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## Delegating or Divesting?

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## DELEGATING OR DIVESTING?

*Philip Hamburger*

**ABSTRACT**—A gratifying feature of recent scholarship on administrative power is the resurgence of interest in the Founding. Even the defenders of administrative power hark back to the Constitution’s early history—most frequently to justify delegations of legislative power. But the past offers cold comfort for such delegation.

A case in point is *Delegation at the Founding* by Professors Julian Davis Mortenson and Nicholas Bagley. Not content to defend the Supreme Court’s current nondelegation doctrine, the article employs history to challenge the doctrine—arguing that the Constitution does not limit Congress’s delegation of legislative power. But the article’s most central historical claims are mistaken. For example, when quoting key eighteenth-century authors, the article makes errors of omission and commission—leaving out passages that contradict its position and misunderstanding the passages it recites. The initial goal of this Essay is therefore to explain the evidentiary mistakes in the attack on nondelegation.

This Essay’s broader aim, however, is conceptual: it points out two basic principles that have thus far received insufficient attention from both the defenders and opponents of administrative power.

First, the delegation problem can be understood more specifically as a question of vesting. To be sure, the nondelegation doctrine should be put aside—not on the grounds offered by Professors Mortenson and Bagley, but because the Constitution speaks instead in stronger terms about *vesting*. Thus, what are generically depicted as questions of delegation can be understood more specifically in terms of vesting and divesting. It thereby becomes apparent that Congress cannot vest in others, or divest itself of, any power that the Constitution vests in it.

Second, it is necessary to draw attention to a much-neglected idea of executive power. Recent scholarship has debated widely different conceptions of executive power—Mortenson’s view, now echoed by Bagley, being that executive power is an “empty vessel.” But all such scholarship tends to ignore another conception of executive power: that it involves the nation’s action, strength, or force. This understanding of executive power has foundations in eighteenth-century thought—as revealed even by the

authors quoted by Mortenson and Bagley. Indeed, it is the conception asserted by *Federalist Number 78* and evident in the Constitution itself.

A narrow historical inquiry thus points to broad conceptual lessons. Both delegation and executive power need to be reconsidered on the basis of the Constitution and its history.

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INTRODUCTION .....	89
I. NOT DELEGATION, BUT DIVESTING .....	91
A. Really “What the Founders Said”? .....	92
B. Nondelegation Theory .....	96
C. The Value of Nondelegation .....	101
D. Early Federal Practices.....	104
E. Not Merely Delegation and Nondelegation, but Vesting and Divesting .....	108
II. NOT AN EMPTY VESSEL, BUT THE NATION’S ACTION, STRENGTH, OR FORCE .....	110
A. Action, Strength, or Force .....	111
III. FROM MISDIRECTED ATTACKS TO A RELEVANT DEBATE .....	116
CONCLUSION.....	118

## INTRODUCTION

The recent appearance of *Delegation at the Founding* (the Article) by Professors Julian Davis Mortenson and Nicholas Bagley has already caused a stir.<sup>1</sup> Even the *New Republic* and *The Atlantic* have taken notice, for the Article seems to bring good news from the past for the administrative state.<sup>2</sup> According to the Article, the Constitution did not bar delegation. To be precise, Mortenson and Bagley argue that, under the U.S. Constitution,

<sup>1</sup> Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. (forthcoming 2021) (on file with author) (as published on SSRN on May 26, 2020).

<sup>2</sup> Matt Ford, *The Plot to Level the Administrative State*, NEW REPUBLIC (Jan. 14, 2020), <https://newrepublic.com/article/156207/plot-level-administrative-state> [https://perma.cc/N4S4-RZG2]; Julian Davis Mortenson & Nicholas Bagley, *There’s No Historical Justification for One of the Most Dangerous Ideas in American Law*, ATLANTIC (May 26, 2020), <https://www.theatlantic.com/ideas/archive/2020/05/nondelegation-doctrine-orliginalism/612013/> [https://perma.cc/6DHS-BL3K]. Among other commentaries, see Robert Verbruggen, *Is ‘Most of Government’ Unconstitutional?*, NAT’L REV. (Jan. 9, 2020, 6:30 AM), <https://www.nationalreview.com/2020/01/nondelegation-doctrine-debate-is-most-government-unconstitutional/> [https://perma.cc/M8UU-75CS].

although Congress cannot irrevocably “transfer” or “alienate” legislative power, it can revocably “delegate” it.<sup>3</sup>

But is this true? “Not so fast,” argues Professor Ilan Wurman—joined by others, such as Aaron Gordon and Rob Natelson.<sup>4</sup> This Essay more systematically questions the claims by Professors Mortenson and Bagley, most basically on evidentiary grounds. The difficulty is not merely that their the article misleadingly clusters together a near menagerie of eighteenth-century sources, European as well as American, under the legitimizing rubric of “what the Founders said.” Worse, when quoting eighteenth-century authors, the Article makes errors of omission and commission—neglecting passages that contradict its position and misreading the passages it recites.

The goal here, however, is not merely historical, but conceptual. Rather than defend the nondelegation doctrine from unmerited historical attack, this Essay aims, on a more positive note, to reveal some fresh perspectives that both the defenders and the opponents of administrative power have yet to recognize. What is needed is not merely better history, but a reconceptualization of the debates over delegation and executive power.

Part I argues that generic discussions of delegation should give way to a more accurate analysis in terms of vesting. Much evidence utilized by Mortenson and Bagley does not support, and often contradicts, their pro-delegation conclusions. But the nondelegation doctrine should be put aside on other grounds—namely, that the Constitution speaks of vested rather than delegated powers. Although nondelegation has strong foundations in early political theory, the Supreme Court’s nondelegation doctrine has weak foundations in the Constitution, because the Constitution speaks instead in much stronger terms about vesting. The Constitution *vests* legislative powers in Congress, and that body therefore cannot vest in others, or *divest* itself of, the powers that the Constitution vests in it.<sup>5</sup> Accordingly, generic questions about delegation must be understood, in the context of the Constitution, to involve more specific concerns about vesting.

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<sup>3</sup> Mortenson & Bagley, *supra* note 1, at 3, 22, 31.

