note 13, at 361 ("The line between legislative power and executive or judicial power thus turns, in close cases, on whether the function in question involves 'important subjects' or matters of 'less interest.'"); Wurman, *Founding*, *supra* note 1, at 1556 (concluding that "originalists might . . . have to . . . focus more on an 'important subjects' theory" of nondelegation).

[17] *See* Chad Squitieri, *Who Determines Majorness?*, 44 HARV. J.L. & PUB. POL'Y 463, 495–513, 515 (2021) (explaining why a "majorness" or "importance" inquiry is incompatible with the judicial task when performed in the merits context).

In this Article, I offer a two-part proposal. First, the single nondelegation doctrine should be replaced with a series of nondelegation doctrines, each applying to a different congressional power. Second, each nondelegation doctrine should be developed by interpreting specific constitutional provisions to mean what the public originally understood them to mean at the time the provisions were enacted.

To be sure, one need not adopt the second part of my proposal to adopt the first. Those who object to interpreting text pursuant to its original public meaning, and those who prefer other nondelegation tests – such as the intelligible principle or important subjects tests – can accept the first part of my proposal alone. Put differently, one might be convinced of the benefits of transforming a single doctrine into multiple doctrines, but decide to develop those multiple doctrines by using different interpretive methods—such as a law and economics method, or a method of interpretation pursuant to which text is better able to take on new meaning over time. Those alternative methods could vastly improve the current nondelegation doctrine. But in this Article, I use a historical-based approach to develop multiple doctrines—in part because that approach might be attractive to the current Supreme Court (which seems poised to revive the nondelegation principle in potentially problematic ways), and in part because recent nondelegation scholarship has exhibited a focus on historical evidence.

Fully developing nondelegation doctrines for each of Congress' powers will require more historical research than can be offered here. Entire articles can (and should) be dedicated to determining the original public meaning of each power. I invite such scholarship by introducing and defending the idea that the original public meaning of each of Congress' powers speaks not only to the subjects Congress can address (*e.g., what* is "commerce" and "war"), but also to the extent Congress can delegate its authority to address those subjects (*e.g., who* can "regulate" commerce or "declare" war).

Rather than review all delegations under a single nondelegation doctrine, different delegations should be reviewed under different nondelegation doctrines. And the relevant doctrines should not be derived from judicial dicta or the latest political science literature. Instead, the doctrines should be derived from the Constitution's text and history. Thus, when it comes to the "legislative powers" vested in Congress by Article I, Section 8, the relevant nondelegation question concerns whether a particular delegation would have been considered a "necessary and proper" means "for carrying [the relevant Article I, Section 8 power] into execution," as understood by the objective reader in 1788.[18] By comparison, when it comes to the power vested in Congress by the Fifteenth Amendment, the relevant nondelegation

[18] U.S. CONST. art I § 8, cl. 18.

question includes a consideration as to whether an objective reader in 1870 would have understood a particular delegation to have been an "appropriate" way for Congress to "enforce" the Fifteenth Amendment's voting rights.[19]

Parts II.A and II.B will discuss the current state of the nondelegation doctrine by briefly describing the intelligible principle test and its failure to produce a judicially manageable standard. Part II.C will then situate this Article within an active scholarly debate discussing the existence (or nonexistence) of the nondelegation doctrine at the time of the Founding. That debate has helpfully uncovered important evidence exhibiting narrow (and broad) delegations made by early Congresses. This evidence is helpful, but its limits must be recognized: the evidence only speaks to particular delegations of particular powers. By attempting to leverage power-specific evidence into larger arguments in favor of the existence (or nonexistence) of a single nondelegation doctrine, scholars on both sides of the present debate go too far.

In response to the present debate, Part III proposes the development of multiple nondelegation doctrines. These text-centric doctrines require a closer parsing of the relevant text and history than has been called for in present literature. In proposing nondelegation doctrines, Part III provides textual analyses of Congress' original legislative powers, other powers vested in Congress by the Constitution as originally ratified, and additional powers vested in Congress by constitutional amendments. Each of those powers requires the application of a different nondelegation doctrine.

Finally, Part IV provides three defenses of nondelegation doctrines. Part IV.A explains how developing multiple nondelegation doctrines can serve as a *modus vivendi* between those who see a revived nondelegation doctrine as a tool to significantly rein in an overgrown federal government and those who fear that a revived nondelegation would spell disaster for the modern administrative state. Part IV.B responds to the anticipated critique that developing multiple nondelegation doctrines will not succeed in providing judicially manageable standards but will instead only exaggerate the problem by requiring courts to apply multiple unmanageable standards. Part IV.B then argues that the development of nondelegation doctrines makes a feature out of what might otherwise be seen as a flaw in current doctrine – numerous historical examples illustrating disparate applications of nondelegation principles.

II. THE NONDELEGATION DOCTRINE

Article I, Section 1 of the Constitution provides that "[a]ll legislative powers herein granted shall be vested in a Congress of the

[19] U.S. CONST. amend. XV, § 2.

United States, which shall consist of a Senate and House of Representatives."[20] Drawing upon the reference to "*[a]ll*" such legislative powers, the nondelegation doctrine prohibits Congress from delegating its legislative powers to other entities, including administrative agencies.[21] At its core, the nondelegation doctrine seeks to enforce the people's choice to vest legislative authority in a politically accountable Congress.[22] Today, the nondelegation doctrine permits Congress to delegate decision-making discretion to agencies so long as the agency's discretion is cabined by an "intelligible principle" set by Congress.[23]

A. The Intelligible Principle Test

"[T]he Constitution does not speak of 'intelligible principles.'"[24] Nevertheless, the phrase first entered the judicial lexicon in 1928 and has come to play an outsized role in constitutional jurisprudence.[25] In *J. W. Hampton, Jr., & Co. v. United States*,[26] the Supreme Court considered a challenge to a "flexible" tariff provision of the Fordney–McCumber Tariff Act of 1922.[27] That provision permitted the President to increase or decrease statutorily set tariffs upon making certain findings relating to production costs.[28] The President exercised his authority by increasing

[20] U.S. CONST. art. I, § 1.

[21] *Id.*; *see also* Dep't of Transp. v. Ass'n of Am. Railroads, 135 S. Ct. 1225, 1241 (2015) (Thomas, J., concurring in the judgment) (recognizing Article I, Section 1 as an "exclusive" grant of power, and noting that "[w]hen the Court speaks of Congress improperly delegating power, what it means is Congress' authorizing an entity to exercise power in a manner inconsistent with the Constitution").

[22] Some scholars trace the doctrine back three centuries to one of John Locke's constraints on legislative power. *See, e.g.*, Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1297 (2003).

[23] Sunstein & Vermuele, *supra* note 14, at 414 (citing J.W. Hampton, Jr., and Co. v United States, 276 U.S. 394, 409 (1928)).

[24] Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

[25] *J.W. Hampton, Jr.*, 276 U.S. at 409.

[26] *Id.*

[27] *Id.* at 400 (citing 42 Stat. 858).

[28] *Id.* In making the necessary findings, the President was to consider "(1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a foreign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition." *Id.* at 401–02 (quoting § 315(c) of Title III of the Tariff Act of 1922).

tariffs applicable to imported barium dioxide in order to offset differences between foreign and domestic production costs.[29] J.W. Hampton, which had paid the increased tariff on imported barium dioxide, argued that the flexible tariff provision constituted an unconstitutional delegation of legislative authority to the President.[30]

In rejecting J.W. Hampton's nondelegation argument, the Court explained that although "the difference" in domestic and foreign production costs "is difficult to fix with exactness," Congress' instruction to the President that he adjust tariffs to account for that difference was "perfectly clear and perfectly intelligible."[31] Expanding upon that principle in more general terms, the Court stated that "[i]f 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."[32]

After *J.W. Hampton*, the Court next mentioned the intelligible principle test in 1935, when the Court first relied on the nondelegation doctrine to hold a delegation unconstitutional.[33] In that case, *Panama Refining Co. v. Ryan*,[34] the Court considered a provision in the National Industrial Recovery Act ("NIRA") purporting to prohibit the transportation of oil produced in excess of quotas set by "order of the President."[35] Pursuant to that authority, the President approved a "Code of Fair Competition for the Petroleum Industry."[36] Oil industry plaintiffs sued to prevent the enforcement of the code, arguing that the Recovery Act constituted "an unconstitutional delegation to the President of legislative power."[37]

In considering the challenge, the Court observed that Congress had not "establishe[d]" any "criterion to govern the President's course," nor had Congress "declare[d]" any "policy as to the transportation of the excess production."[38] Instead, Congress had provided "the President an unlimited authority to determine the policy" himself, thereby "commit[ting] to the President the functions of a legislature rather than those of an executive."[39] After quoting Chief Justice Taft's reference to

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[29] *Id.* at 403.

[30] *Id.* at 400, 404.

[31] *Id.* at 404.

[32] *Id.* at 409.

[33] Panama Refining Co. v. Ryan, 293 U.S. 388, 432–33 (1935).

[34] 293 U.S. 388 (1935).

[35] *Id.* at 406 (1935) (quoting § 9 (c) of Title I of the National Industrial Recovery Act).

[36] *Id.* at 408–09.

[37] *Id.* at 411.

[38] *Id.* at 415.

[39] *Id.* at 415, 418.

"intelligible principle[s]," the Court held NIRA's delegation of authority to be unconstitutional.[40]

A few months later, the Court considered another NIRA provision in *A. L. A. Schechter Poultry Corporation v. United States*.[41] Pursuant to that provision, the President had approved a "Live Poultry Code."[42] The government then brought indictments under the code, including one for the selling of "an unfit chicken."[43] In considering whether Congress could delegate the authority to promulgate the code, the Court "look[ed] to the statute to see" if Congress had "itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."[44] Because the NIRA offered few guiding principles to limit the President's discretion, the Court invalidated the code as resulting from an unconstitutional "delegation of legislative power."[45]

Not since 1935 has the Supreme Court held a delegation of power unconstitutional pursuant to the nondelegation doctrine.[46] That is not to say that doctrine has ceased to exist – far from it. One scholar has referred to the doctrine as the "Energizer Bunny of constitutional law," because "[n]o matter how many times it gets broken, beaten, or buried, it just keeps on going and going."[47] The nondelegation doctrine's "remarkable staying power" was on display, for example, in *Whitman v. American Trucking Association*.[48] Although the Court in *Whitman* rejected a nondelegation challenge to provisions of the Clean Air Act,[49] Justice Thomas suggested that the nondelegation doctrine still had life left to be lived – even if in a different form.[50] As Justice Thomas wrote:

> The parties to these cases who briefed the constitutional issue wrangled over constitutional doctrine with barely a nod to the text of the Constitution. Although this Court since 1928 has treated the "intelligible principle" requirement as the only constitutional limit on

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[40] *Id.* at 429–30, 433.

[41] 295 U.S. 495 (1935).

[42] *Id.* at 521, 523 (referring to § 3 of the National Industrial Recovery Act).

[43] *Id.* at 528.

[44] *Id.* at 530.

[45] *Id.* at 495, 551.

[46] *See generally id.*

[47] Lawson, *Original Meaning*, *supra* note 13, at 330. Other scholars have noted this phenomenon in less welcoming terms. *See, e.g.*, Mortenson & Bagley, *supra* note 1, at 278 ("Like a bad penny, the nondelegation doctrine keeps turning up.").

[48] 531 U.S. 457 (2001); *Lawson, Original Meaning, supra* note 13, at 332.

[49] *Id.* at 485–86 (referring to 42 U.S.C. § 7409(b)(1)).

[50] *Id.* at 487 (Thomas, J., concurring).

> congressional grants of power to administrative agencies, the Constitution does not speak of "intelligible principles."[51]

It followed that, "[o]n a future day," Justice Thomas "would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders' understanding of separation of powers."[52]

The atextual nature of the intelligible principle test was also referenced in *Gundy v. United States*.[53] Like in *Whitman*, the Court in *Gundy* rejected a nondelegation challenge.[54] But in a dissenting opinion, Justice Gorsuch – joined by Chief Justice Roberts and Justice Thomas – explained that the modern intelligible principle test "has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked."[55] The three justices expressed a desire to "revisit" how much legislative authority Congress can "hand[] off" to the executive branch.[56] In a brief concurrence, Justice Alito noted that he too would "support th[e] effort" to "reconsider[]" the intelligible principle doctrine in a different case.[57] After joining the Court several months later, Justice Kavanaugh wrote that his colleagues' desire to revisit the nondelegation doctrine "raised important points that may warrant further consideration in future cases."[58] These opinions, which account for five noses on the current Supreme Court, point towards a shared conclusion: the atextual intelligible principle test is living on borrowed time.

B. No Judicially Manageable Standard

As noted above, several sitting justices have taken issue with the intelligible principle test on the grounds that the test is unmoored from the Constitution's text.[59] Another complaint lodged at the intelligible principle test is that after nearly 100 years, the test has failed to produce

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[51] *Whitman*, 531 U.S. at 487 (Thomas, J., concurring) (citation omitted).

[52] *Id.*

[53] 139 S. Ct. 2116 (2019).

[54] *Id.* at 2121.

[55] *Id.* at 2139 (Gorsuch, J., dissenting) ("This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked.").

[56] *Id.* at 2131.

[57] *Id.* (Alito, J., concurring).

[58] Paul v. United States, 140 S. Ct. 342 (2019) (Justice Kavanaugh) (mem.).

[59] *See supra* notes 48–49, 52–53 and accompanying text.

a judicially manageable standard.[60] This criticism was most notably advanced by Justice Scalia in *Mistretta v. United States*.[61]

At issue in *Mistretta* was whether Congress could delegate to the United States Sentencing Commission the authority to promulgate sentencing guidelines.[62] While the Court upheld the statute against a nondelegation challenge, Justice Scalia dissented "because of a technical quirk in the design of the Sentencing Commission's authority."[63] Specifically, he complained that "[t]he lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law," resulting in the creation of "a sort of junior-varsity Congress."[64] Although Justice Scalia would have held the statute unconstitutional on those grounds alone, he took the opportunity to critique the intelligible principle test.[65]

As Justice Scalia explained, "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action, and it is up to Congress, by the relative specificity or generality of its statutory commands, to determine – up to a point – how small or how large that degree shall be."[66] Thus, "while the doctrine of unconstitutional delegation is unquestionably a fundamental element of our constitutional system, it is not an element readily enforceable by the courts."[67] As one scholar explained, Justice Scalia's dissent in *Mistretta* "all but came out and said that the nondelegation doctrine is nonjusticiable – that the line drawing it requires is not a legal analysis at all, but is instead political (because it is discretionary) at its core."[68]

Justice Scalia's *Mistretta* dissent reveals that his objection to the "unconstitutional delegation" doctrine, as he then called it, was an

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[60] *See* Michael B. Rappaport, *A Two Tiered and Categorical Approach to the Nondelegation Doctrine* 12 (San Diego Legal Stud. Paper, Paper No. 20-471, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710048 [https://perma.cc/M4L8-T924] [hereinafter Rappaport, *Two Tiered*] ("One of the most serious charges against a strict nondelegation doctrine is that it does not provide a judicially manageable test.").