<sup>4</sup> Ilan Wurman, *No Nondelegation at the Founding? Not So Fast*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 5, 2020), <https://www.yalejreg.com/nc/no-nondelegation-at-the-founding-not-so-fast-by-ilan-wurman/> [<https://perma.cc/2X78-B7W8>]; Aaron Gordon, A Rebuttal to ‘Delegation at the Founding’ (July 8, 2020) (unpublished manuscript) (on file with author); Rob Natelson, *How Much Power May Congress Delegate to Federal Agencies?*, INDEP. INST. (Jan. 28, 2020), <https://i2i.org/how-much-power-may-congress-delegate-to-federal-agencies/> [<https://perma.cc/W994-KEF5>]; see also Christopher J. Walker, *The Mortenson-Bagley-Wurman Debate on Nondelegation and Originalism*, YALE J. ON REG.: NOTICE & COMMENT (Mar. 24, 2020), <https://www.yalejreg.com/nc/the-mortenson-bagley-wurman-debate-on-nondelegation-and-originalism/> [<https://perma.cc/263J-4229>].

<sup>5</sup> U.S. CONST. art 1, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

Part II then suggests a more accurate understanding of executive power as the nation’s action, strength, or force. Recent scholarship has debated widely different conceptions of executive power—Mortenson’s view, now echoed by Bagley, being that it is an “empty vessel,” which is open to delegation.<sup>6</sup> But recent scholarship tends to ignore a central conception of executive power—as the nation’s action, strength, or force. This understanding has deep foundations in eighteenth-century thought, not least in the authors quoted by Mortenson and Bagley.<sup>7</sup> Indeed, it is the conception asserted by *Federalist No. 78* and evident in the Constitution.<sup>8</sup>

Finally, Part III observes the failure of Mortenson and Bagley to engage with the constitutional arguments on the other side and invites a more relevant debate. Although my work has rejected any reliance on nondelegation as a doctrine, the Mortenson and Bagley article oddly singles out my scholarship for defending the nondelegation doctrine.<sup>9</sup> In fact, this Essay’s claims about vesting and divesting and about executive force have both appeared in my prior writing, and the divesting argument was picked up by Justice Gorsuch in *Gundy v. United States*.<sup>10</sup> Nonetheless, the Mortenson and Bagley article does not even acknowledge these key arguments, let alone respond to them. If the debate were really still the same as in the 1930s, the Article would be on point. But the debate has been shifting in recent years, and the Article’s failure to recognize and confront current ideas about vesting and divesting and about executive force leaves the impression that it is an assault more on the dead than on the living. This Essay, in short, proposes a reconceptualized debate—one that engages with the Constitution’s long misunderstood but crucial principles of vesting and executive power.

## I. NOT DELEGATION, BUT DIVESTING

Does the Constitution really permit congressional delegation of legislative powers? Notwithstanding the Mortenson and Bagley article, the

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<sup>6</sup> Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1174 (2019) (arguing that “the first sentence of Article II would have been understood as vesting the wholly derivative authority to execute the laws, and nothing else” and surveying alternatives); Mortenson & Bagley, *supra* note 1, at 4, 38, 40.

<sup>7</sup> See *infra* Part II.A. For prior discussion of this idea, see PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 332–36 (2014).

<sup>8</sup> See *infra* Part II.B.

<sup>9</sup> Mortenson & Bagley, *supra* note 1, at 15–16, 79 n.286.

<sup>10</sup> See 139 S. Ct. 2116, 2135, 2142 (2019) (Gorsuch, J., dissenting) (“Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What’s the test? . . . [W]e apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.”).

historical evidence does not support any such conclusion. Indeed, the Constitution suggests that one should focus not merely on generic questions about delegation and nondelegation, but more specifically on vesting and divesting.

*A. Really “What the Founders Said”?*

The Article’s main conceptual framework comes in an account of “what the Founders said.”<sup>11</sup> But does it really offer evidence about what the Founders said?

*Delegation.* On the question of whether legislative power could be delegated, the Article relies on curiously few statements from the framing and ratification of the Constitution. For example, the Article relies on two James Wilson quotations from after ratification about the people’s initial delegation of power to the legislature—as if the people’s delegation of their powers meant that their legislature could subdelegate such powers!<sup>12</sup> Although the Article offers one Wilson quotation from the Pennsylvania ratification convention, that passage addresses the English constitution in the sixteenth century and actually suggests *criticism* of legislative delegation.<sup>13</sup> The Article also quotes James Kent during ratification speaking *critically* of delegation under the English constitution.<sup>14</sup> These are the only statements

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<sup>11</sup> Mortenson & Bagley, *supra* note 1, at 21.

<sup>12</sup> The Article quotes Justice James Wilson’s lectures on society’s transfer of powers to government as if this were dispositive about any subdelegation. *Id.* at 27 (“All these powers and rights, indeed, cannot, in a numerous and extended society, be exercised personally; but they may be exercised by representation. One of those powers and rights is to make laws for the government of the nation. This power and right may be delegated for a certain period, on certain conditions, under certain limitations, and to a certain number of persons.”) (quoting James Wilson, *Lectures on Law*, in THE WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 3, 190 (1804)). The Article also quotes Justice Wilson’s lectures on the chain of representation—again, as if this were dispositive. *Id.* at 29 (“[r]epresentation is the chain of communication between the people and those, to whom they have committed the important charge of exercising the delegated powers necessary for the administration of publick affairs. *This chain may consist of one link, or of more links than one*; but it should always be sufficiently strong and discernible.”) (quoting Wilson, *supra*, at 430).

<sup>13</sup> Mortenson & Bagley, *supra* note 1, at 29, 29 n.104 (“So that when that body [Parliament] was so base and treacherous to the rights of the people as to transfer the legislative authority to Henry VIII, his exercising that authority by proclamations and edicts could not strictly speaking be termed unconstitutional.”).

<sup>14</sup> *Id.* at 30–31, n.111 (“[T]he people even under Henry the 8th were insensible to the importance of their voice in parliament, . . . and the House was composed of a most abject set of slaves, who by a single act the most extraordinary that ever was recorded, conferred on the King’s proclamations the force of law.”) (quoting James Kent, *A Country Federalist*, POUGHKEEPSIE COUNTRY J. (1787), *reprinted in* 19 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 434 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, & Margaret A. Hogan eds., 2003)).

from the framing and ratification that appear in the Article’s nineteen pages on “what the Founders said” about delegation.<sup>15</sup> Really, that’s all there is.

So, the Article’s central evidence consists of two quotations from the framing and ratification that do not support the Article’s claim about delegation. Indeed, to the extent they suggest anything, they tend (as noted above in italics) to cut against that claim.

To be sure, the Article quotes several other early Americans. In particular, it quotes Aequus, Benjamin Franklin, James Otis, and Daniel Shute in the 1750s and 1760s,<sup>16</sup> and Thomas Jefferson arguing *against* delegation in the early 1780s.<sup>17</sup> But each of these individuals were writing in circumstances very different from ratification in the late 1780s and on questions very different from congressional delegation under the U.S. Constitution.<sup>18</sup> The only other quotations are from a few court cases in the 1880s and 1890s.<sup>19</sup>

Recognizing the limited American evidence—let alone from the framing and ratification of the Constitution—the Article admits: “While the total number of instances is not large, scattered references . . . can be found in the colonial, framing, and ratification records.”<sup>20</sup> That’s right. In the end, the American sources are “scattered references,” and as already hinted, those actually from the framing or ratification (by Wilson and Kent) do not support the argument.

Everything else in the nineteen pages on “what the Founders said” about the delegation of legislative power comes from Europeans.<sup>21</sup> Of course, prior European thought, if correctly understood, can be very revealing. But it is important to be clear at the outset that the Founders and their European forbears are not the same.

<sup>15</sup> *Id.* at 21–39.

<sup>16</sup> The Article quotes Aequus on the delegation of legislative power to the colonies, *id.* at 29; Franklin on the delegation of local power to municipal corporations, *id.* at 30, n.108; Otis on colonial governance, *id.* at 37; and Shute on the community’s initial delegation to government. *Id.* at 37.

<sup>17</sup> *Id.* at 37 (“Thomas Jefferson, for example, savaged legislative proposals to create a dictatorship during the revolutionary war by arguing that the ‘laws [of nature] forbid the *abandonment* of [legislative responsibility], even on ordinary occasions; and much more a *transfer* of their powers into other hands and other forms, without consulting the people.’”) (quoting THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 135 (Univ. N.C. 2006) (1788), <https://docsouth.unc.edu/southlit/jefferson/jefferson.html> [<https://perma.cc/4T4J-DEKF>]).

<sup>18</sup> See *supra* notes 13–18 and accompanying text.

<sup>19</sup> Mortenson & Bagley, *supra* note 1, at 38–39.

<sup>20</sup> *Id.* at 37.

<sup>21</sup> Some of the European scholarship on which the Article relies includes the works of Montesquieu, Jean-Jacques Rousseau, John Locke, William Blackstone, William Burgh, Algernon Sidney, and David Hume, among others. *Id.* at 25–34.

What is one to make of this? The Article goes out of its way to critique my work for relying so much on European sources,<sup>22</sup> but when explaining what the Founders said about delegation, it relies heavily on European and other indirect evidence.<sup>23</sup> In fact, there is no evidence actually on point from the framing and ratification in the Article.

Though it is tempting to suggest that scholars in European glass houses should hesitate before throwing stones, this would be a distraction from more serious points. Professors Mortenson and Bagley are to be commended for relying so extensively on European theory, for this can often be useful for understanding the Constitution, but in sweeping so much under the rug of “what the Founders said,” their work goes awry. It conflates Americans with Europeans, and what Americans said during the framing and ratification with what they said in earlier circumstances. It thus founders in expounding the Founders.

*Articles of Confederation.* Evidentiary problems persist when the Article argues that rulemaking pursuant to statutory authorization is an exercise of executive power.<sup>24</sup> Though the Article purports to be proving “what the Founders said,” its evidence is based almost entirely on the powers of the Continental Congress under the Articles of Confederation.

To be sure, one could describe American leaders under the Articles as “Founders,” but the effect is to conflate what was said then about the Continental Congress with what was said later about the Congress established by the U.S. Constitution. What was said about one set of problems is thus taken as evidence about a very different set of issues.

The Articles of Confederation were a treaty or contract among the states.<sup>25</sup> Thus, the Articles were not a constitutional law, and they did not authorize the Continental Congress to make law. Instead, as the Articles repeatedly revealed, the Continental Congress only had authority to make “determinations”—a euphemism for decisions that were not really statutes.<sup>26</sup> Even formal congressional acts under the Articles did not have legal obligation.<sup>27</sup> Eventually, James Madison became so frustrated with this that

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<sup>22</sup> See *id.* at 15.

<sup>23</sup> *Id.* at 25–34.

<sup>24</sup> See *id.* at 39.

<sup>25</sup> ARTICLES OF CONFEDERATION of 1781, art. III (establishing a “firm league of friendship” between the states).

<sup>26</sup> *Id.* at art. XIII, para. 1. (“Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them.”).

<sup>27</sup> This is why the Articles ended with the delegates reciting: “[A]nd we do further solemnly plight and engage the faith of our respective constituents, that they shall abide by the determinations of the



he claimed that congressional determinations, especially congressional requisitions to the states for revenue, should be understood as “a law to the States”—an argument that did not persuade the states, or even his ally Alexander Hamilton, but that Mortenson and Bagley take as evidence that the Continental Congress enjoyed legislative power.<sup>28</sup> Far from proving that Congress had legislative power, their reliance on this Madison quotation confirms the opposite conclusion.

Congress, in contrast, was established by the U.S. Constitution with only legislative powers.<sup>29</sup> This is not a surprise, as it was adopted precisely to reject the Articles of Confederation and its misbegotten Continental Congress. What, then, is the relevance of that old congress?

Rather than face this problem, the Article uses discussions of the Continental Congress to suggest the fluidity of legislative and executive power under the U.S. Constitution.<sup>30</sup> To this end, it even argues that the Continental Congress enjoyed all three powers of government, including legislative power.<sup>31</sup> But that is exactly what the Continental Congress did not have. Though some Americans strained to attribute legislative power to that Congress, the Articles of Confederation only gave the Congress elements of executive and judicial powers. The Continental Congress therefore cannot supply evidence about the delegation of legislative power.