[61] 488 U.S. 361, 413–427 (1989) (Scalia, J., dissenting).

[62] *Id.* at 362 (referring to 18 U.S.C. § 3551 *et seq.* (1982 ed., Supp. IV)).

[63] Lawson, *Original Meaning*, *supra* note 13, at 329.

[64] *Mistretta*, 488 U.S. at 420, 427 (Scalia, J., dissenting).

[65] *Id.* at 416–27.

[66] *Id.* at 417.

[67] *Id.* at 415.

[68] William K. Kelley, *Justice Scalia, The Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2118 (2017); *see also* Lawson, *Original Meaning*, *supra* note 13, at 354 ("[Justice Scalia] made clear [in *Mistretta*] that he regards the degree of discretion to be vested in administrators as essentially a political question that cannot (at least in the normal run of cases) be evaluated by courts.").

objection to the intelligible principle test and its failure to provide a judicially manageable standard.[69] It was not an objection to the more general idea that Congress is limited in its ability to delegate its constitutionally vested powers. This is consistent with his broader judicial philosophy. Pursuant to that philosophy, Justice Scalia "was a fierce proponent of the Court's staying the hand of judicial power and deferring to the outcome of the political process" where "the Constitution, properly understood, left a decision to the realm of discretionary judgment."[70] But he "was equally confident in the exercise of judicial power when he concluded that the Constitution, again properly understood, ruled out of bounds the outcome of the political process."[71]

In the wake of the intelligible principle test's failure to produce a judicially meaningful standard, many scholars have offered various proposals to reinvigorate the nondelegation doctrine in new form.[72] I wish to here highlight one of those proposals, the "important subjects" test, as I believe that test to be just as unlikely as the intelligible principle test to produce a judicially manageable standard.[73]

The important subjects test can be traced back to Chief Justice Marshall's opinion in *Wayman v. Southard*.[74] That case concerned the 1792 Process Act, which established that federal courts would adopt the judicial processes prevailing in state supreme courts, "subject however to such alterations and additions as the [federal] courts respectively shall *in their discretion* deem expedient, or to such regulations as the supreme court of the United States shall *think proper* from time to time by rule to prescribe to any circuit or district court concerning the same."[75] The defendant in *Wayman* objected to this delegation of authority, arguing that "[a]ll the legislative power is vested exclusively in Congress," and that Congress "cannot delegate such power to the judiciary."[76]

In considering the nondelegation challenge, Chief Justice Marshall explained that Congress could not delegate "exclusively legislative" powers.[77] Elaborating on his conclusion, Chief Justice Marshall distinguished between "those *important* subjects, which must be entirely

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[69] *Mistretta*, 488 U.S. at 416.

[70] Kelley, *supra* note 68, at 2107.

[71] *Id.*

[72] *See* PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 378 (2014).

[73] Indeed, even Gary Lawson, a proponent of the important subjects test, acknowledges that "[a]s constitutional tests go, this one certainly sounds pretty lame—not to mention absurdly referential." Lawson, *Original Meaning*, *supra* note 13, at 361.

[74] Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[75] Act of May 8, 1792, ch. 36, § 2, 1 Stat. 275, 276 (emphases added).

[76] *Wayman*, 23 U.S. (10 Wheat.) at 13.

[77] *Id.* at 42–43.

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."[78]

Relying on *Wayman*, some scholars have proposed that Chief Justice Marshall's important subjects replace the intelligible principle test.[79] In general, these proposals would have it such that Congress may delegate the authority to decide issues of "less interest," but not delegate the authority to decide "important subjects."[80] I have elsewhere argued that this type of importance inquiry is incompatible with a proper understanding of the judicial task because it calls on courts to engage in freewheeling policy considerations.[81] I double down on that argument here.

An issue thought "unimportant" by one group might be thought "important" by another. Determining relative importance is thus a task appropriately exercised by the political branches, not courts. Like identifying intelligibility in *Mistretta*, determining a delegation's relative "importance" involves "a debate not over a point of principle but over a question of degree."[82] And it goes without saying that the term "important subjects" is found nowhere in the Constitution. It follows, then, that the "important subjects" test – which is derived from judicial dicta rather than the Constitution, and which necessitates unconstrained considerations of policy – is a poor substitute to replace the failed "intelligible principle" test.

C. Turning to History

After decades of attempting to define how "intelligible" is "intelligible" enough, recent nondelegation scholarship has focused on a topic that courts are better equipped to consider: historical evidence.[83]

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[78] *Id*. at 43.

[79] *See, e.g.*, Lawson, *Original Meaning*, *supra* note 13, at 361 ("The line between legislative power and executive or judicial power thus turns, in close cases, on whether the function in question involves 'important subjects' or matters of 'less interest.'"); Wurman, *Founding*, *supra* note 1, at 1556 (concluding that "originalist scholars . . . might . . . have to . . . focus more on an 'important subjects' theory" of nondelegation); Rappaport, *Two Tiered*, *supra* note 60, at draft 1 (referring to the important subjects test as the "leading existing approach to a strict nondelegation doctrine").

[80] *See, e.g.*, *Wayman*, 23 U.S. (10 Wheat) at 43.

[81] Squitieri, *supra* note 17, at 495–513, 515.

[82] Mistretta v. United States, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

[83] Philip Hamburger, *Delegating or Divesting*, 115 NW. U. L. REV. ONLINE 88, 88 (2020) ("A gratifying feature of recent scholarship on administrative power is the resurgence of interest in the Founding."); Wurman, *Founding*, *supra* note 1, at 1494 ("[M]uch of the earlier literature focuses on constitutional structure, the meaning of

This turn to history has no doubt been motivated by Justice Gorsuch's *Gundy* dissent, which one scholar described as a dissent likely to "launch[] a hundred law-review ships."[84] Here I will briefly describe a few key pieces of scholarship, each of which marshals historical evidence in an attempt to establish the existence (or nonexistence) of the nondelegation doctrine at the time of the Founding.

Positioned on one end of the debate are Julian Davis Mortenson and Nicholas Bagley, who contend that "[t]here was no nondelegation doctrine at the Founding, and the question isn't close."[85] To support their conclusion, Mortenson and Bagley begin their argument by placing the burden on those who would conclude the opposite.[86] "[O]riginalists," the pair argues, "ought to be able to point to consistent concrete, and specific evidence" of the nondelegation doctrine being invoked at the Founding.[87] Mortenson and Bagley go on to offer a thorough canvassing of Founding era sources.[88]

Most notable is the evidence Mortenson and Bagley present regarding the First Congress.[89] Mortenson and Bagley address legislation concerning federal territories, commercial regulations, interactions with Native Americans, social welfare and entitlement benefits, finance and budget, tax assessment and enforcement, and citizenship.[90] They aim to show that the First Congress delegated broad grants of discretion relating to each of those subjects.[91]

Mortenson and Bagley note, for example, that the First Congress enabled a territorial governor and judges to "adopt and publish in the [territory], such laws of the original States, criminal and civil, *as may be*

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the term 'legislative power,' and the normative and theoretical reasons to have a nondelegation doctrine. The recent contributions force scholars to confront another, perhaps more direct, source of evidence or original meaning: the actual statements and practices of those first operating under the new federal Constitution.").

[84] Adam White, *Nondelegation's Gerrymander Problem*, YALE J. ON REGUL.: NOTICE & COMMENT (Dec. 16, 2019), https://www.yalejreg.com/nc/nondelegations-gerrymander-problem/ [https://perma.cc/F2Q8-N79J]; *see also* Christine Kexel Chabot, *Nondelegation at the Founding? What James Madison Told the First Congress*, YALE J. ON REGUL.: NOTICE & COMMENT, (July 19, 2020), https://www.yalejreg.com/nc/nondelegation-at-the-founding-what-james-madison-told-the-first-congress-by-christine-kexel-chabot/ [https://perma.cc/7MWS-YKJV] ("Justice Gorsuch's dissent in Gundy has inspired somewhat of an originalist renaissance and a flurry of invaluable scholarship addressing delegation in the founding era . . . .").

[85] Mortenson & Bagley, *supra* note 1, at 367.

[86] *Id.* at 293.

[87] *Id.*

[88] *Id.* at 289–349.

[89] *Id.* at 332–49.

[90] *Id.*

[91] *Id.* at 349.

necessary, and best suited to the circumstances of the [territory]."[92] They also highlight a statute authorizing the President "to identify any of his soldiers who were 'wounded or disabled while in the line of his duty in public service,' and put them on 'the list of the invalids of the United States, *at such rate of pay, and under such regulations, as shall be directed by the President of the United States*, for the time being.'"[93] Mortenson and Bagley posit that these examples, among others, showcase Congress delegating broad authorities to the President during the early years of the Republic.[94]

Mortenson and Bagley also address the debates that the Second Congress had regarding its ability to delegate its constitutional power to "establish . . . post roads."[95] As the pair of professors concedes, the post road debates offer originalists "their best evidence . . . for the principle that the nondelegation doctrine existed at the Founding."[96]

The post roads debates began in December of 1791 when the House of Representative's considered a bill to establish the United States postal system.[97] Invoking Congress' Article I power to "establish post offices and post roads,"[98] a committee of the Second Congress proposed a bill outlining in detail which post routes should be established.[99] In response, Representative Theodore Sedgwick of Massachusetts introduced an amendment to replace that detailed list of routes with a provision referring to "such routes as the President of the United States shall, from time to time, cause to be established."[100] When considered against the detailed list of post routes contained in the original bill, Representative

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[92] *Id.* at 334 (quoting Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51).

[93] *Id.* at 342 (emphasis added).

[94] *Id.* at 349.

[95] U.S. CONST. art. I, § 8, cl. 7.

[96] Mortenson & Bagley, *supra* note 1, at 350.

[97] *Id.* (citing Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, 232).

[98] U.S. CONST. art. I, § 8, cl. 7.

[99] Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, 232 (1792) ("That from and after the first day of June next, the following roads be established as post roads, namely: From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah, and from Augusta by Washington in Wilkes county to Greenborough and from thence . . . ."); Wurman, *Founding*, *supra* note 1, at 1506.

[100] 3 ANNALS OF CONG. 229 (1791).

Sedgwick's amendment constituted a broad delegation of authority to the President. The debates surrounding Representative Sedgwick's amendment thus offer a glimpse into how such delegations were perceived by members of the Second Congress.

In response to Representative Sedgwick's amendment, Representative Samuel Livermore of New Hampshire noted "that the Legislative body being empowered by the Constitution 'to establish post offices and post roads,' it is as clearly their duty to designate the roads as to establish the offices; and he did not think they could with propriety delegate that power, which they were themselves appointed to exercise.'"[101] Representative Thomas Hartley of Pennsylvania added that "[w]e represent the people, we are constitutionally vested with the power of determining upon the establishment of post roads; and, as I understand at present, ought not to delegate the power to any other person."[102] James Madison noted "there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution."[103] Other representatives lodged similar objections, and Representative Sedgwick's amendment was ultimately rejected.[104]

The post roads debates are said to strengthen the argument of those who would argue that a nondelegation doctrine existed at the time of the Founding because the debates concluded with the rejection of a broad delegation of a congressional power to the President.[105] Although Mortenson and Bagley acknowledge the significance of the objections to Representative Sedgwick's amendment, the duo discounts the objections by noting that they "did not reflect a majority view among those present and voting, much less a constitutional consensus."[106] Mortenson and Bagley thus conclude that the post roads debates fail to offer sufficient historical support for the nondelegation doctrine.[107]

Like Mortenson and Bagley, Christine Kexel Chabot argues that the "originalist arguments" in favor of the nondelegation doctrine "find no support in the understandings of delegation that prevailed in the Founding era."[108] But where Mortenson and Bagley offer a wide argument covering many statutes, Chabot offers a deep examination of a

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[101] *Id.*

[102] *Id.* at 231.

[103] *Id.* at 239.

[104] Wurman, *Founding*, *supra* note 1, at 1506.

[105] *Id.* at 1511; Mortenson & Bagley, *supra* note 1, at 350.

[106] Mortenson & Bagley, *supra* note 1, at 353.

[107] *Id.* at 355.

[108] Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming Fall 2021) (manuscript at 1), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564 [https://perma.cc/4QGC-DNEV].

few key examples. Specifically, Chabot examines how the First Congress exercised its powers to pay the national debt and regulate patents.[109]

As to the national debt, Chabot details the 1790 Act Making Provision for the [payment of the] debt of the United States.[110] That Act delegated to the President the authority to take out loans subject to only two parameters: first, that the loans "not exceed" $12 million in total, and second, that repayment occur within 15 years.[111] With those two parameters being the only relevant restrictions on the President's discretion, Chabot concludes the Act to have been a broad delegation of power.[112]

As to the regulation of patents, Chabot contends that the Patent Act of 1790 offered only "minimal legal standards . . . for examiners" to follow, and that "Congress left other large gaps for the Patent Board to address."[113] This too, Chabot argues, constitutes historical evidence of Congress' ability to broadly delegate authority to the Executive branch.[114] Chabot concludes by stating that "[t]he historical record of legislation passed by early Congresses is one of broad delegation to decide important questions," meaning that "originalists searching for an alternative to the intelligible principle doctrine have embarked on a futile quest."[115]

Ilan Wurman challenges the conclusions that Mortenson, Bagley, and Chabot draw from the historical record.[116] To do so, Wurman marshals a detailed collection of affirmative evidence in favor of the nondelegation doctrine, noting that "that Mortenson and Bagley have not come close to demonstrating their claim that there was no nondelegation doctrine at the Founding."[117] "Although the history is messy," Wurman argues, "there is significant evidence that the Founding generation adhered to a nondelegation doctrine, and little evidence that clearly supports the proposition that the Founding generation believed that Congress could freely delegate its legislative power."[118]

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[109] *Id.* at manuscript 18–42.

[110] *Id.* at manuscript 19 (referring to Act Making Provision for the Debt of the United States, ch. 34, 1 Stat. 138 (1790).

[111] *Id.* at manuscript 28 (referring to Act Making Provision for the Debt of the United States, ch. 34, 1 Stat. 138 (1790).

[112] *Id.* at manuscript 27–31.

[113] *Id.* at manuscript 38.

[114] *Id.* at manuscript 36.

[115] *Id.* at manuscript 50.

[116] Wurman, *Founding*, *supra* note 1, at 1497.

[117] *Id.* at 1493–94.

[118] *Id.* at 1494.

Prominent amongst Wurman's affirmative evidence are the post roads debates.[119] Also prominent are the debates surrounding the Alien Friends Act, within which "Madison argue[d] that if a law were so vague and undefined, that might work an unconstitutional transfer of legislative power to another department."[120] Wurman also offers evidence surrounding lesser known debates, such as a bill which would have authorized the President to raise an army of up to 10,000 men, leaving the ultimate number to the President's discretion.[121] In objecting to that bill, a representative noted that if the Congress "could delegate the power of raising an army to the President, why not do the same with respect to the power of raising taxes?"[122] The implication left by that objection, of course, is that Congress could delegate neither power to the President.[123] Another representative confirms that implication, explaining that the bill "would be unconstitutional" because "it delegates Legislative powers to the President."[124]

Wurman further defends his position on the nondelegation doctrine by highlighting Founding era arguments made outside of Congress, such as those arguments outlined in the Federalist Papers.[125] In Federalist No. 62, for example, James Madison described one advantage of a bicameral

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[119] *Id.* at 1506–13.