Whether in relying on American discussions of the Continental Congress or European delegation theory, the Article makes the mistake of trying to reduce these sources to “what the Founders said.” In other words, it squeezes all sorts of quotations into what looks like a relevant pigeonhole

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United States in Congress assembled, on all questions, which by the said confederation are submitted to them.” *Id.* at art. XIII, para. 2. In 1787, it was observed that, “in no case, is Congress invested . . . with legislative or judicial powers: And the reason is evident; the Confederation was not intended by any means to consolidate the several states into one general Commonwealth.” Grand Committee, *Observations Upon the Seven Articles*, N.Y. GAZETTEER (Jan 29, 1787), reprinted in 31 VA. INDEP. CHRON. (Feb. 21, 1787) (on file with author).

<sup>28</sup> Mortenson & Bagley, *supra* note 1, at 51. For Hamilton’s views, see *id.* at 52.

<sup>29</sup> U.S. CONST. art. I.

<sup>30</sup> Mortenson & Bagley, *supra* note 1, at 43 (arguing that those discussions “make nonsense of originalist claims that government action must be neatly slotted under a single font of government authority. Depending on the relationships you focused on, a given act could properly be classified as both legislative and executive at the same time”).

<sup>31</sup> Mortenson & Bagley, *supra* note 1, at 43 (“[T]he Articles government was commonly understood to possess all three powers of a complete government—albeit in notoriously ineffective form.”). In claiming legislative power for the Continental Congress, the Article merely quotes the power of Congress under the Articles to establish rules for deciding capture and prize cases. *Id.* at 44, n.150. But such rules were more typically binding on foreigners than Americans, and Congress did not have general binding domestic legislative power. To get over the reality that the Congressional Congress lacked legislative power, the Article says that it was “commonly understood to possess” such power. *Id.* at 43. But that was not the reality, as the authors appear to understand.

without sorting out exactly why such evidence may or may not be relevant. The result is a combination of inflated claims and weak evidence, which does not inspire confidence.

### *B. Nondelegation Theory*

On the assumption that European theory is relevant, how should it be understood? As recognized by the Article's focus on John Locke and Thomas Rutherford, English theory may be of particular importance for interpreting the U.S. Constitution. It is therefore disturbing that in expounding European theory—the bulk of the Article's evidence on whether legislative power could be delegated—the Mortenson and Bagley article goes astray. It looks for a uniform distinction between revocable and irrevocable transfers of power and thereby misreads the very sources on which it most relies.

*Revocable vs. Irrevocable.* The Article recognizes that many early political theorists, notably John Locke, argued against any legislative alienation or transfer of legislative power.<sup>32</sup> But rather than acknowledge that Locke and many others worried about all sorts of legislative shifts of legislative power, the Article argues that there was a pervasive distinction between revocable and irrevocable grants.<sup>33</sup>

The Article contends that words such as “alienate” and “transfer” had a fixed technical meaning in seventeenth- and eighteenth-century European theory. Allegedly, these terms referred to irrevocable assignments of power, and in contrast, the term “delegation” referred only to revocable shifts of power.<sup>34</sup> On this basis, it is said that Locke did not object to delegation—meaning a revocable transfer of legislative power—but only rejected irrevocable transfers of legislative power.<sup>35</sup> The Article concludes that the U.S. Constitution should be read to permit Congress to shift its power as it pleases as long as Congress can recall the power. As now will be seen, however, the Article's assumptions about European theory are dubious.

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<sup>32</sup> *Id.* at 30–31.

<sup>33</sup> *Id.* at 31.

<sup>34</sup> *Id.* at 32–34.

<sup>35</sup> *Id.* at 31. (“Far from reflecting some pervasive view that legislative power could not be delegated, the founding-era evidence thus indicates the opposite. That didn’t necessarily have to mean, however, that legislatures were unconstrained in their disposition of rulemaking authority. A small handful of writers did argue for one specific limitation, albeit one different in kind from modern nondelegation doctrine. On the account of those who took this view, what was prohibited was legislatures’ *permanent alienation* of legislative power without right of reversion or control. The best-known exposition of this anti-alienation principle was probably Section 141 of John Locke’s Second Treatise on Government.”).

*Contested Concepts.* The claim that there was a single pervasive view about delegation across early Europe already suggests more than a little overstatement. The Article finds an unvarying distinction between revocable and irrevocable shifts of power from the time of Locke to the era of the Constitution, observing that “writers, lawyers, and politicians repeatedly surfaced the same distinction.”<sup>36</sup> In this, however, the Article fails to observe the degree to which, from the seventeenth through the eighteenth century, there was disagreement about what could be delegated, and that this disagreement concerned both levels of delegation: the initial delegation of power from the people and any subsequent possible delegation from the bodies in which the people placed their power.

The failure to recognize the range of disagreement is particularly disappointing because it misses the extent to which in seventeenth- and eighteenth-century England there was widespread, though not complete, distrust of an unlimited power of delegation to, or within, government.

From the monarchical perspective, there certainly were limits on delegation. In at least some monarchical theory, the people could and perhaps had to delegate their power to the monarch, and once they had conceded power to him, they arguably could not withdraw it. And some of the monarch’s prerogatives—such as the pardon power—were so inherently personal that he could not alienate them.<sup>37</sup>

From a more popular point of view—most notably elaborated by John Locke and later picked up by Americans—the people, by the law of nature, could not delegate so much power as to give up their right of self-preservation.<sup>38</sup> In other words, they could not irrevocably dispose of their powers. But that was not all. When, by means of the Constitution, the people established their legislature, the legislature had no authority to alter their constitution and therefore could not delegate its power.<sup>39</sup> Of course, there were yet other perspectives, but these monarchical and more popular visions should suffice here to suggest the range of possibilities.

Tellingly, neither political party in England was so devoted to any point of view as to be unwilling to shift gears when it suited them. By means of the 1716 Septennial Act, a Whig Parliament elected for three years extended its own life to seven years.<sup>40</sup> The three-year Parliament was thereby

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<sup>36</sup> Mortenson & Bagley, *supra* note 1, at 36.

<sup>37</sup> HAMBURGER, *supra* note 7, at 380–82.

<sup>38</sup> JOHN LOCKE, TWO TREATISES OF GOVERNMENT 429 (Peter Laslett ed., Cambridge Univ. Press 1960) (1690). Here and in subsequent quotations from Locke, capitalization and italics are modernized, except where they seem to illuminate the argument.

<sup>39</sup> See *infra* text accompanying notes 48–49.

<sup>40</sup> Septennial Act 1716, 2 Geo. 1 c. 38 (Eng.).

understood to have delegated its power to a seven-year Parliament—a delegation that remained revocable until the end of Parliament’s initial, three year term. The delegation prompted at least one Tory to quote John Locke against any delegation. Reciting Locke’s familiar assumption that “[t]he power of the legislative” was “derived from the people by a positive voluntary grant and institution,” John Snell—a Tory from Gloucester—further quoted that the “legislative,” meaning the legislature, “can be no other[] than what that positive grant conveyed” and that “the legislative can have no power of transferring their authority of making laws, and place it in other hands.”<sup>41</sup> Though this suggests some hypocrisy, it more interestingly reveals the degree to which principles against any sort of legislative delegation were widely familiar, even among those who would not ordinarily be identified with such a perspective.

Thus, even before one gets to the particular European theorists most relied upon by the Article, it is important to recognize just how implausible it is for the Article to suggest a monolithic European view on delegation. There were diverse points of view, which recognized the varied circumstances in which power was delegated. For example, not only was the people’s delegation distinguishable from their legislature’s delegation but also the legislature’s delegation of local legislative power to a municipal corporation or colony could be differentiated from its delegation of national legislative power.<sup>42</sup> In each of these circumstances, Europeans could and did disagree. It is therefore deeply confused, and apt to lead to a misreading of sources, to assume a unity of thought.<sup>43</sup>

*John Locke.* Consider Locke’s *Two Treatises of Government*—a crucial text for early Americans.<sup>44</sup> As already noted by Professor Wurman, Locke at

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<sup>41</sup> HAMBURGER, *supra* note 7, at 382.

<sup>42</sup> *Id.* at 388–89 (regarding municipal power).

<sup>43</sup> In a mirror image of its peculiar claim of a near-consensus permitting delegation, the Article claims that those who disagree must show a near consensus against delegation: “For originalists to carry their argument, the historical evidence ought to show that most everyone at the founding would have understood the Constitution to bar the delegation of too much power or power of the wrong kind.” Mortenson & Bagley, *supra* note 1, at 22. Really, “most everyone”? Good grief. Just to illustrate how wrongheaded this is, consider that the Constitution, being adopted merely by majorities, often gave effect to contested ideas, which it presented in contested language. Though the majorities might prevail in establishing their ideas in their phrasing, it should be no surprise that this engendered further disputes about the words and their meaning. It is therefore very odd to claim that anyone who disagrees with the Article must show a near-consensus, and this is especially comic as the Article’s own evidence is not only weak, but often cuts against its thesis.

<sup>44</sup> For a brief sampling of the scholarship, see John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in POLITICAL OBLIGATION IN ITS HISTORICAL CONTEXT: ESSAYS IN POLITICAL THEORY 53 (2002); STEVEN M. DWORETZ, THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION (1990); JEROME HUYLER, LOCKE IN AMERICA: THE

least sometimes clearly meant a revocable delegation when he wrote against the “transfer” of legislative power.<sup>45</sup> But the evidence goes much further.

Elsewhere in his book, Locke squarely addressed the question of delegation and wrote in unmistakable terms: “*freedom of men under government*, is, to have a standing rule to live by, common to every one of that society, and made by the legislative power erected in it.”<sup>46</sup> That is, the rules governing society had to be made by the legislature erected by the people. Locke also wrote: “The *liberty of man*, in society, is to be under no other legislative power, but that established, by consent, in the commonwealth; nor under the dominion of any will, or restraint of any law, but what that legislative shall enact, according to the trust put in it.”<sup>47</sup> Such ideas resonated with Americans.<sup>48</sup>

Indeed, Locke explained that governments are “dissolved from within” when “the legislative”—meaning the legislature—is “altered”:

The Constitution of the legislative is the first and fundamental act of society, whereby provision is made for the continuation of their union, under the direction of persons, and bonds of laws made by persons authorized to thereunto, by the consent and appointment of the people, without which no one man, or number of men, amongst them, can have authority of making laws, that should be binding to the rest. When any one, or more, shall take upon them to make laws, whom the people have not appointed so to do, they make laws without authority, which the people are not therefore bound to obey.<sup>49</sup>

The dissolution of government was, of course, the opportunity for revolution, and Locke’s first example of this situation was when laws are made by persons who are not appointed as lawmakers by the people.

It is therefore passing strange to claim that Locke’s principles left room for a legislature to transfer legislative power to other bodies, as long as the

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MORAL PHILOSOPHY OF THE FOUNDING ERA (1995); C. BRADLEY THOMPSON, *AMERICA’S REVOLUTIONARY MIND: A MORAL HISTORY OF THE AMERICAN REVOLUTION AND THE DECLARATION THAT DEFINED IT* 21–37 (2019); Merle Curti, *The Great Mr. Locke: America’s Philosopher, 1783–1861*, HUNTINGTON LIBR. BULL. 107 (1937).

<sup>45</sup> Wurman, *supra* note 4 (“Mortenson and Bagley’s entire argument about Locke is that he was arguing that the people delegated their power to the legislature and did not alienate their power, as absolutists like Jean Bodin had argued. And now we see that in section 135, when Locke is talking about this original delegation (not alienation), he uses the word ‘transfer.’ In section 135, then, ‘transfer’ means delegation, not alienation.”) (internal citations omitted).

<sup>46</sup> LOCKE, *supra* note 38, at 302.

<sup>47</sup> *Id.*

<sup>48</sup> For a hint as to how such ideas were studied by Americans, note that the first quotation in the paragraph above was copied out in 1778, with other passages from Locke, by George Gilmer, an American officer in Virginia. GEORGE GILMER, COMMONPLACE BOOK 122–23, 132 (before May 1778), Virginia Historical Society, Mss 5:5, G4213:1.

<sup>49</sup> LOCKE, *supra* note 38, at 425–26.

transfer was revocable. His principles clearly barred any shift in legislative power.

And, of course, this was the most famous eighteenth-century application of Locke's theory about the shifting of legislative power. Recall the debates about the 1716 Septennial Act, in which even a Tory quoted John Locke against a revocable parliamentary delegation.<sup>50</sup> If an early eighteenth-century member of Parliament, not to mention Locke himself, understood the philosopher's principles to bar a revocable legislative delegation, perhaps one might hesitate before ardently insisting that Locke opposed only irrevocable alienations of legislative power.