[120] *Id.* at 1512–14. The Alien Friends Act authorized "the President . . . to order all such aliens as he shall judge dangerous to the peace and safety of the United States" to depart the country. An Act Concerning Aliens, ch. 58, 1 Stat. 570 (1798). Madison argued against the Act, noting that:

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

James Madison, Virginia Report of 1800.

[121] Wurman, *Founding*, *supra* note 1, at 1514–15 (referring to An Act authorizing the President of the United States to raise a provisional army, ch. 47, 1 Stat. 558 (1798)).

[122] 8 ANNALS OF CONG. 1526–27.

[123] *Id.*

[124] *Id.* at 1535.

[125] Wurman, *Founding*, *supra* note 1, at 1523-35. (referring to THE FEDERALIST NOS. 37, 47, 53, 55 (James Madison)).

legislature as being that "[n]o law or resolution can now be passed without the concurrence, first, of a majority of the people, and then, of a majority of the States."[126] Wurman contends that the advantage Madison ascribes to a bicameral legislation "would be entirely eliminated if Congress could freely delegate its legislative power to the Executive."[127] In the end, Wurman concludes that the historical record leans in favor of his position that the nondelegation doctrine was alive and well at the founding: "In contrast to the abundant evidence that is at least suggestive of a nondelegation doctrine," he writes, "the direct evidence that the founding generation believed there was no limit to what Congress could delegate is scant."[128]

Other scholars have also entered the fray, providing historical evidence they perceive as either supporting or undermining the argument that nondelegation principles were present at the Founding.[129] And of course, the present debate is being held atop a foundation developed by scholars such as Gary Lawson,[130] Michael Rappaport,[131] Larry Alexander,[132] and Saikrishna Prakash.[133]

This Article need not decide which of the above scholars has the best read on history. To the contrary, I contend that all of the scholars mentioned above might be right as to different legislative powers. But the various historical examples that these scholars highlight are only

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[126] THE FEDERALIST NO. 62, at 378 (James Madison) (Clinton Rossiter ed., 1961).

[127] Wurman, *Founding*, *supra* note 1, at 1524.

[128] *Id.* at 1526–27.

[129] *See, e.g.*, Aaron Gordon, *Nondelegation*, 12 N.Y.U. J. L. & LIBERTY 718, 744–79 (2019) (collecting historical evidence supporting the argument that the nondelegation doctrine has a firm foundation in the Constitution's original meaning); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 Yale L.J. 1288 (2021) (providing an in-depth account of the "direct tax" of 1798, regarding which Congress empowered federal assessors to assign taxable values to every house and farm in country and decide what each was "worth in money," a standard that the relevant legislation stated but did not define).

[130] *See, e.g.*, Lawson, *Original Meaning*, *supra* note 13; Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework For the Public-Law Puzzle of Subdelegation*, (forthcoming 2021) [hereinafter *Meet. Mr. Marshall*], https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607159&download=yes [https://perma.cc/H6EN-NPZB].

[131] *See, e.g.*, Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265 (2001) [*hereinafter The Selective Nondelegation Doctrine*]; Rappaport, *Two Tiered*, *supra* note 60.

[132] *See, e.g.*, Alexander & Prakash, *supra* note 22, at 1297.

[133] *Id.*

examples speaking to particular legislative powers. It is a mistake to treat evidence speaking to *particular* powers as evidence speaking to *all* of Congress' powers. Such a one-size-fits all understanding of nondelegation fails to account for the Constitution's actual text, which speaks not of some generalized "legislative power," but which instead vests specific powers in Congress.

III. INTRODUCING NONDELEGATION DOCTRINES

As an alternative to the current nondelegation doctrine, Part III proposes that separate nondelegation doctrines be developed for each of Congress' powers. In particular, Part III proposes that to develop nondelegation doctrines, courts (assisted by scholars and the adversarial process) should determine the original public meaning of each of Congress' powers, including what that meaning says about Congress' ability to delegate each power. One need not accept that constitutional provisions should be interpreted pursuant to their original public meaning in order to agree that multiple nondelegation doctrines (corresponding to each of Congress' powers) should be created. Part III, however, outlines how multiple nondelegation doctrines can be created by utilizing an original public meaning approach.

The judicial task proposed below requires courts to identify how an objective reader would have answered key nondelegation questions at the time Congress was vested with each power. Courts and scholars should apply these key nondelegation questions (derived below) when considering the constitutionality of specific delegations. In applying these key nondelegation questions, individual nondelegation doctrines can be developed over time.

A. Powers Not Power

The Constitution contains twenty-two references to "power," and thirteen references to "powers."[134] Many of those references vest power in Congress; this Article will examine each one that does.[135] The analysis begins with Article I, Section 1, which provides:

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[134] *See generally* U.S. CONST.

[135] The other references to "power" or "powers," which are not examined in detail in this Article, include: a reference to "foreign power," U.S. CONST. art. I, § 10, cl. 3; "the executive Power," U.S. CONST. art. II, § 1; multiple references to the President's "powers and duties," U.S. CONST. art. II, § 1, cl. 6; U.S. CONST. amend. §§ III, IV; the President's power to "to grant Reprieves and Pardons," U.S. CONST. art. II, § 2, cl. 1; the President's power "to make Treaties," U.S. CONST. art. II, § 2, cl. 2; the President's power to "to fill up all Vacancies that may happen during the Recess of the Senate," U.S. CONST. art. II, § 2, cl. 3; three references to "the judicial Power," U.S. CONST. art. III, § 1, cl. 1; U.S. CONST. art. III, § 2, cl. 1; U.S. CONST.

> All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.[136]

Note the difference in wording between that legislative vesting clause and the vesting clauses for the executive and judicial powers, which respectively provide:

> The executive Power shall be vested in a President of the United States of America.[137]

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.[138]

The conspicuous use of "The" in the latter two vesting clauses (*i.e.*, "The" executive power and "The" judicial power) suggest references to terms of art, the meaning of which were fixed at the time of the Constitution's ratification.[139] It has thus been argued that "[i]f an activity

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amend. XI; and the "powers" reserved to the several states, U.S. CONST. amend. X. Also not examined is the ability for state legislatures to "empower" state governors to make "temporary appointments" to the U.S. Senate, until such time that the vacancies are filled "by election as the legislature may direct." U.S. CONST. amend. XVII, § 1, cl. 2.

Also outside the scope of this Article are the House's "sole power of impeachment," U.S. CONST. art. I, § 2, cl. 5; the Senate's "sole Power to try all Impeachments," U.S. CONST. art. I, § 3, cl. 6; and the Senate's "Advice and Consent" powers relating to the making of treaties and the appointment of "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States." U.S. CONST. art. II, § 2, cl. 2. Those powers, although vested in a single chamber *of* Congress, are not powers vested *in* Congress. Eric A. Posner & Adrian Vermeule, *Interring The Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1755 (2002) ("[T]he treaty approval power is held by the Senate as a separate institution, not by the *Congress*. Precedent from both the Supreme Court and Congress itself has always recognized that distinction.") (citing INS v. Chadha, 462 U.S. 919, 955–56 (1983)). Although these powers are worthy of future scholarly attention, in this Article, I focus on those constitutional powers vested in Congress, with more limited references to other powers when appropriate.

[136] U.S. CONST. art. I, § 1.

[137] U.S. CONST. art. II, § 1, cl. 1.

[138] U.S. CONST. art. III, § 1.

[139] John Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, 78 U. CHI. L. REV. 1101, 1109 (2011) ("To understand the judicial power conferred by Article III, it is common to look to the practices of the English courts that were known to the Framers. It is also a standard, though controversial, move to look to the King's authority in understanding the President's authority, and specifically in understanding the executive power referred to in Article II."); *see also*

falls within the late eighteenth-century understanding of 'executive' or 'judicial' power, the President or the federal courts are presumptively authorized to engage in that activity."[140]

Examining the precise contours of the executive and judicial powers is beyond the scope of this Article. My immediate point is only that, while mapping the limits of presidential and judicial power may require determining the original public meaning of "The" executive power and "The" judicial power *in their entirety*, mapping the limits of Congress' powers requires determining the original public meanings of each of the different congressional powers enumerated in the Constitution.[141]

Recognizing Congress as having been vested with only *certain* legislative powers is consistent with the Constitution's structure and history.[142] Although the Founders took care to ensure that power was not concentrated in any one branch of federal government,[143] the Founders were particularly concerned with concentrating power in Congress.[144] As James Madison wrote in Federalist No. 51, "[i]n republican government, the legislative authority necessarily predominates."[145] The specific attention given to the legislative branch was in part due to a legislature's natural incentive to "draw[] all power into its impetuous vortex" by

Ilan Wurman, *In Search of Prerogative*, 70 DUKE L. J. 93, 133–37 (2020) [hereinafter Wurman, *Prerogative*] (examining the differences between the Constitution's three vesting clauses).

[140] Lawson, *Original Meaning*, *supra* note 13, at 337–38; *see also* Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 231, 240 (referring to "our holding that the judicial power unalterably includes the power to render final judgments" and stating that "[t]he Constitution's separation of legislative and judicial powers denies [Congress] the authority" to "set aside a final judgment"); *but see* Mortenson & Bagley, *supra* note 1, at 55 (arguing that at the time of the Founding "executive power had an extremely thin meaning: the authority to execute instructions and prohibitions as formulated by some prior exercise of legislative power.").

[141] The full text of Article I § 1 is not always given the attention it deserves. Justice Stevens, for example, once explained that "[i]n Article I, the Framers vested 'All legislative Powers' in the Congress, just as in Article II they vested the 'executive power" in the President." Whitman v. American Trucking Ass'n, 531 U.S. 457, 489 (2001) (Stevens, J., concurring). Crucially, in making that comparison, Justice Stevens left out the portion of Article 1 § 1 referring to "herein granted." *Id.*

[142] *See generally* U.S. CONST. art. I.

[143] Mortenson and Bagley, *supra* note 1, at 293 ("The Founders divided power in this manner because both their own experience and the best political science of the era left them with serious concerns about the excessive consolidation of governmental authority.").

[144] *Id.* at 332.

[145] THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

"everywhere extending the sphere of its activity."[146] To prevent a tyrannical federal legislature, the Founders were careful to first split Congress into two chambers, and to then vest the bicameral body with only a limited selection of powers.[147] Most obviously, Congress was *not* vested with the authority to exercise the more general legislative authorities exercisable by the several states.[148]

Having acknowledged that Congress is vested only with specifically enumerated powers, the next task is to identify the specific powers Congress was vested with. Recall that Article I, Section 1 refers to "[a]ll legislative powers *herein granted*."[149] The reference to "herein granted" could either be a reference to the powers granted in the Constitution generally, or the powers granted in Article I specifically.[150] To decide between those two options, it is helpful to review how the Constitution uses the word "herein" in two other contexts.

Article I, Section 9, Clause 4 provides that "[n]o Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration *herein* before directed to be taken."[151] In that instance, the word "herein" refers to Article I, Section 2, Clause 3, which provides in part that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers."[152] Thus, the reference to "herein" in Article I,

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[146] THE FEDERALIST NO. 48, at 309 (James Madison) (Clinton Rossiter ed., 1961).

[147] THE FEDERALIST NO. 51, at 321–25 (James Madison) (Clinton Rossiter ed., 1961).

[148] *See* THE FEDERALIST NO. 83, at 497 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[T]he power of congress or in other words of the national legislature, shall extend to certain enumerated cases. This specification of particulars evidently excludes all pretension to a general legislative authority; because an affirmative grant of special powers would be absurd as well as useless, if a general authority was intended."); Gonzales v. Raich, 545 U.S. 1, 64 (2005) (Thomas, J., dissenting) (referring to a "police power of the sort reserved to the States"). Two exceptions, explained in greater detail in Part II.C, relate to Congress' powers to regulate as to the District of Columbia, and as to federal territories. U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2. In those two instances Congress has broader grants of legislative authority, although such authority is geographically limited. *See generally* U.S. CONST. art. I, § 8, cl. 17; U.S. CONST. art. IV, § 3, cl. 2.

[149] U.S. CONST. art. I, § 1 (emphasis added).

[150] Thomas W. Merrill, *Rethinking Article I, Section I: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2118–20 (2004).

[151] U.S. CONST. art. I, § 9, cl. 4 (emphasis added). Note that the Sixteenth Amendment changed the substantive meaning of this provision, although it does not alter the use of the word "herein." *See* U.S. CONST. amend. XVI ("The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several states, and without regard to any census or enumeration.").

[152] U.S. CONST. art. I, §2, cl. 3.

Section 9, Clause 4 directs the reader to look elsewhere within Article I specifically, not the Constitution generally.

The Constitution also uses the word "herein" in Article II, Section 2, Clause 2:

> [The President] shall . . . appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not *herein* otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[153]

In reference to that provision, Thomas Merrill has argued that "[t]he most likely reference of 'herein otherwise provided for' would be the Members of Congress, whose method of appointment is detailed in Article I."[154] According to Merrill, then, Article II's reference to "herein" requires the reader to look to "the Constitution as a whole, not a single article."[155]

Merrill's interpretation of the term "herein," which comes in a footnote and is only tangential to an otherwise meticulous analysis of Article I, is not the best interpretation. The problem with Merrill's interpretation is that Article I does not speak to the "appointment" of Members of Congress – it speaks to their *election*.[156]

Because Members of Congress are elected, not appointed, Article II, Section 2, Clause 2's reference to "Appointments . . . not herein otherwise provided for" should *not* be understood as a reference to Members of Congress.[157] Instead, the use of "herein" in Article II, Section 2, Clause 2 is best understood as a reference to Article II, Section

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[153] U.S. CONST. art. II, §2, cl. 2 (emphasis added).

[154] Merrill, *supra* note 150, at 2136 n.157. Gary Lawson has made the same point in passing. Lawson, *Original Meaning*, *supra* note 13, at 337 ("[Article I] expressly confirms that Congress can exercise only those legislative powers referenced elsewhere in the Constitution rather than any imaginable powers that bear the label 'legislative.'").

[155] Merrill, *supra* note 150, at 2136.

[156] U.S. CONST. art. I, § 2, cl. 4 ("When vacancies happen in the Representation from any State, the Executive Authority thereof shall issue Writs of *Election* to fill such Vacancies.") (emphasis added); U.S. CONST. art. I, § 3, cl. 2 ("Immediately after [the Senate] shall be assembled in Consequence of the first *Election*, they shall be divided as equally as may be into three Classes.") (emphasis added); U.S. CONST. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding *Elections* for Senators and Representatives, shall be prescribed in each State by the Legislature thereof . . . .") (emphasis added); U.S. CONST. art. I, § 5, cl. 1 ("Each House shall be the Judge of the *Elections*, Returns and Qualifications of its own Members . . . .") (emphasis added).

[157] U.S. CONST. art. II, § 2, cl. 2.

2, Clause 2 itself.[158] Specifically, when Article II, Section 2, Clause 2 states "herein," it references the types of appointed officers mentioned within the very same clause – *i.e.*, "Ambassadors, other public Ministers and Consuls, Judges of the supreme Court."[159] Relevant scholarship and Supreme Court precedent supports this conclusion.[160]

As the two examples noted above demonstrate, when the Constitution uses the term "herein," it does so to refer the reader to a specific article, not the Constitution generally.[161] It follows that the reference to "herein" in Article I, Section 1 should similarly be understood as a reference to the powers vested in Article I.[162] In sum, Article I's vesting in Congress of the "legislative powers herein granted"

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[158] *Id.*

[159] *Id.*

[160] Free Enter. Fund v. Pub. Co., 561 U.S. 477, 497–98 (2010) ("The people do not vote for the 'Officers of the United States.' Art. II, §2, cl. 2. They instead look to the President to guide the 'assistants or deputies . . . subject to his superintendence.'") (quoting Federalist No. 72, p. 487 (J. Cooke ed.1961) (A. Hamilton); United States v. Mouat, 124 U.S. 303, 307 (1888) ("Unless a person in the service of the government, therefore, holds his place by virtue of an appointment by the president, or of one of the courts of justice or heads of departments authorized by law to make such an appointment, he is not strictly speaking, an officer of the United States."); Josh Blackman & Seth Barrett Tillman, *The Emoluments Clauses litigation, Part 1: The Constitution's taxonomy of officers and offices*, WASH. POST (Sept. 25, 2017, 10:04 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/09/25/the-emoluments-clauses-litigation-part-1-the-constitutions-taxonomy-of-officers-and-offices/ [https://perma.cc/5GH6-WCZP] ("Under the canon of *ejusdem generis*, 'all other Officers of the United States' should be read to reference the same kind of executive and judicial branches officers that the clause expressly lists. All these officers are appointed, not elected.").

[161] *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2. Additionally, Article I, Section 8, Clause 18 speaks to the existence of "other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," further suggesting that the Constitution is capable of referring the reader to powers outside of Article I when necessary. U.S. CONST. art. I., § 8, cl. 18.

[162] Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV., 1849, 1869 (2019) (contending that "herein granted" refers to "the enumerated powers granted in Article I"). Indeed, even Merrill comes to interpret Article I, Section 1's use of "herein" as a reference to the enumerated powers found in Article I. Merrill, *supra* note 151, at 2137. "[T]he overall structure of the Constitution makes more sense," he argues, "if we construe 'herein' in Article I . . . to refer only to Article I itself." *Id.* Interpreting it otherwise would have odd results, "[f]or example, the President's power to make treaties, set forth in Article II, seems to qualify as a type of legislative power," and "[i]t would be odd for the constitutional drafters to confer 'all' legislative powers on Congress in Article I, and then grant a specific type of legislative power to the President in Article II." *Id.* "The anomaly disappears," Merrill persuasively concludes, "if we read 'herein granted'" to refer to the "powers enumerated in Article I." *Id.*

is a vesting of those legislative powers specifically enumerated in Article I, Section 8.[163]

B. Congress' Original Legislative Powers

Having determined that the original "legislative powers" vested in Congress are located in Article I, Section 8, the next task in developing nondelegation doctrines is to begin uncovering the original public meanings of each power. Obtaining those original public meanings will shed light not only on the subjects Congress can regulate (*e.g.*, *what* is "commerce" or "war"), but also the extent to which Congress can delegate its authority to address those subjects (*e.g.*, *who* can "regulate" commerce or "declare" war).

Because Congress' Article I, Section 8 powers are the first powers to be analyzed in this Article, it is helpful to briefly outline the mechanics of my proposal. Below I begin to outline key nondelegation questions applicable to different categories of congressional powers. I propose that these key nondelegation questions structure the necessary historical analyses courts must engage in (as cases arise) to determine whether any particular delegation of discretion is constitutional. By applying the applicable key nondelegation questions to the different delegations, crystalized nondelegation doctrines can develop over time.

My proposed project begins, then, with an analysis of Article I, Section 8, which vests legislative powers in Congress through seventeen individual clauses:

> [1] The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United States;
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> [2] To borrow Money on the credit of the United States;
>
> [3] To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
>
> [4] To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

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[163] James Madison shared this interpretation of Article I, Section 1. Alexander & Prakash, *supra* note 22, at 1317 (noting that Madison "certainly regarded the 'legislative powers' mentioned in the Article I Vesting Clause as referencing the legislative authorities granted in Article I, Section 8") (citing James Madison, *Letters of Helvidius No. 1*, in 4 THE FOUNDERS' CONSTITUTION 66, 67-68 (Phillip B. Kurland & Ralph Lerner, eds., 1987) and James Madison, *Letters of Helvidius No. 2*, in 4 THE FOUNDERS' CONSTITUTION 69, 70 (Kurland & Lerner, eds., 1987).

> [5] To coin Money, regulate the Value thereof, and of foreign Coin, and fix the Standard of Weights and Measures;
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> [6] To provide for the Punishment of counterfeiting the Securities and current Coin of the United States;
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> [7] To establish Post Offices and post Roads;
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> [8] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;
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> [9] To constitute Tribunals inferior to the supreme Court;
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> [10] To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;
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> [11] To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
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> [12] To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
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> [13] To provide and maintain a Navy;
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> [14] To make Rules for the Government and Regulation of the land and naval Forces;
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> [15] To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> [16] To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> [17] To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings.[164]

[164] U.S. CONST. art. I, § 8, cl. 1–17.

Note the diversity of subjects addressed in those seventeen clauses. The familiar power to "regulate Commerce,"[165] for example, is listed alongside the less familiar power to "punish Piracies."[166] The diverse range of subjects addressed in Article I, Section 8 is a clue that developing a single nondelegation doctrine constitutes a fool's errand.

Note also the character of each of Congress' Article I, Section 8 powers. As explained above, the Constitution refers to those powers as "legislative powers."[167] But many of those powers – such as the power to declare war and the power to organize, arm, and discipline the militia – hardly seem "legislative," at least not in the way a political scientist might use the term. Indeed, as Michael McConnell has explained, many of Congress' powers historically belonged to the British monarch.[168] "The framers self-consciously analyzed each of the prerogative powers" exercised by the Crown, McConnell explains, "but did not vest all (or even most) of them in the American executive."[169] Instead, some of the royal prerogatives "were vested in Congress."[170] Article I's reference to "legislative powers," then, serves as something of a defined term encompassing powers more naturally exercised by an executive. This casts more doubt on the current nondelegation doctrine's focus on the abstract conception of "legislative power," rather than the specific, sometimes-executive-like powers that are actually vested in Congress.[171]

Deriving the key nondelegation question applicable to Congress' Article I, Section 8 powers begins with a further review of Article I,

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[165] U.S. CONST. art. I, § 8, cl. 3.

[166] U.S. CONST. art. I, § 8, cl. 10.

[167] *Supra* Part III.A (interpreting "herein").

[168] MICHAEL W. MCCONNELL, THE PRESIDENT WHO WOULD NOT BE KING: EXECUTIVE POWER UNDER THE CONSTITUTION 11 (2020).

[169] *Id.*; *see also* Wurman, *Prerogative*, *supra* note 139, at 134 ("[T]he [Constitutional] Convention arguably assigned Congress much more than just 'the legislative power.'").

[170] MCCONNELL, *supra* note 168, at 11.

[171] Recognizing the executive-like nature of many of Congress' powers distinguishes this Article's proposal from that offered by Cary Coglianese, pursuant to which delegations are evaluated on six dimensions and then compared to the dimensions of an Article I, Section 8 power. Coglianese, *supra* note 162, at 1851, 1863–70. Coglianese's proposal (which focuses on the unique dimensions of a "legislative" power) can be conceptualized as a middle approach between this Article's proposal (which focuses on the nature of each Congressional power but does not consider how "legislative" that power might be) and the traditional nondelegation doctrine (which focuses on "legislative power" in the abstract). *See id.* at 1863 (describing "lawmaking authority" as consisting of six "distinct sticks or features"); *see also id.* at 1865 (an unconstitutional delegation "must at minimum authorize the making of law"). Thus, this Article's proposal applies to all of Congress' powers, not just the "legislative" powers vested in Article I, Section 8. U.S. CONST. art. I, § 8.

Section 8 itself. Following the seventeen clauses listed above, Article I, Section 8 contains an eighteenth clause providing:

> [18] 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.[172]

This Necessary and Proper Clause provides the text-based standard for determining how Congress can delegate its Article I, Section 8 powers.[173] The key nondelegation question for the legislative powers enumerated in Article I, Section 8 is therefore as follows:

Key Nondelegation Question for Article I, Section 8 Powers
Whether an objective reader in 1788 would have understood a particular delegation to be a "necessary and proper" means of "carrying" a particular Article I, Section 8 power "into execution."

The objective reader is correctly positioned in 1788, the year that the Necessary and Proper Clause and each Article I, Section 8 power was ratified.[174] Interpreting the relevant constitutional text from the perspective of the objective reader in 1788 therefore promotes the Fixed-Meaning Canon, which holds that "[w]ords must be given the meaning they had when the text was adopted."[175] Thus, to develop the

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[172] U.S. CONST. art. I, § 8, cl. 18.

[173] Gary Lawson has similarly identified the Necessary and Proper Clause as providing the relevant nondelegation standard. Lawson, *Original Meaning*, *supra* note 13, at 350 ("[I]f a fully informed eighteenth-century audience would have viewed a statute purporting to authorize an executive agent to make laws as 'improper,' then Congress does not have the enumerated power to circumvent the Constitution's basic Article II and Article III limitations on executive and judicial activity."); *id.* at 351 (arguing that the Necessary and Proper Clause "is in fact a crucial textual vehicle through which the specific contours of the nondelegation doctrine are constitutionalized").

[174] Gary Lawson & Guy Seidman, *When Did The Constitution Become Law?*, 77 NOTRE DAME L. REV. 1, 24 (2001) ("[T]he Constitution was properly ratified when the necessary ninth state convention completed its work, which in this case was 1:00 p.m. on June 21, 1788.").

[175] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (West 2012); Interpreting texts from the perspective of the objective reader is, of course, a central tenet of originalism. *Id.* at 69–77 (describing the Ordinary-Meaning Canon); Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 2018) ("We look for a sort of 'objectified' intent-the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris."); Frank H. Easterbrook,

nondelegation doctrines applicable to Article I, Section 8 powers, a court must ask what "necessary and proper" meant in 1788.

As most first year law students are aware, some evidence of the original public meaning of the Necessary and Proper Clause is found in Chief Justice Marshall's 1819 opinion in *McCulloch v. Maryland*.[176] The threshold issue in that case was whether Congress had the constitutional authority to establish a national bank.[177] Because the Constitution does not explicitly vest such a power in Congress, debate turned to whether Congress could establish a bank by relying on the Necessary and Proper Clause.[178] In interpreting that clause, Chief Justice Marshall announced the test which has since become well-known: "Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional."[179]

Chief Justice Marshall's interpretation of the Necessary and Proper Clause has been described as expansive, as it permits Congress to make laws that, although not strictly necessary, are "convenient or useful."[180] But some scholars have suggested that the original understanding of Necessary and Proper Clause – ratified thirty years before *McCulloch* – was much narrower.[181] One competing understanding of the Necessary and Proper Clause, for example, was advanced by James Madison and Thomas Jefferson, who both distinguished "necessity" from "convenience" in a way that Chief Justice Marshall arguably did not.[182]

I do not here argue that Chief Justice Marshall, Madison, or Jefferson had the better interpretation. But I do posit that, in determining the degree to which Congress may delegate a particular power, a court must do more than blindly assume that the dicta in *McCulloch* applies

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The Role of Original Intent in Statutory Construction, 11 HARV. J.L. & PUB. POL'Y 59, 61 (1988). ("Meaning comes from the ring the words would have had to a skilled user of words at the time, thinking about the same problem.").

[176] McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

[177] *Id.* at 316.

[178] *Id.* at 323–24.

[179] *Id.* at 421.

[180] Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 220 (2003) (describing the "view attributed to Marshall").

[181] Gary Lawson & Patricia B. Granger, *the "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 Duke L.J. 267, 286-89 (1993).

[182] Barnett, *supra* note 180, at 193, 195–96 (quoting 1 ANNALS OF CONG. 1950 (Joseph Gales ed., 1791) and OPINION OF THOMAS JEFFERSON, SECRETARY OF STATE, ON THE SAME SUBJECT (FEB. 15, 1791), *reprinted in* LEGISLATIVE AND DOCUMENTARY HISTORY OF THE BANK OF THE UNITED STATES, at 93 (M. St. Clair Clarke & D.A. Hall eds., Augustus M. Kelley 1967)).

equally to each of Congress' diverse powers; additional historical research is required. For the purposes of advancing my argument, however, I will momentarily assume without deciding that Chief Justice Marshall's familiar understanding of the Necessary and Proper Clause is the same understanding that an objective reader would have assigned to that clause in 1788. But as is central to my proposal, delegations deemed "necessary and proper" to carry one power into execution may not be "necessary and proper" to carry another power into execution.

Consider a preliminary application of the above-proposed key nondelegation doctrine question to Article I, Section 8, Clause 5, which provides Congress with three separate powers: (1) The power "[t]o coin Money"; (2) the power to "regulate the Value [of such Money], and of foreign Coin"; and (3) the power to "fix the Standard of Weights and Measures."[183] An initial analysis suggests that an objective reader in 1788 understood Congress as being able to delegate each of those powers differently.

It is unlikely, for example, that the objective reader understood Congress' power to "coin money" as requiring legislators to personally press copper over an open flame. The discretion inherent in exercising that power (*e.g.*, how hot to make the flame) could be delegated to others. By comparison, an objective reader likely would have understood Congress as being perfectly able to "regulate the value" of such coins without it being "necessary and proper" to delegate any authority to others.[184] The 1792 Coinage Act provides some evidence suggesting that these initial analyses are correct.[185]

The 1792 Coinage Act delegated to the "Director of the Mint" the authority to "employ as many clerks, workmen, and servants *as he shall from time to time find necessary*."[186] Simultaneously, the Act set the "value" of the coins that those workers would produce.[187] Put

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[183] U.S. CONST. art. I, § 8, cl. 5.

[184] *Id.*

[185] Coinage Act of April 2, 1792, ch.16, 1 Stat. 246 (1792).

[186] § 2.