*Thomas Rutherford.* It would be more tedious than difficult to review and question the relevance of every quotation deployed by the Article against nondelegation,<sup>51</sup> but it is worth examining the treatment of Thomas Rutherford. This eighteenth-century English natural law theorist was unusually sophisticated, and the Article relies upon him second only to Locke.<sup>52</sup>

Although the Article quotes Rutherford repeatedly on the transfer of royal power, it only once quotes him on legislative power:

It belongs to the legislative power, considered as the common understanding, or joint sense of the body politic, to determine and direct what is right to be done: and it belongs to the executive power, considered as the common or joint strength of the same body, to carry what is so determined and directed into execution.<sup>53</sup>

From this, the Article concludes: "On this historical understanding, agency rulemaking pursuant to statutory authorization would qualify as an exercise of executive power, for the simple but decisive reason that the agency is carrying out legislative instructions."<sup>54</sup> But that is the opposite of Rutherford's point. When saying that it belongs to the legislative power to "determine and direct what is right to be done," he is speaking of rules governing society, not instructions to agencies to legislate.

Reinforcing this point is Rutherford's vision of internal executive power as a matter of law execution. In his view, the legislature adjusts and

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<sup>50</sup> See *supra* text accompanying notes 41–42.

<sup>51</sup> For doubts about the relevance of most of the European and American quotations that appear in the text of the Article's section on the delegation of legislative power, see *supra* notes 12–18.

<sup>52</sup> See Mortenson & Bagley, *supra* note 1, at 34–36 (discussing 1 T. RUTHERFORTH, INSTITUTES OF NATURAL LAW, BEING THE SUBSTANCE OF A COURSE OF LECTURES ON *GROTIUS DE JURE BELLII ET PACIS* 318, 320 (1754–56)).

<sup>53</sup> *Id.* at 40.

<sup>54</sup> *Id.* at 41.

settles the rights of members of the society and therefore determines when persons have a right to law enforcement, which is much of the internal version of executive power:

Now, as the legislative power adjusts and settles the rights of the several members of a civil society, it naturally belongs to this power to determine how far, and upon what occasions, they shall have a right to the interposition of the common force; that is, it naturally belongs to this power to direct the use and extent of the internal executive power.<sup>55</sup>

In other words, Rutherford’s understanding that it belongs to the legislature to “adjust[] and settle[] the rights of the several members of a civil society” goes hand in hand with his law-execution view of domestic executive power. There is little room in such a perspective for agency lawmaking.

What, then, can be said about the Article’s treatment of the leading English theorists of nondelegation? The Article surely is correct in focusing on Locke and Rutherford.<sup>56</sup> But whether it reads these theorists correctly is another matter.

### *C. The Value of Nondelegation*

The risks of misreading Locke go beyond the history of ideas. There is also a danger of not understanding why a nondelegation principle, or something like it, still matters in today’s world.

*A Historical and Living Principle.* Professors Mortenson and Bagley’s arguments against the nondelegation doctrine tend to ignore why such a doctrine might continue to be valuable. So, it is important to spell this out. One reason is that nondelegation keeps the legislative power in the hands of elected lawmakers and thus preserves the foundation of law in popular consent. A second reason is that if the people delegate their legislative power to the legislature, and that body can subdelegate its power to other bodies, then the servant can almost effortlessly subvert its masters’ constitutional choice. On both grounds, there have long been ideals, at least in England and America, against subdelegation.

The second of these arguments against subdelegation—that it preserves the people’s constitutional choices—deserves special attention in an essay on constitutional law, and revealingly it was fully developed already in the early seventeenth-century arguments against monarchical delegation of

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<sup>55</sup> RUTHERFORTH, *supra* note 52, at 274.

<sup>56</sup> Mortenson & Bagley, *supra* note 1, at 31–33 (discussing LOCKE, *supra* note 38); *id.* at 34–36 (discussing RUTHERFORTH, *supra* note 52).

personal prerogatives.<sup>57</sup> Toward the end of the century it was also employed to argue against legislative delegation.<sup>58</sup> It is therefore troubling that the nondelegation position misstates the seventeenth-century theory—not because that theory is determinative, but rather because a correct understanding of the theory illuminates why nondelegation, or something like it, is essential for preserving the people’s constitutional choices. Even if there had never been such a principle, one might be inclined to invent it. It is, in this sense, not merely a historical ideal, but one of continuing vitality—dare one say, a living principle?

From this perspective, it is important to examine Locke’s reasoning in more detail, for it remains relevant as a still vital response to an enduring problem. Locke was a philosopher rather than a lawyer, and his argument aimed to preserve the people’s choice of constitutional structure, particularly their formation of the “legislative.”

He argued that “the constitution of the legislative” was “the original and supreme act of the society, antecedent to all positive laws in it, and depending wholly on the people,” and therefore “no inferior power can alter it.”<sup>59</sup> More specifically, he argued that the people’s delegation of legislative power to the legislative body precluded that body from transferring its power: “The legislative cannot transfer the power of making laws to any other hands. For it being but a delegated power from the people, they, who have it, cannot pass it over to others.”<sup>60</sup>

Locke argued that this principle followed not simply from their constitution, but also from the nature of constitutions:

The people alone can appoint the form of the commonwealth . . . . And when the people have said, we will submit to rules, and be govern’d by laws made by such men, and in such forms, no body else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those, whom they have chosen, and authorized to make laws for them.<sup>61</sup>

On these assumptions about constitutional law—not to mention underlying ideas about consent under “the law of God and nature”—there could be no

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<sup>57</sup> HAMBURGER, *supra* note 7, at 380–81 (discussing advisory opinion from 1605 on delegation of royal dispensing power).

<sup>58</sup> See *infra* notes 58–62 and accompanying text.

<sup>59</sup> LOCKE, *supra* note 38, at 3991 quoted in Mortenson & Bagley, *supra* note 1, at 26–28.

<sup>60</sup> LOCKE, *supra* note 38, at 380 quoted in Mortenson & Bagley, *supra* note 1, at 31.