[187] § 9. ("That there shall be from time to time struck and coined at the said mint, coins of gold, silver, and copper, of the following denominations, values and descriptions, viz. Eagles—each to be of the value of ten dollars or units, and to contain two hundred and forty-seven grains and four eighths of a grain of pure, or two hundred and seventy grains of standard gold. Half eagles—each to be of the value of five dollars, and to contain one hundred and twenty three grains and six eights of a grain of pure, or one hundred and thirty five grains of standard gold. Quarter Eagles—each to be of the value of two dollars and a half dollar, and to contain sixty-one grains and seven eighths of a grain of pure, or sixty-seven grains and four eighths of a grain of standard gold. Dollars or Units—each to be of the value of a Spanish milled dollar as the same is now current, and to contain three hundred and seventy-one grains and four sixteenth parts of a grain of pure, or four hundred and sixteen grains of standard silver, Half Dollars—each to be of half the

differently, Congress delegated broad discretion when it came to the task of physically producing coins, but delegated narrow discretion in setting the value of those coins.[188] Congress also delegated narrow discretion when it first exercised its power to "fix the Standard of Weights and Measures" in 1828.[189] Congress delegated these three powers differently, and in ways that likely aligned with what the objective reader in 1788 would have considered "necessary and proper." To be sure, the 1792 Coinage Act is just one example – and I've only scratched the surface of the relevant historical record. But the preliminary application above shows how the key nondelegation question applicable to Congress' Article I, Section 8 powers can be applied in practice.

C. Congress' Other Original Powers

As ratified in 1788, the Constitution vested powers in Congress through provisions found outside of Article I as well. First is the Territorial Clause of Article IV, Section 3, Clause 2, which provides:

> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

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value of the dollar or unit, and to contain one hundred and eighty-five grains and ten sixteenth parts of a grain of pure, or two hundred and eight grains of standard silver. Quarter Dollars—each to be of one fourth the value of the dollar or unit, and to contain ninety-two grains and thirteen sixteenth parts of a grain of pure, or one hundred and four grains of standard silver. Dismes—each to be of the value of one tenth of a dollar or unit, and to contain thirty seven grains and two sixteenth parts of a grain of pure, or forty one grains and three fifth parts of a grain of standard silver. Half Dismes—each to be of the value of one twentieth of a dollar, and to contain eighteen grains and nine sixteenth parts of a grain of pure, or twenty grains and four fifth parts of a grain of standard silver. Cents—each to be of the value of the one hundredth part of a dollar, and to contain eleven penny-weights of copper. Half Cents—each to be of the value of half a cent, and to contain five penny-weights and half a penny-weight of copper.").

[188] *See* Edwin Vieira, Jr., *Forgotten Role of the Constitution in Monetary Law*, 2 TEX. REV. L. & POL. 77, 110 (1997) (arguing that Congress was "crystal clear" in setting the value unit of the money system).

[189] U.S. CONST. art. I, § 8, cl. 5; ARTHUR H. FRAZIER, UNITED STATES STANDARDS OF WEIGHTS AND MEASURES 1 (1978), available at https://repository.si.edu/bitstream/handle/10088/2439/SSHT-0040_Hi_res.pdf [https://perma.cc/XBL8-DPES]. The power had gone unexercised up until 1828, likely because congressmen succumbed to local pressures advocating for the continued use of disparate, state-set weights. *Id.* When Congress finally exercised its power in 1828, Congress did so not by delegating discretion to, say, a Board of Weights and Measurements. Instead, Congress explicitly identified a particular "brass troy pound weight" to serve as a uniform standard. *See* Act to Continue the Mint at the City of Philadelphia § 2 ((1821).

Second is Article III, Section 3, Clause 2, which provides:

> The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.[190]

As noted in Part II.A, these extra-Article I powers are not the "legislative powers" referred to in Article I, Section 8.[191] Nonetheless, these extra-Article I powers are subject to the limitation imposed by the Necessary and Proper Clause,[192] which is not limited to Congress' Article I, Section 8 powers, but instead applies to "*all* . . . powers vested by this Constitution."[193] The key nondelegation question applicable to the extra-Article I powers delegated in the original Constitution is therefore the same question applicable to Congress' Article I, Section 8 powers:

Key Nondelegation Question for Congress' Other Original Powers
Whether an objective reader in 1788 would have understood a particular delegation to be a "necessary and proper" means of "carrying" a particular power "into execution."

Like the key nondelegation question applicable to Congress' Article I, Section 8 powers, the question applicable to Congress' other original powers requires interpreting the Constitution from the perspective of the objective reader in 1788 – the year the Necessary and Proper Clause and the extra-Article I powers originally vested in Congress were ratified.[194]

To see how this key nondelegation question can be applied in practice, consider first the Territorial Clause of Article IV. Beginning with the Northwest Territory, Congress has long relied on its Territorial Clause power to establish territorial governments by statute.[195] The

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[190] U.S. CONST. art. IV, § 3, cl. 2; *Id.* art. III, § 3, cl. 2. *See supra* note 118 for other examples of powers vested in Congress outside of Article I.

[191] *See also* Wurman, *Prerogative*, *supra* note 139, at 134 ("[T]he [Constitutional] Convention arguably assigned Congress much more than just 'the legislative power.'").

[192] U.S. CONST. art I, § 8, cl.18.

[193] *Id.* (emphasis added).

[194] Lawson & Seidman, *supra* note 174, at 24.

[195] 1 Stat. 50 (1789) (Northwest); 1 Stat. 123 (1790) (Southwest); 1 Stat. 549 (1798) (Mississippi); 2 Stat. 58 (1800) (Indiana); 2 Stat. 283 (1804) (Orleans); 2 Stat. 309 (1805) (Michigan); 2 Stat. 331 (1805) (Louisiana); 2 Stat. 514 (Illinois); 2 Stat. 743 (1812) (Missouri); 3 Stat. 371 (1817) (Alabama); 3 Stat. 493 (1819) (Arkansas); 3 Stat. 654 (1822) (Florida); 5 Stat. 10 (1836) (Wisconsin); 5 Stat. 235 (1838) (Iowa); 9 Stat. 323 (1848) (Oregon); 9 Stat. 403 (1849) (Minnesota); 9 Stat. 446 (1850) (New Mexico); 9 Stat. 453 (1850) (Utah); 10 Stat. 172 (1853)

creation of these territorial governments is a means for Congress to exercise its authority over far-flung corners of the continent (and beyond).[196] This was particularly important at the time of the Constitution's ratification, when communicating with distant territories was difficult.[197] The Territorial Clause thus responds to these geographical difficulties by permitting Congress to empower territorial governors, legislatures, and courts to govern geographic terrain that Congress could not itself govern directly.[198]

Given geographical realities, it is likely that the objective reader in 1788 would have understood Congress' early statutes establishing territorial governments as being "necessary and proper" means for Congress to "make all needful Rules and Regulations respecting" the territories.[199] Mortenson and Bagley, however, offer a competing view. The duo contends that Congress' establishing of territorial governments constitutes evidence that no nondelegation doctrine (for any power) existed at the time of the Founding.[200] Arguing that Congress' Territorial Clause power is "legislative —just like the powers enumerated in Article I," Mortenson and Bagley state that "[i]f originalists are right that Congress can't delegate its Article I authority to 'regulate Commerce,' it should follow that Congress also can't delegate its Article IV power to make 'needful Rules and Regulations respecting the Territory.'" [201]

Respectfully, Mortenson and Bagley are mistaken on two grounds. First, the power exercised by territorial governments is *territorial* power; territorial governments do not exercise *federal* power (legislative or otherwise).[202] Thus, Congress does not *delegate* its Territorial Clause power to territorial governments. Instead, Congress *exercises* its Territorial Clause power when it creates territorial governments that (in

(Washington); 10 Stat. 277 (1854) (Kansas); 10 Stat. 277 (1854) (Nebraska); 12 Stat. 172 (1861) (Colorado); 12 Stat. 209 (1861) (Nevada); 12 Stat. 239 (1861) (Dakota); 12 Stat. 664 (1863) (Arizona); 12 Stat. 808 (1853) (Idaho); 13 Stat. 85 (1864) (Montana); 15 Stat. 178 (1868) (Wyoming); 26 Stat. 81 (1890) (Oklahoma); 31 Stat. 141 (1900) (Hawaii); 37 Stat. 512 (1912) (Alaska).

[196] U.S. CONST. art. IV, § 3, cl. 2.

[197] *How Did People Communicate in the 1700s?*, Reference, https://www.reference.com/history/did-people-communicate-1700s-f522b0825da9b118 [https://perma.cc/CH8Z-R9B8] (March 27, 2020).

[198] U.S. CONST. ART. IV, § 3, cl. 2.

[199] U.S. CONST. ART. I, § 8, cl. 18; *id.* art. IV, § 3, cl. 2.

[200] Mortenson & Bagley, *supra* note 1, at 333–38.

[201] *Id.* at 336.

[202] Fin. Oversight & Mgmt. Bd. for Puerto Rico v. Aurelius Inv., LLC, 140 S. Ct. 1649, 1651 (2020)) ("[W]hen Congress creates local offices using these two unique powers, [*i.e.*, the Territorial Clause and Article I, Section 8, Clause 17, which refers to what is now the District of Columbia] the officers exercise power of the local government, not the Federal Government.").

turn) enact, enforce, and adjudicate territorial laws.[203] As Justice Thomas explained after a thorough review of the historical evidence, "the First Congress recognized the distinction between territorial and national powers."[204] It follows that Congress' establishing of territorial governments does not constitute evidence of the nonexistence of a single nondelegation clause. Instead, Congress' establishing territorial governments is better understood as a straightforward exercise of Congress' Territorial Clause power.

Second, even if Mortenson and Bagley were to disagree with Justice Thomas and argue that there is no distinction between federal and territorial power, they still go too far in arguing that Congress' establishing territorial governments constitutes evidence that there was no nondelegation doctrine at the time of the Founding. At best, Congress' alleged "delegations" of federal legislative authority to territorial governments would only be evidence speaking to how Congress can delegate the power vested by the Territorial Clause. It would not be evidence speaking to how Congress can delegate powers vested by other clauses.

As was previously noted, there are practical reasons for Congress to have the ability to delegate authority to far-flung territories.[205] Those reasons do not apply to other powers vested in Congress. So even if the nondelegation doctrine applicable to the Territorial Clause allowed "delegations" of Congress' Territorial Clause power, it would not follow that other nondelegation doctrines applicable to other powers would allow for similar delegations. Each power must be considered in its own context.

Consider another example involving the other extra-Article I congressional power quoted above, which vests in Congress the "Power to declare the Punishment of Treason."[206] In the Crimes Act of 1709, Congress exercised that power with fatal precision: "[S]uch person or persons [who] shall be adjudicated guilty of treason against the United States . . . shall suffer death."[207] More recently, Congress has exercised

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[203] A similar relationship exists between Congress and the District of Columbia, which Congress has empowered to exercise *local* authority pursuant to Congress' power "[t]o exercise exclusive legislation in all cases whatsoever, over [the District of Columbia]." U.S. CONST. art. I, § 8, cl. 17. As Part II.A demonstrated, the proper nondelegation doctrine as to federal statutes granting the local D.C. government the authority to enact local laws is whether such federal statutes are a "necessary and proper" means for Congress to carry out its Article I, Section 8, Clause 17 power.

[204] *Aurelius*, 140 S. Ct. at 1670 (Thomas, J., concurring).

[205] *See supra* notes 197–199 and accompanying text.

[206] U.S. CONST. art. III, § 3, cl. 2.

[207] 1 Stat. 112, 112 (1790). The judiciary's involvement in "adjuciat[ing]" such treason charges does not raise a serious nondelegation challenge, since the

its declaratory power by establishing that those guilty of treason "shall suffer death, or shall be imprisoned not less than five years and fined under this title but not less than $10,000; and shall be incapable of holding any office under the United States."[208]

As compared to the Crimes Act of 1709, the modern statute declaring the punishment for treason leaves more discretion to the President and the courts.[209] In 1709, the punishment was clearly set by Congress: If you were adjudicated guilty, you were to be sentenced to death.[210] Today, lawyers within the executive branch can propose to a court whether a fine, imprisonment or execution is an appropriate punishment for a particular defendant.[211] I take no position as to whether leaving such discretion constitutes an impermissible delegation of Congress' power to "declare" the punishment for treason. Instead, I note that the relevant framework for determining a nondelegation challenge to the modern statute would be to consider whether, in the eyes of the objective reader in 1788, the discretion granted in the modern statute is a "necessary and proper" means of "carrying out" Congress' power to declare the punishment of treason.[212] That inquiry, which is focused

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Constitution elsewhere notes that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same over Act, or on Confession in open Court." U.S. CONST. art. III, § 3, cl. 1. Put differently, Congress must "declare" the penalty for treason, but may then permit the courts to determine if the crime of treason has occurred. *Id.*

[208] 18 U.S.C. § 2381.

[209] *Id.*

[210] 1 Stat. 112 (1790).

[211] U.S. DEPT OF JUSTICE, U.S. ATTORNEYS' MANUAL: PRINCIPLES OF FEDERAL PROSECUTION § 9-27.730, available at https://www.justice.gov/jm/jm-9-27000-principles-federal-prosecution#9-27.730 [https://perma.cc/8DKG-BWBY].

[212] Answering that question will require examining historical evidence speaking to, among other things, the discretion executive officials had in 1788 to make charging decisions, and how those charging decisions were permissibly shaped by legislation. U.S. CONST. Art. I, § 8, cl. 18. McGinnis and Rappaport have suggested that the historical understanding of prosecutorial discretion would allow for broad delegations of power. John O. McGinnis & Michael B. Rappaport, *The Power of Interpretation: Minimizing the Construction Zone*, 96 NOTRE DAME L. REV. 919, 950 (2021) ("Prosecutorial discretion is one of these specific areas where the executive enjoyed significant discretion. Consequently, if the Congress conferred authority on the President to adopt his nonenforcement program, this action would have been well within any limits on Congress's constitutional power."); *see also* Staphanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. PA. L. REV. 959, 1011 (2009) (citing Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 YALE L. J. 1131, 1189 (1991)) (discussing the role of prosecutors at the Founding); Peter L. Markowitz, *Prosecutorial Discretion Power at Its Zenith: The Power to Protect Liberty*, 97 B.U. L. REV. 489, 497–501 (2017) (discussing the history of prosecutorial discretion in early America).

upon a particular constitutional provision, involves little need to map the vague outlines of a generalized conception of "legislative power."

D. The Sixteenth Amendment

This Article has so far examined powers originally vested in Congress by the Constitution as ratified in 1788. Constitutional amendments, however, vest additional powers in Congress. Many of those amendments vest in Congress the power to "enforce" the amendment by "appropriate legislation."[213] Other amendments vest in Congress the power to provide for something "by law."[214] Both of those categories of amendments will be examined in turn. But it is helpful to first discuss the Sixteenth Amendment, which utilizes unique language for an amendment, and which can be examined in isolation. The Sixteenth amendment provides:

> The Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.[215]

The key nondelegation question applicable to the Sixteenth Amendment is therefore as follows:

Key Nondelegation Question For The Sixteenth Amendment
Whether an objective reader in 1788 would have understood a particular delegation to be a "necessary and proper" means of "carrying into execution" the taxing power vested in Congress by the Sixteenth Amendment, as that power was understood by an objective reader in 1913.

The Sixteenth Amendment's key nondelegation question, like the questions applicable to Congress' original powers, asks for a consideration of what the objective reader would have considered "necessary and proper" in 1788.[216] That consideration is (again) derived from the Necessary and Proper Clause, which applies to "all . . . powers vested by this Constitution."[217] When the Sixteenth Amendment was

[213] *See, e.g.*, U.S. CONST. amend. XIIV, § 5; U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[214] *See, e.g.*, U.S. CONST. amend. XX, § 2; U.S. CONST. amend. XXV, § 4, cl. 1.

[215] U.S. CONST. amend. XVI.

[216] *Id.*

[217] U.S. CONST. art. I, § 8, cl. 18.

ratified, it became a "power[] vested by this Constitution," and thus became a power subject to the limitations imposed by the Necessary and Proper Clause.[218]

Unlike the key nondelegation questions applicable to Congress' original powers, the Sixteenth Amendment's nondelegation key question includes an additional consideration. Namely, it requires a court to consider what the objective reader in 1913 (the year the Sixteenth Amendment was ratified) understood the Sixteenth Amendment as empowering Congress to do. It can be said, then, that the Sixteenth Amendment's nondelegation doctrine requires courts to engage in a bit of interpretive time traveling.[219]

By "time traveling," I mean that the Sixteenth Amendment's key nondelegation question requires a court to consider the constitutionality of a delegation from the perspective of objective readers positioned at two different points in time – 1913 (the year the Sixteenth Amendment was ratified) and 1788 (the year the Necessary and Proper Clause was ratified). This task was unnecessary when examining Congress' original powers because those powers were vested in Congress in 1788, the same year the Necessary and Proper Clause was ratified.[220]

In applying the Sixteenth Amendment's key nondelegation question to determine if a particular delegation is constitutional, a court should begin by considering the scope of the Sixteenth Amendment as understood by the objective reader in 1913. If the delegation in question concerned a levying of a tax on real property, for example, the court could readily determine that the delegation was improper pursuant to the Sixteenth Amendment, which only empowers Congress to tax "incomes."[221] If, however, the delegation at hand appears to fall within the original public meaning of the Sixteenth Amendment (*e.g.*, a delegation of discretion to a federal tax agent to calculate income), the court must then consider whether the delegation was a "necessary and proper" means of "carrying" the Sixteenth Amendment power "into execution," as that "necessary and proper" limitation was understood by the objective reader in 1788.

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[218] *See* Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1811 (2010).

[219] *See* Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does it Matter Today?*, 108 NW. U. L. REV. 799, 803 (2014).

[220] *See* U.S CONST. art. 1 § 8 cl. 18.

[221] U.S. CONST. amend. XVI. The delegation may, however, be permissible pursuant to Congress' Article I, Section 8, Clause 1 power to "lay and collect Taxes." U.S CONST. art. 1, § 8, cl. 2.

E. Appropriate Legislation Powers

Several amendments vest in Congress the power to "enforce" an amendment by "appropriate legislation." A full accounting of these "appropriate legislation" powers is as follows:

> [The Thirteenth Amendment, ratified in 1865, provides:] Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction. . . . Congress shall have power to **enforce this article by appropriate legislation**.[222]
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> [The Fourteenth Amendment, ratified in 1868, provides:] No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . . Congress shall have power to **enforce, by appropriate legislation**, the provisions of this article.[223]
>
> [The Fifteenth Amendment, ratified in 1879, provides:] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. . . . Congress shall have power to **enforce this article by appropriate legislation**.[224]
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> [The Eighteenth Amendment, ratified in 1919 and repealed in 1933, provides:] After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited. . . . Congress and the several states shall have concurrent power to **enforce this article by appropriate legislation**.[225]

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[222] U.S. CONST. amend. XII (emphasis added).

[223] U.S. CONST. amend. XIV (emphasis added).

[224] U.S. CONST. amend. XV (emphasis added).

[225] U.S. CONST. amend. XIIX (emphasis added).

The Eighteenth Amendment utilizes unique language in that it vests a power "concurrently" in Congress and the several states. *Id.* at § 2. Shortly after the amendment's ratification, Justice McReynolds referred to the Eighteenth Amendment as a "bewilderment." Noel T. Dowling, *Concurrent Power under the Eighteenth Amendment*, 6 MINN. L. REV. 447, 447 (1922) (quoting National Prohibition Cases, 253 U.S. 350, 392 (1920) (McReynolds, J. concurring)). Justice McReynolds' bewilderment was justified, as a "concurrent power in two distinct sovereignties to regulate the same thing is as inconsistent in principle as it is

> [The Nineteenth Amendment, ratified in 1920, provides:] The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex. . . . Congress shall have power to **enforce this article by appropriate legislation**.[226]

> [The Twenty Third Amendment, ratified in 1961, provides:] The District constituting the seat of government of the United States shall appoint in such manner as the Congress may direct: . . . A number of electors of President and Vice President . . . and they shall meet in the District and perform such duties as provided by the twelfth article of amendment. . . . Congress shall have power to **enforce this article by appropriate legislation**.[227]

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impracticable in action. Smith v. Turner, 48 U.S. 283, 399 (1849) (The Eighteenth Amendment utilizes unique language in that it vests a power "concurrently" in Congress and the several states.). It involves a moral and physical impossibility. *Id.* A joint action is not supposed, and two independent wills cannot do the same thing. *Id.* The action of one, unless there be an arrangement, must necessarily precede the action of the other; and that which is first, being competent, must establish the rule. *Id.* If the powers be equal; as must be the case, both being sovereign, one may undo what the other does, and this must be the result of their action." *Id.*

One can imagine a circumstance where a delegation made by Congress pursuant to the Eighteenth Amendment was found to have unconstitutionally interfered with the concurrent power vested in the states. In light of the Eighteenth Amendment's repeal I will not here seek to fully explore such circumstances. But I do note that any such limitation on Congress' ability to delegate its eighteenth Amendment authority would be a limitation unique to the Eighteen Amendment's concurrently vested powers. This, I posit, further highlights my broader argument that one must independently review the substance of each of Congress' powers to conclude how Congress can delegate any particular power. It would be wrong to blindly conclude that a limitation on Congress' ability to delegate its concurrently vested Eighteenth Amendment power is a limitation that also applies to any other power vested in Congress. The peculiar language associated with each of Congress' powers must be given an independent review.

[226] U.S. CONST. amend. XIX (emphasis added).

[227] US. CONST. amend. XIII (emphasis added). The Twenty Third Amendment utilizes relatively unique language in that the amendment provides Congress with the power to "direct" the government of the District of Columbia to appoint electors. US. CONST. amend. XIII, § 1. The Twenty Third Amendment then vests in Congress the power to "enforce" its power to "direct" the government of the District of Columbia "by appropriate legislation." US. CONST. amend. XIII, § 2. Such language results from Congress' supervisory relationship with the government of the District of Columbia. U.S. CONST. art. I, § 8, cl. 17 (vesting in Congress the power to "exercise exclusive Legislation in all Cases whatsoever, over" the District of Columbia). The power vested in Congress by the Twenty Third Amendment resembles the power constitutionally vested in state legislatures to appoint electors. U.S. CONST. art. II, § 1 ("Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors . . . .").

> [The Twenty Fourth Amendment, ratified in 1964, provides:] The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any state by reason of failure to pay any poll tax or other tax. . . . Congress shall have power to **enforce this article by appropriate legislation**.[228]
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> [The Twenty Sixth Amendment, ratified in 1971, provides:] The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United States or any state on account of age. . . . Congress shall have the power to **enforce this article by appropriate legislation**.[229]

By vesting in Congress the power to "enforce" an amendment by "appropriate legislation," the above-quoted amendments call for a more complicated nondelegation question than the questions applicable to either the Sixteenth Amendment or the powers vested in Congress by the Constitution as ratified in 1788. The complication arises because, as previously noted, the Necessary and Proper Clause applies to "all . . . powers vested by this Constitution,"[230] including those powers added to the Constitution by amendments.

The "appropriate legislation" amendments do not, for example, vest in Congress the power to "prohibit slavery."[231] Instead, Congress is vested with the more awkwardly worded power to "enforce [a prohibition on slavery] by appropriate legislation."[232] Thus, the key nondelegation question for Congress' "appropriate legislation" powers becomes:

Key Nondelegation Question For Congress' "Appropriate Legislation" Powers
Whether an objective reader in 1788 would have understood a particular delegation to be a "necessary and proper" means of "carrying into execution" a power, as the power was understood by an objective reader at the time the power was vested by a particular amendment, to "enforce" the amendment by "appropriate legislation."

I readily concede that this key nondelegation question constitutes a bit of a mouthful. There is some reason to believe that it could (eventually) be shortened by removing the underlined reference to

[228] U.S. CONST. amend. XXIV (emphasis added).
[229] U.S. CONST. amend. XXVI (emphasis added).
[230] U.S. CONST. art. I, § 8, cl. 18.
[231] U.S. CONST. amend. XIII.
[232] U.S. CONST. art. XIII, § 2.

"appropriate legislation." But as explained below, additional historical research will be needed to justify that removal.

The case for removing the reference to "appropriate legislation" from the above-proposed nondelegation question rests on the argument that the "appropriate legislation" inquiry captures the same "necessary and proper" inquiry derived from the Constitution as ratified in 1788. Evaluating the historical accuracy of that argument begins with a consideration of the Reconstruction era following the Civil War. During that era, Congress enacted three Reconstruction Amendments – the Thirteenth, Fourteenth, and Fifteenth Amendments.[233] The Thirteenth Amendment was the first amendment to utilize the term "appropriate legislation."[234] The term was then repeated in the Fourteenth and Fifteenth Amendments.[235]

As Jack Balkin explains, "[t]he framers of the Reconstruction Amendments assumed that the *McCulloch* test would apply to Congress' new Reconstruction Powers, and that the use of the term 'appropriate' in the text of all three enforcement clauses reflects this assumption."[236] Other scholars agree with Balkin,[237] and their view is consistent with the view espoused by the Supreme Court during the Civil Rights Movement.[238]

During the Civil Rights Movement, Congress enacted landmark civil rights statutes grounded in the Reconstruction Amendments.[239] In *Katzenbach v. Morgan*,[240] the Court explained that "the *McCulloch v. Maryland* standard is the measure of what constitutes 'appropriate legislation' under [Section] 5 of the Fourteenth Amendment."[241] The Court similarly connected the term "appropriate legislation" to the

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[233] *See* John Harrison, *The Lawfulness of the Reconstruction Amendments*, 68 U. CHI. L. REV. 375 (2001).

[234] U.S. CONST. amend. XIIV, § 2.

[235] U.S. CONST. amend. XIV, § 5; U.S. CONST. amend. XV, § 2.

[236] Balkin, *supra* note 218, at 1810; *see also id.* at 1815 ("My point here is not simply that the Reconstruction Congress *expected* that courts would apply the test of *McCulloch*; the point, rather, is that the language of *McCulloch* is actually *embedded in the text* of Section 5, and, given the structural purposes of the Reconstruction Amendments, there is no good textual or structural reason to give Congress a narrower power.").

[237] *Id.* at n. 34 (collecting sources).

[238] *Id.* at 39 (collecting sources).

[239] *See, e.g.*, Nw. Austin Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 217–18 (2009) (Thomas, J., concurring in part and dissenting in part) ("There is certainly no question that the [Voting Rights Act of 1965] initially 'was passed pursuant to Congress' authority under the Fifteenth Amendment.'") (quoting Lopez v. Moterey Cnty., 525 U.S. 266, 282 (1999)).

[240] 384 U.S. 641 (1966).

[241] *Id.* at 651.

McCulloch test in other cases involving other Reconstruction Amendments.[242]

It is logical enough to presume, then, that different objective readers – although positioned at the different moments in time when each amendment was ratified – would each interpret "appropriate legislation" to mean the same thing it meant when it was first ratified in the Thirteenth Amendment. Indeed, giving the term a consistent meaning across the Constitution's amendments might even be defended by reference to the Presumption of Consistent Usage.[243] But before concluding the reference to "appropriate legislation" may be properly removed from the key nondelegation question proposed above, it is necessary to consider a second possibility. Particularly, it is necessary to consider the possibility that objective readers positioned at different points in time interpreted "appropriate legislation" differently – or, at minimum, interpreted the term differently than Chief Justice Marshall interpreted the Necessary and Proper Clause in *McCulloch*.

Recall that *McCulloch* was decided in 1819 – thirty years after the ratification of the original Constitution.[244] Further recall that scholarship suggests that Chief Justice Marshall's interpretation of the Necessary and Proper Clause was incorrect, in the sense that a different meaning applied to the clause at the time it was ratified in 1788.[245] Also consider that, over time, the Supreme Court has changed its view as to whether constitutional references to "appropriate legislation" adopt the *McCulloch* test. In *City of Boerne v. Flores*,[246] for example, "[t]he Supreme Court abruptly changed course" from its previous holdings establishing that "appropriate legislation" incorporated the *McCulloch* test.[247] The *City of Boerne* Court instead "held that Congress's

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[242] Jones v. Alfred H. Mayer Co., 392 U.S. 409, 443 (1968) (citing *McCulloch* test as standard for congressional power under Thirteenth Amendment); City of Rome v. United States, 446 U.S. 156, 177 (1980) ("[U]nder § 2 of the Fifteenth Amendment Congress may prohibit practices that in and of themselves do not violate § 1 . . . so long as the prohibitions attacking racial discrimination in voting are 'appropriate,' as that term is defined in *McCulloch v. Maryland and Ex parte Virginia* . . .); Balkin, *supra* note 218, at 1811 n.39 (collecting sources).

[243] SCALIA & GARNER, *supra* note 175, at 70 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

[244] Barnett, *supra* note 180, at 198.

[245] *Id.* at 220–21

[246] 521 U.S. 507 (1997).

[247] Balkin, *supra* note 218, at 1812 (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997)); *see also* Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, *supra* note 139, at 1126 ("The Court in *City of Boerne v Flores* prominently cited *M'Culloch* but did not connect its test under § 5 to Chief Justice Marshall's descriptions of power under the Necessary and Proper Clause. The

enforcement powers under Section 5 of the Fourteenth Amendment were limited to remedies that were 'congruen[t] and proportional[]' to the Supreme Court's view of what violates the Fourteenth Amendment."[248]

These disparate interpretations of "necessary and proper" and "appropriate legislation" suggest that the latter term may not have always been understood as capturing the same test attributable to the former. Depending on the year an amendment was ratified, the objective reader might have understood "appropriate legislation" as adopting the "necessary and proper" test proposed by Madison, Jefferson, or Chief Justice Marshall; or the objective reader might have thought "appropriate legislation" presented an entirely new test, such as the "congruent and proportional" test later pronounced in *City of Boerne*.

To muddy the waters even more, note that identifying the original public meaning of each constitutional reference to "appropriate legislation" requires identifying what the objective reader reasonably *understood* the term "appropriate legislation" to mean. That inquiry is distinguishable from determining whether the objective reader had a "correct" read on 18th century history – although this later determination may constitute an important data point. Put differently, an objective reader at the time a particular "appropriate legislation" amendment was ratified might have thought the term was a reference to Chief Justice Marshall's "necessary and proper" test – even if an objective reader in 1788 would have thought that Chief Justice Marshall's test was a poor interpretation of the Necessary and Proper Clause. In that scenario, the Constitution's multiple references to "appropriate legislation" might be thought as "locking in" Chief Justice Marshall's (incorrect) interpretation of the Necessary and Proper Clause. If so, Chief Justice Marshall's test would be *inapplicable* to the Necessary and Proper Clause, but *applicable* to all (or more confusingly, some) of the Constitution's references to "appropriate legislation."