<sup>61</sup> LOCKE, *supra* note 38, at 380–81, quoted in Mortenson & Bagley, *supra* note 1, at 31. Locke continued: “The power of the *legislative* being derived from the people by a positive voluntary grant and institution, can be no other, than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.” LOCKE, *supra* note 38, at 381.



subdelegation: “The legislative neither must nor can transfer the power of making laws to any body else, or place it any where but where the people have.”<sup>62</sup> Locke’s reasoning was broad, and it led to the clear conclusion that the legislature could not “place” its lawmaking power “any where but where the people have.”<sup>63</sup>

This principle and the underlying logic remain as pertinent today as in the past. If laws are to be made with the people’s consent, they must be enacted, without delegation, by the elected body established by the people as their legislature. And if the legislature established by a constitution can delegate its power, then, notwithstanding the people’s constitutional choices, the legislature can substitute its own.

*Implausible Results.* Reinforcing the value of a nondelegation principle is the sheer implausibility of the Article’s open rejection of the nondelegation doctrine in favor of generally unfettered congressional delegation. Such a position is both too feeble and too bold.

It is too feeble because the current nondelegation doctrine, which employs the intelligible principle standard, already allows Congress to delegate almost as much as it wishes. Although the doctrine purports to bar the delegation of legislative power, it permits an agency to bind Americans as long as Congress guides the agency with an intelligible principle.<sup>64</sup> The result, in reality, is to permit delegation, subject to a minimal degree of congressional process, not any substantive limit. It is therefore unclear how an open abandonment of the nondelegation doctrine would make much of a difference. Certainly, it would not solve the problem faced by judges when attempting to figure out what can be delegated and what cannot.

It is also too bold because it would candidly permit much that would be absurd. Thus far, the nondelegation doctrine has permitted what, in fact, is delegation of legislative power—at least to federal departments and other agencies.<sup>65</sup> But if there were no nondelegation doctrine, could Congress delegate legislative power not merely to agencies but to the President, so that he personally would make rules binding on Americans? In this eventuality, the President alone—without expertise and, if Congress wishes, unrestrained by any procedures—could make binding rules or laws. Legislative power would thus be in the hands of the very person in whom the Constitution places the veto, and a sort of partial veto would be in the legislature, thus

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<sup>62</sup> LOCKE, *supra* note 38, at 363, *quoted in* Mortenson & Bagley, *supra* note 1, at 31 n.113.

<sup>63</sup> LOCKE, *supra* note 38, at 363, *quoted in* Mortenson & Bagley, *supra* note 1, at 31 n.113.

<sup>64</sup> See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 404 (1928).

<sup>65</sup> *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 135 S. Ct. 1225, 1226 (2015) (holding Amtrak to be a governmental agency and leaving undecided the fate of regulations by private entities).

inverting the Constitution's structure. Indeed, if there were no nondelegation doctrine, then Congress could delegate its legislative power to private bodies, even perhaps to my Great Aunt Gertrude.<sup>66</sup> To state these consequences of the permissive view of delegation is to refute it.

#### D. *Early Federal Practices*

Professors Mortenson and Bagley's final argument in justification of delegation rests on early federal practices. Again, the Article engages in some conflation. In this instance, it relies on examples from Parliament,<sup>67</sup> the colonies,<sup>68</sup> state legislatures,<sup>69</sup> and the Continental Congress<sup>70</sup> before getting to the first Congress. But more to the point, it misunderstands what Congress did and fails to mention what Congress did not do.

*What Congress Did.* The Article recounts a host of practices authorized by early federal statutes. Of course, there is nothing unfamiliar about these practices, which are discussed in the prior literature, including my own.<sup>71</sup> But, as is conventional in scholarship supporting administrative power, they are upheld as examples of the delegation of legislative power, primarily to the executive.

These practices include the following:

- Determinations of facts (including tax assessments, customs determinations, and presidential determinations under conditional statutes)<sup>72</sup>

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<sup>66</sup> The Article's vision of the breadth of congressional power to delegate is evident from its account of how early "regulatory delegations were limited only by the will and judgment of the legislature." Mortenson & Bagley, *supra* note 1, at 61.

<sup>67</sup> *See id.*

<sup>68</sup> *Id.* at 67–68.

<sup>69</sup> *Id.* at 62–63.

<sup>70</sup> *Id.* at 63–67.

<sup>71</sup> *See, e.g.,* HAMBURGER, *supra* note 7, at 79–81 (suspending and dispensing); *id.* at 85–89 (executive regulations, instructions, and orders); *id.* at 89–95 (executive interpretation); *id.* at 95–97 (military orders); *id.* at 100–02 (determinations); *id.* at 104–07 (licensing regulations); *id.* at 107–110 (determinations of facts); *id.* at 192–93 (executive adjudication concerning nonsubjects); *id.* at 193–203 (executive adjudication concerning benefits or other privileges); *id.* at 203–05, 208–11 (executive adjudication as a means of determining and giving notice of duties); *id.* at 211–15 (executive role of judges); *id.* at 215–17 (coercive and other physical acts by executive officers); *id.* at 217–19 (nonbinding orders and warrants); *id.* at 220–22 (executive orders to appear, testify, or produce records); *id.* at 222–24 (reporting, record keeping, and inspection).

<sup>72</sup> Mortenson & Bagley, *supra* note 1, at 83–85 (tax assessments); *id.* at 84 (paying duties or bonds to the satisfaction of customs inspector); *id.* at 99 (presidential determinations under conditional statutes). But factual determinations were permitted only in narrow circumstances and were understood to involve discretion in the sense of judgment rather than lawmaking will. HAMBURGER, *supra* note 7, at 100–02 (determinations); *id.* at 107–10 (determinations of facts).

- Executive inspection and seizure (notably by customs officers)<sup>73</sup>
- The selection of locations (for post offices, post roads, and district boundaries)<sup>74</sup>
- Delegated legislation in federal enclaves where Congress enjoys local power (such as the District of Columbia and the territories)<sup>75</sup>
- Executive rulemaking regarding the distribution of various benefits and other privileges (ranging from pensions to patents)<sup>76</sup>
- Executive licensing regulation of trade with Indian tribes.<sup>77</sup>

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<sup>73</sup> Mortenson & Bagley, *supra* note 1, at 84–85 (executive inspection and seizure by customs officers). But these were executive acts conducted under statutory authorization. *See, e.g.*, HAMBURGER, *supra* note 7, at 222–24 (inspections).