All of this is to say that the objective reader, positioned at different points in time, might have understood "appropriate legislation" to mean slightly different things. Moreover, assigning different meanings to different uses of the term "appropriate legislation" would not be

implication is strong that the requirement of congruence and proportionality is stronger than that under the clause.") (internal citations omitted).

[248] Balkin, *supra* note 218, at 1812 (citing *City of Boerne*, 521 U.S. at 520). At least one notable originalist, Justice Thomas, has more recently confirmed this understanding of the Fourteenth Amendment. Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 225 (2009) (Thomas, J., concurring in part and dissenting in part) (explaining that for an act enacted pursuant to Section 5 of the Fourteenth Amendment to be constitutional, "there must be a demonstrated connection between the 'remedial measures' chosen and the 'evil presented' in the record made by Congress when it renewed the [a]ct") (quoting *City of Boerne*, 521 U. S. at 530).

inconsistent with the Presumption of Consistent Usage.[249] For one, the Presumption of Consistent Usage is just that – a *presumption*; it can be overcome when good sense demands it.[250] And although the presumption typically seeks to have terms interpreted consistently, the presumption "is particularly defeasible by context," and is more persuasive when two instances of a repeated term were "enacted at the same time, and dealt with the same subject."[251]

Each "appropriate legislation" amendment was enacted at different times, in different contexts, to address different subjects.[252] The term "appropriate legislation," when used in the context of enforcing a prohibition on slavery in 1865,[253] might have been understood differently than when the term was used in 1920 to vest in Congress the power to enforce "[t]he right of citizens of the United States to vote" regardless of "sex."[254] And the term "appropriate legislation" might have meant something else in 1961, when Congress was vested with the power to enact "appropriate legislation" to ensure that the District of Columbia was awarded electors in the Electoral College.[255]

To be sure, it might be perfectly reasonable to presume that the meaning of "appropriate legislation," as understood in the Thirteenth Amendment, is the same meaning that future objective readers assigned to the term when it was repeated in later amendments. And it might be that all of those references to "appropriate legislation" capture the same test that Chief Justice Marshall assigned to the Necessary and Proper Clause.[256] If so, the key nondelegation question proposed above could be shortened so as to not require an explicit analysis of the original public meaning of each reference to "appropriate legislation." The analysis could instead focus on the substantive scope of the amendment invoked to support a particular delegation, and whether the particular delegation is a "necessary and proper" means of carrying Congress' power to "enforce" the amendment into execution. But absent a close review of the historical records relating to each amendment, such a conclusion

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[249] SCALIA & GARNER, *supra* note 175, at 70 ("A word or phrase is presumed to bear the same meaning throughout a text; a material variation in terms suggests a variation in meaning.").

[250] *Id.* at 59 ("No canon of interpretation is absolute. Each may be overcome by the strength of differing principles that point on other directions.").

[251] *Id.* at 173.

[252] *Id.* at 171, 173.

[253] U.S. CONST. amend. XIII, § 2.

[254] U.S. CONST. amend. XIX.

[255] U.S. CONST. amend. XXIII.

[256] McCulloch v. State, 17 U.S. 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

cannot yet be drawn. To be thorough, then, courts and scholars should utilize the key nondelegation question offered above in its entirety to help ensure that latent historical discrepancies are not overlooked.

A final consideration regarding the key nondelegation question applicable to Congress' "appropriate legislation" powers concerns the meaning of "enforce." After all, each of those amendments vests in Congress the "power to *enforce* [the amendment] by appropriate legislation." Is the use of the term "enforce" significant as it relates Congress' ability to delegate? Unlikely, but definitive answers will turn on a more thorough review of the historical records associated with each amendment.

It is widely accepted, for example, that the Reconstruction Amendments provide Congress with the authority to "enforce" the amendments' protections by enacting broad, prophylactic measures.[257] As Balkin explains, the Reconstruction Amendments empower Congress to "do more" than "remedy past violations[,] . . . prevent future ones," or "find legislative facts to justify the remedies and the prospective solutions it creates."[258] Referencing the Thirteenth Amendment as an example, Balkin contends that the amendment gives Congress broad authority to "disestablish all the institutions, practices, and customs associated with slavery and make sure they can never rise up again."[259] Justice Thomas has also written of the broad scope of the powers vested in Congress by Reconstruction Amendments.[260] "The [Supreme] Court," Justice Thomas explained, has upheld legislation "on the view that the Reconstruction Amendments give Congress the power 'both to remedy and to deter violation of rights guaranteed thereunder by prohibiting a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text."[261]

It is possible, then, that the original public meanings of the Reconstruction Amendments permit Congress to delegate discretion relatively freely. After all, the Reconstruction Amendments were enacted when federal troops were still dispatched to the southern states.[262] Permanently "disestablish[ing] . . . institutions, practices, and customs"[263] of slavery was (and is) a far-reaching task. The objective reader at the time the Thirteenth Amendment was enacted might have

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[257] Balkin, *supra* note 218, at 1815.

[258] *Id.*

[259] *Id.* at 1817.

[260] Nw. Austin Mun. Util. Dist. No. One v. Holder, 557 U.S. 193, 223–24, (2009) (Thomas, J., concurring) (quoting Kimel v. Florida Bd. of Regents, 528 U.S. 62, 81 (2000)).

[261] *Id.*

[262] Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L. L. REV. 231, 237–38 (2008).

[263] Balkin, *supra* note 218, at 1817.

considered it unthinkable for Congress to accomplish such a far-reaching task without delegating significant discretion to executive officials on the ground. On the other hand, the thirty-ninth and fortieth Congresses were often at odds with President Andrew Johnson when it came to reconstruction policies.[264] The objective reader during Reconstruction, then, might have understood Congress as preferring to tightly control reconstruction policies, not enact constitutional amendments allowing the President to exercise broadly delegated powers.

This history only scratches the surface. But assume, *arguendo*, that a thorough review of the historical records surrounding the Reconstruction Amendments confirms that those amendments do indeed permit Congress to delegate discretion relatively freely. Must it follow that Congress can just as freely delegate its Twenty-Third Amendment power to assign electoral votes in the District of Columbia?[265] After all, the Twenty-Third Amendment uses the same "enforce . . . by appropriate legislation" language used in the Reconstruction Amendments.

My proposal to develop multiple nondelegation doctrines would hold that Congress must not be automatically understood as having the same ability to delegate different powers. Eradicating the effects of slavery is a vast, society-wide effort; assigning electoral votes in a single city is a comparatively smaller task. Both the Thirteenth and Twenty-Third Amendments are important, but the mere fact that they each vest in Congress a power to "enforce [the amendment] by appropriate legislation" does not mean that Congress has the same ability to delegate each power. The original public meaning of the Twenty-Third Amendment might reasonably be understood as providing Congress with less ability to delegate.

* * *

The awkward wording of the powers vested in Congress by the "appropriate legislation" amendments has necessitated a rather complicated analysis. To leverage the fruits of that analysis, courts considering the constitutionality of a particular delegation of an "appropriate legislation" power should structure their own analyses by asking the key nondelegation question proposed above. Like all of the key nondelegation questions proposed in this Article, the task is to consider the scope of the relevant power – as understood by the correctly positioned objective reader – and then ask whether the objective reader

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[264] Vagts, *supra* note 262, at 238; David P. Currie, *The Reconstruction Congress*, 75 U. CHI. L. REV. 383, 438 ("As early as January 1867, before the first Reconstruction Act was adopted, no fewer than three resolutions were introduced in the House urging that President Johnson be impeached."); *id.* at 438–39 (noting that the "crux" of one impeachment indictment was that "President Johnson had had the gall to attempt to re-construct the former Confederate states on his own").

[265] US. CONST. amend. XXIII, § 2.

in 1788 would have considered the delegation under review a "necessary and proper" use of the power in question.

F. "By Law" Powers

A final set of congressional powers includes those stating that Congress may provide for something "by law." Some of the "by law" powers vested in Congress are quite narrow. An initial review (unaided by a full consideration of the historical records) suggests Congress has little ability to delegate those powers. Consider the Twentieth Amendment, which provides in part:

> The Congress shall assemble at least once in every year, and such meeting shall begin at noon on the 3d day of January, unless they shall **by law** appoint a different day.[266]

The ability for Congress to delegate that power seems limited. Congress has the authority to change the time at which it shall convene, but any exercise of that power must specify a precise day.[267] Selecting a new day "of the President's choosing," for example, would seem unlikely to satisfy the requirement that "they," *i.e.*, Congress, "appoint a different day."[268]

By comparison, other clauses within the Twentieth Amendment seem to offer Congress the ability to delegate discretion more freely. Consider two other provisions in the Twentieth Amendment, which provide:

> [Section 3 of the Twentieth Amendment provides]: If a President shall not have been chosen before the time fixed for the beginning of his term, or if the President elect shall have failed to qualify, then the Vice President elect shall act as President until a President shall have qualified; and **the Congress may by law provide** for the case wherein neither a President elect nor a Vice President elect shall have qualified, declaring who shall then act as President, or the manner in which one who is to act shall be selected, and such person shall act accordingly until a President or Vice President shall have qualified.[269]

> [Section 4 of the Twentieth Amendment provides]: **The Congress may by law provide** for the case of the death of any of the persons from whom the House of Representatives may choose a President whenever the right of choice shall have devolved upon them, and for

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[266] U.S. CONST. amend. XX, § 2 (emphasis added).

[267] *Id.*

[268] *Id.*

[269] U.S. CONST. amend. XX, § 3 (emphasis added).

> the case of the death of any of the persons from whom the Senate may choose a Vice President whenever the right of choice shall have devolved upon them.[270]

Pursuant to Section 3, Congress may either declare who shall act as President, or declare "the manner in which one who is to act [as President] shall be selected."[271] One can imagine an instance where "the manner" Congress declares is a manner delegating significant discretion to individuals outside of Congress, such as voters or election officials.

A natural reading of Section 4 seems to provide Congress with similarly broad options. Section 4 is applicable when a candidate dies while either the House or Senate is conducting a contingent election.[272] Although Congress has never enacted legislation pursuant to Section 4,[273] one can imagine Congress doing so by delegating broad discretion. Congress might enact a law, for example, delegating significant discretion to the political party of a deceased candidate, perhaps declaring that "a dead vice-presidential candidate in the Senate . . . be replaced by a new party nominee."[274] The importance of such a decision (*i.e.*, selecting the next Vice President) could be monumental.

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[270] U.S. CONST. amend. XX, § 4 (emphasis added).

[271] U.S. CONST. amend. XX § 3.

[272] A contingent election refers to those circumstances in which no presidential candidate or no vice-presidential candidate receives a majority of votes in the Electoral College. Brian C. Kalt, *Of Death and Deadlocks: Section 4 of the Twentieth Amendment*, 54 HARV. J. LEG. 101, 104–05. For more on contingent elections, see generally William Josephson, *Senate Election of the Vice President and House of Representatives Election of the President*, 11 U. PA. J. CONST. L. 597 (2009).

[273] Kalt, *supra* note 272, at 103 ("But in all the years since 1933, Congress has never even come close to using its Section 4 power to provide for candidate substitutions.").

[274] *Id.* at 104 (proposing hypothetical legislation to be enacted pursuant to Section 4 of the Twentieth Amendment).

Section 4 of the Twentieth Amendment is particularly interesting for purposes of nondelegation because the provision constitutes a re-vesting of constitutional power. U.S. CONST. amend. XX, § 4. The Twelfth Amendment vests a power in the House to conduct a contingent election of the President and vests a power in the Senate to conduct a contingent election of the Vice President. U.S. CONST. amend. XII. As I noted at the start of Part III of this Article, powers vested in a single chamber of Congress are not properly understood as powers vested in Congress. Posner & Vermeule, *supra* note 135, at 1755. By vesting in *Congress* the power to "provide for the case of the death" of a candidate in a contingent election, Section 4 of the Twentieth Amendment supplants powers originally vested in the House and Senate as independent bodies. *See* Kalt, *supra* note 230, at 104 ("Section 4 is helpful in one respect: it makes clear that the proper mechanism for resolving this mess is legislation (as opposed to, say, a House rule).").

Nonetheless, Section 4 appears to empower Congress to freely delegate the discretion to make potentially history-changing decisions.

Consider also two provisions of the Twenty-Fifth Amendment:

> Whenever the Vice President and a majority of either the principal officers of the executive departments or of **such other body as Congress may by law provide**, transmit to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office, the Vice President shall immediately assume the powers and duties of the office as Acting President.[275]

> Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of **such other body as Congress may by law provide**, transmit within four days to the President pro tempore of the Senate and the Speaker of the House of Representatives their written declaration that the President is unable to discharge the powers and duties of his office.[276]

As the language quoted above indicates, the Twenty-Fifth Amendment explicitly vests in Congress a power to establish a "body" to determine an important policy question (*i.e.*, the President's fitness for office).[277] The Twenty-Fifth Amendment, then, explicitly permits Congress to delegate significant discretion to others.[278]

Although Congress' "by law" powers come primarily in constitutional amendments, the same language appears in the Constitution as it was ratified in 1788.[279] For example, Article II, Section 1, Clause 6 provides:

> Congress **may by Law** provide for the Case of Removal, Death, Resignation or Inability, both of the President and Vice President, declaring what Officer shall then act as President, and such Officer

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[275] U.S. CONST. amend. XXV, § 4, cl. 1 (emphasis added).

[276] U.S. CONST. amend. XXV, § 4, cl. 2 (emphasis added).

[277] THOMAS H. NEALE, CONG. RESEARCH SERV., R45394, *Presidential Disability Under the Twenty-Fifth Amendment: Constitutional Provisions and Perspectives for Congress*, at (2018).

[278] *Id.*

[279] *Id.* at 1.

> shall act accordingly, until the Disability be removed, or a President shall be elected.[280]

Article II, Section 2, Clause 2 provides:

> Congress **may by Law** vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.[281]

And Article III provides:

> The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the Congress **may by law** have directed.[282]

Some of these powers have been altered by later amendments, and they all (like every Congressional power) are vested with unique language requiring independent examinations.[283] Note, for example, that Article II, Section 1, Clause 2 includes an explicit reference to what Congress "think[s] proper."[284] Such textual peculiarities must be accounted for when developing power-specific nondelegation doctrines.

All of Congress' "by law" powers, whether vested in an amendment or the original Constitution, are subject to the Necessary and Proper Clause.[285] The key nondelegation question for all of Congress' "by law" powers is therefore as follows:

Key Nondelegation Question For Congress' "By Law" Powers
Whether an objective reader in 1788 would have understood a particular delegation to be a "necessary and proper" means of "carrying into execution" a particular power, as that power was understood by an objective reader at the time the power was ratified.

In considering the constitutionality of delegations made pursuant to the category of "by law" powers vested by the original constitution, a court need only consider the objective reader in 1788. For those "by law" powers vested by latter amendments, the key nondelegation

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[280] U.S. CONST. art. II, § 1, cl. 6 (emphasis added).

[281] U.S. CONST. art. II, § 2, cl. 2 (emphasis added).

[282] U.S. CONST. art. III, § 2, cl. 3 (emphasis added).

[283] U.S. CONST. art. I, §§ 1, 8.

[284] U.S. CONST. art. II, § 2, cl. 2.

[285] U.S. CONST. art. I, § 8, cl. 18 (applying to "all . . . powers vested by this Constitution").

question again requires a bit of "time traveling," similar to the key nondelegation questions applicable to the Sixteenth Amendment and Congress' "appropriate legislation" powers.

IV. DEFENDING NONDELEGATION DOCTRINES

In the remainder of this Article, I offer three defenses of my proposal to develop multiple nondelegation doctrines. First, I explain how developing multiple nondelegation doctrines can lower the stakes of enforcing nondelegation principles. Second, I respond to the anticipated critique that creating multiple nondelegation doctrines will not avoid the difficulty in creating a judicially manageable standard, but will instead only splinter the problem by turning one unmanageable doctrine into many unmanageable doctrines. Third, I argue that developing multiple nondelegation doctrines makes a feature out of an alleged flaw in the current nondelegation doctrine – namely, that the current doctrine is riddled with exceptions.

A. Lowering the Stakes

Particularly following *Gundy*, the temperature of the debates concerning the nondelegation doctrine has increased.[286] In one camp are those who see a reinvigorated nondelegation doctrine as a way to rein in an expansive federal government.[287] In another camp are those who fear that a revived nondelegation doctrine would spell disaster for the administrative state.[288] Unsurprisingly, these two camps see themselves as diametrically opposed when it comes to nondelegation, and as existing in a winner-take-all relationship. That need not be the case.

Multiple nondelegation doctrines can serve as a *modus vivendi* between the two camps.[289] Were a court to hold a particular delegation

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[286] *See, e.g.*, Hannah Mullen & Sejal Singh, *The Supreme Court Wants to Revive a Doctrine That Would Paralyze Biden's Administration*, Slate (Dec. 1, 2020, 12:56 PM), https://slate.com/news-and-politics/2020/12/supreme-court-gundy-doctrine-administrative-state.html [https://perma.cc/5C9C-YWX2].

[287] *See, e.g.*, Jeffrey A. Pojanowski, *Neoclassical Administrative Law*, 133 HARV. L. REV. 852, 873, 900 (2020) (explaining the "administrative skeptic" position on nondelegation).

[288] *See, e.g.*, *id.* at 869 (referring to the "[a]ministrative supremac[ist], who "recognizes the authority of the legislature to delegate its lawmaking power to administrative agencies").

[289] *C.f.* Squitieri, *supra* note 17, at 467–68 (arguing that the major questions doctrine fails to similarly serve as a *modus vivendi* when it comes to reinvigorating the nondelegation doctrine); Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 976–77 (2018) [*hereinafter* Wurman, *As-Applied*] ("So much is at stake by finding a statute in violation of the nondelegation doctrine that the Court simply does not enforce it . . . .The nondelegation doctrine could be refashioned to avoid

involving a particular power to be unconstitutional pursuant to one nondelegation doctrine, it need not follow that the same result would apply to another delegation involving other powers. Thus, courts need not bludgeon nearly one hundred years of post-New Deal legislation with a single nondelegation doctrine, nor need they ignore clear nondelegation problems out of a fear that correcting those problems will lead to unmanageably wide consequences. Instead, courts can address nondelegation issues more precisely by developing multiple nondelegation doctrines.

B. Judicially Manageable Standards

As described in Part II, the intelligible principle test has failed to produce a judicially manageable standard.[290] A skeptical reader might argue that developing multiple nondelegation doctrines will do little to correct that failure. Pursuant to that critique, developing multiple nondelegation doctrines might be thought to only worsen the situation by requiring courts to grapple with multiple (if smaller) unmanageable standards. This critique fails to appreciate that the judicial task involved in the nondelegation doctrines I propose are different in kind than the task required by the intelligible principle test (as well as the task presented by the important subject test).

In applying the intelligible principle test, courts seek to determine how "intelligible" a principle must be in order to qualify as "intelligible" enough.[291] This inquiry boils down to something of an unrestrained judicial gut check, in which courts are asked to determine how much delegated discretion is too much delegated discretion.[292] As Justice Scalia correctly noted in *Mistretta*, that inquiry concerns "a debate not over a point of principle but over a question of degree."[293] Article III courts are ill-suited to decide such questions.[294]

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this problem and to become workable—it could be fashioned into an as-applied doctrine.").

[290] *See supra* Part II.B.

[291] Mistretta v. United States, 488 U. S. 361, 372 (1989).

[292] *See* Coglianese, *supra* note 162, at 1879 ("Judgment calls like these, completely untethered from anything but perhaps the judge's own gut instincts, would indeed prove unworkable if not also unwise."); Wurman, *As-Applied*, *supra* note 189, at 981 ("Nondelegation's guiding principle is therefore discretion, and a statute either confers the requisite intelligible principle or it does not. The doctrine is exceedingly difficult to administer, which partly explains why the Court has only invoked the doctrine twice in its history.") (internal citations omitted).

[293] *Mistretta*, 488 U.S. at 415–16 (Scalia, J., dissenting).

[294] *See* Squitieri, *supra* note 17, at 495–513 (arguing that the judicial power does not permit courts to definitively decide questions of policy).

Under my proposal, there would still be *some* need for courts to exercise discretion. But this is only because "a certain degree of discretion, and thus of lawmaking, *inheres* in most executive or judicial action."[295] Courts are regularly asked to decide, for example, whether a sculpture constitutes protected "speech,"[296] or whether downloading files from a computer constitutes a "search[]" or "seizure[]" of "papers" or "effects."[297] The intelligible principle test (as well as the important subjects test) *enlarges* this type of discretion, which is inherent in exercising the judicial duty to say what the law is.[298] "Speech" and "search[]" are actual words in the Constitution; they can interpreted in relation to the rest of the Constitution and relevant history. "Intelligible principle" and "important subjects," on the other hand, are judicial dicta ungrounded from the Constitution's text. The relative benefit of my proposal, then, is that it *curtails* the discretion necessarily exercised by courts because courts would be required to hue closely to text and history.[299]

As John Manning argues, "constitutional values do not . . . exist in the abstract."[300] Instead, "constitutional values . . . find concrete expression in many discrete constitutional provisions, which prescribe the means of implementing the value in question."[301] The Constitution, for example, does not embrace a freestanding conception of federalism.[302] Rather, "federalism is implemented by a number of constitutional provisions that divide and structure the relationships

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[295] *Mistretta*, 488 U.S. at 417 (Scalia, J., dissenting).

[296] U.S. CONST. amend. I.

[297] U.S. CONST. amend. IV.

[298] *See* Rappaport, *Two Tiered*, *supra* note 60, at 2. (referring to the important subjects test as "pretty indeterminate"); *but see Meet Mr. Marshall*, *supra* note 130 (manuscript at 8) (arguing that the important subjects test likely incorporates historical private-law principles regarding delegation, and thus courts need not "run away from Chief Justice Marshall's [important subjects] inquiry," but should instead "flesh out its private-law background, which does not leave judges free to roam through their personal preferences").

[299] *See* McGinnis & Rappaport, *supra* note 212, at 967 ("[A] smaller construction zone means that more of constitutional law is anchored in the Constitution's original meaning.").

[300] John F. Manning, *Clear Statement Rules and the Constitution*, 110 COLUM. L. REV. 399, 404 (2010) [*hereinafter Clear Statement Rules*]; *see also* John F. Manning, *The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2013) (referring to "new structuralism" which "rests on freestanding principles of federalism and separation of powers").

[301] *Clear Statement Rules*, *supra* note 300, at 404.

[302] *Id.* at 434.

between federal and state governments in rather particular ways."[303] Nondelegation principles should be treated similarly.

The Constitution does not invite courts to interpret a vague, one-sized-fits-all theory of federalism or nondelegation. Instead, the Constitution lays out a series of provisions promoting those concepts. Similar to how it would be improper for a court to enforce federalism at a level "that is abstracted to an unhelpful level of generality,"[304] courts should refrain from seeking to enforce a vague conception of nondelegation that is unmoored from the Constitution's text. And to state the obvious, judicial dicta speaking to "intelligible" principles and "important" subjects does not qualify as constitutional text.[305] Rather than continue to treat judicial dicta as if it existed on a plain higher than the Constitution, courts should focus on constitutional provisions, the original meanings of which speak to how Congress may delegate particular powers.

C. A Feature, Not a Flaw

Finally, a third defense of my proposal is that it makes a feature of what might otherwise be perceived as a flaw in current nondelegation doctrine. There are a variety of circumstances, grounded in history, where the intelligible principle test does not apply with full force.[306] Justice Gorsuch's dissent in *Gundy* highlights two such circumstances.[307]

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[303] *Id.*; *see also* Harrison, *Enumerated Federal Power and the Necessary and Proper Clause*, *supra* note 139, at 1110 ("The Federal Convention largely invented constitutional federalism, the accompanying principle of limited federal power, and the particular implementation of that principle through a specific enumeration of authority.").

[304] *Clear Statement Rules*, *supra* note 300, at 434.

[305] *See also* Rappaport, *Two Tiered*, *supra* note 60, at 14 (referring to Chief Justice Marshal's reference to important subjects as "dicta").

[306] These circumstances went unaccounted for in *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989). In *Skinner*, the Court cursorily wrote that neither "the text of the Constitution [n]or the practices of Congress require the application of a different and stricter nondelegation doctrine in cases where Congress delegates discretionary authority to the Executive under its taxing power." *Id.* at 222–23. In doing so the Court rejected an invitation to create a "two-tiered" nondelegation doctrine, and "h[e]ld that the delegation of discretionary authority under Congress' taxing power is subject to no constitutional scrutiny greater than that we have applied to other nondelegation challenges." *Id.* at 220, 223.

Properly understood, the "hold[ing]" in *Skinner* is not inconsistent with my proposal. True, the Court held that Congress' power to *tax* was not subject to a uniquely strict nondelegation inquiry. *Id.* at 223. But that holding need not be extended to mean that *no* power is subject to a stricter nondelegation inquiry. *Id.* 222–23. To the extent that the Court suggested otherwise, it was wrong, and did so only in dicta. *Id.* at 224. Certainly, the *Skinner* holding could not be understood as addressing Congress' ability to delegate other powers, as those powers were not at

First are those delegations concerning authority already exercisable by the President as a result of his foreign affairs powers.[308] As Justice Gorsuch noted, "when a congressional statute confers wide discretion to the executive, no separation-of-powers problem may arise if 'the discretion is to be exercised over matters already within the scope of executive power.'"[309] Thus, a "foreign-affairs-related statute . . . may be an example of this kind of permissible lawmaking, given that many foreign affairs powers are constitutionally vested in the president under Article II."[310]

The second set of circumstances addressed by Justice Gorsuch was that concerning the judiciary's power to structure its own internal procedures.[311] In those circumstances, "the same principle" justifying a less stringent application of the intelligent principle test "applied to the judiciary."[312] To support this proposition, Justice Gorsuch cited *Wayman*, and wrote that "[e]ven in the absence of any statute, courts have the power under Article III 'to regulate their practice.'"[313]

Scholars have offered similar examples.[314] Perhaps most notable is Michael Rappaport, who catalogues a variety of circumstances where nondelegation principles apply with differing levels of force.[315] In his most recent contribution, which builds off of his earlier work,[316] Rappaport proposes a two-tiered nondelegation doctrine – one lenient

issue in the case. *Id.* at 221. Indeed, it was only in passing that the Court suggested which of Congress' two taxing powers was even at issue. *Id.* at 220 (referring to Article I, Section 8, Clause 1). And the Court offered no response to the historical evidence addressed in Part IV.B concerning the multiple instances in which the intelligible principle test applies with less force to delegations of certain powers. *Id.* at 218–19.

[307] Gundy v. United States, 139 S. Ct. 2116, 2145 (2019) (Gorsuch, J., dissenting).

[308] *Id.* at 2137.

[309] *Id.* (Gorsuch, J., dissenting) (quoting David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985)).

[310] *Id.* (internal citation omitted).

[311] *Id.*; *see also* Rappaport, *Two Tiered*, *supra* note 60, at 7 n.18 (referring to "the internal administration of the executive and the courts").

[312] *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

[313] *Id.* (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825).

[314] *See, e.g.*, Wurman, *As-Applied*, *supra* note 289, at 1007 n.174 (collecting sources addressing the application of nondelegation principles to private conduct and the creation of legally binding rules); McGinnis & Rappaport, *supra* note 212, at 950 (referring to "specific areas, such as foreign and military affairs, where the executive historically enjoyed much greater discretion").

[315] *See, e.g.*, *The Selective Nondelegation Doctrine*, *supra* note 131; Rappaport, *Two Tiered*, *supra* note 60.

[316] *The Selective Nondelegation Doctrine*, *supra* note 131.

and one strict.[317] In the lenient tier, "the Constitution imposes a lenient test as to delegation – either one that places no limits or weaker limits on the delegation of policymaking discretion."[318] The lenient tier is applicable to those "traditional areas of executive responsibility, such as foreign and military affairs, spending, and the management of government property" where "the Constitution allows for significant delegation of policymaking discretion."[319] By contrast, the strict tier applies to "other areas – which can be roughly summarized as rules that regulate citizens as to their private rights in the domestic sphere," where "the Constitution imposes a strict prohibition on such delegation."[320]

As these examples show, nondelegation principles are regularly applied differently to different powers.[321] These examples might be thought of as a flaw – *i.e.*, unprincipled "exceptions" to a single nondelegation doctrine. More charitably, they might be conceptualized (as Rappaport would have it) as evidence of a "strict" and "lenient" version of a single nondelegation doctrine. I posit, however, that a better way to conceptualize these examples is to acknowledge them as the beginnings of different nondelegation doctrines, each applicable to different congressional powers. Thus, these examples are not flaws in need of being explained away; they are features to be embraced. And these features should be nurtured and given the opportunity to bloom, so that, over time, they may develop into a matured set of historically focused, textually derived nondelegation doctrines.

V. CONCLUSION

When discussing the nondelegation doctrine, courts and scholars frequently speak of Congress' "legislative power." The Constitution, however, speaks of no such thing. Instead, the Constitution vests in Congress a collection of different powers (plural) – many of which are hardly "legislative" at all. In this Article, I have argued that the nondelegation doctrine should be transformed into a series of multiple nondelegation doctrines, each corresponding to one of Congress' distinct powers. Doing so can transform a failed doctrine – which calls on courts to make vague policy determinations – into a more textually-derived

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[317] Rappaport, *Two Tiered*, *supra* note 60, at 2.

[318] *Id.*

[319] *Id.*

[320] *Id.*

[321] *See also id.* n.26 (noting that "James Madison wrote that the delegation prohibition applied '*especially* [to] a law which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger') (quoting 4 The Debates in the Several State Conventions on the Adoption of the Federal Constitution 560 (Jonathan Elliot ed., 2d ed. 1836) (emphasis added).

series of doctrines better positioned to ensure that Congress does not unconstitutionally delegate its powers.