<sup>74</sup> Mortenson & Bagley, *supra* note 1, at 95 (post offices); *id.* at 92–94 (post roads); *id.* at 96 (district boundaries). But the Constitution does not clearly make the specification of such locations a matter of legislative power. *See, e.g.*, U.S. CONST., art. I, § 8 (granting Congress the power “[t]o establish Post Offices and post Roads”) (emphasis added).

<sup>75</sup> Mortenson & Bagley, *supra* note 1, at 72–75 (delegating legislation in federal enclaves where Congress enjoyed local power such as the District of Columbia and the territories). But far from revealing that Congress may delegate its power to the national Executive, the treatment of these places merely shows that Congress could recognize the power of the people in these localities to govern themselves through local bodies. HAMBURGER, *supra* note 7, at 389. Incidentally, Professors Mortenson and Bagley interpret the Constitution to give Congress authority to “exercise *exclusive* legislation [in the capital district] *in all cases whatsoever*”—meaning, in their view, that the Constitution “prohibit[s] delegations of legislative power.” Mortenson & Bagley, *supra* note 1, at 73. They never pause to consider that the Constitution thereby aimed to give Congress a legislative power exclusive of the states. HAMBURGER, *supra* note 7, at 389.

<sup>76</sup> Mortenson & Bagley, *supra* note 1, at 80–82 (pensions); *id.* at 75 (patents). But these, at least formally, were privileges, not binding regulations. *See* HAMBURGER, *supra* note 7, at 193–203 (executive adjudication concerning benefits or other privileges, including patents).

<sup>77</sup> Mortenson & Bagley, *supra* note 1, at 77–78. According to Professors Mortenson and Bagley, my work “dismisses” the licensing regulation of Indian traders “for the curious reason that ‘persons, such as Indian traders, were not entirely subject to domestic law.’” *Id.* at 79, n.286. They then respond that “it’s a tautology that a nation’s laws do not apply to someone not subject to those laws.” *Id.* But it only seems a tautology because Mortenson and Bagley truncate my argument to the point of depriving it of its meat.

My argument was fundamentally about the limited reach of American law beyond the nation’s borders—about its limited reach as to “persons and things that, in various ways, went beyond the territory or shores of the United States.” HAMBURGER, *supra* note 7, at 104. Adding to such concerns, Indian traders were persons not all of whom “considered themselves subjects of the United States, and even those who were subjects tended to venture into the territory of nations that often considered themselves distinct from the United States.” *Id.* The application of federal law in relation to Indian nations remains a complex question, and nothing about this is tautological.

The larger point is that Mortenson and Bagley take an exceptional situation involving cross-border conduct to be suggestive of what was normal in national regulation of domestic matters, and that is simply false. Yes, there was regulatory licensing of Indian traders and of a range of vessels, in which the Executive was authorized to frame regulatory conditions or rules regarding the availability of licenses. But, as I have pointed out, and Mortenson and Bagley do not deny, it is difficult to find early instances in which Congress authorized the Executive to regulate nationally in domestic matters by specifying licensing conditions. *Id.* at 107; PHILIP HAMBURGER, *THE ADMINISTRATIVE THREAT* 48–49 (2017).

My scholarship has already explained why these are not instances of delegated legislative power.<sup>78</sup> Here, it is enough to observe that these instances do not really support Mortenson and Bagley's position.

One might argue that even if the Article's list of early federal practices reveals some delegation, it should be no surprise that practices sometimes depart from principles. On this obvious assumption, one should not discount the Constitution's principles because of minor or occasional deviations. Nor should one expand such deviations into exceptions or counter principles that swallow the rule. But true as all of this may be, none of it is the main objection to Mortenson and Bagley's reliance on early federal practices.

*Constraints on Private Persons vs. Legal Obligation.* Before getting to the main objection, it is important to avoid getting tripped up by a conceptual mistake—which the Article correctly attributes to many originalists<sup>79</sup> but should not attribute to me—namely, that what the Executive could not do was to affect private conduct or alter private rights. From this perspective, it makes sense that the Executive in the early years of the Republic did not make binding rules or adjudications. At the same time, it is puzzling from this point of view that, even with statutory authorization, the Executive made determinations of facts (tax assessments, customs determinations, and presidential determinations) and that it imposed executive inspection and seizure (mostly by customs officers).<sup>80</sup> It is also puzzling from this point of view that executive regulations were not binding on executive officers, but could be enforced merely by dismissing uncooperative officers.<sup>81</sup>

Yet none of this is much of a mystery if one recognizes a different set of underlying assumptions: that a central element of legislative power is to make binding rules, that judicial power involves making binding adjudications, and that executive power is the nation's action, strength, or force. On these foundations, it makes sense that the Executive made determinations, inspections, and searches, but not legally binding rules or adjudications. And it makes sense that executive regulations did not legally bind executive officers but could be enforced through removal.

In other words, when the line between legislative power and executive power is drawn by barring the Executive from limiting private conduct or altering private rights, much gets lost. This is a crude summary of something

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<sup>78</sup> For brief hints of my prior explanations of such alleged instances of delegation, see *infra* notes 79–85.

<sup>79</sup> Mortenson & Bagley, *supra* note 1, at 13, 16, 79 n.286.

<sup>80</sup> See *supra* note 72.

<sup>81</sup> See *infra* notes 84–86.

more interesting: that executive power is the nation's force and does not include the power to create rules or adjudications with legal obligation.

Having cleared this up, one can understand the real import of the early federal practices that, according to the Article, were delegations of legislative power.

*What Congress Did Not Do.* What is missing from the Mortenson and Bagley article is what Congress did not do. To be precise, the Article does not point to any early instance when the Executive, with or without congressional authorization, made binding rules or adjudications that were national and domestic in their scope. None. Not one.

In other words, the Article does not produce a single example of early federal executive action that falls squarely within the sort of national domestic regulation that is at the heart of the dispute over administrative power. Instead, it treats as legislative and judicial all sorts of actions that could reasonably be considered within the scope of executive power. Some actions (such as customs inspections and seizures or executive regulations instructing officers) were clearly within executive power, even if the inspections and seizures needed statutory authorization.<sup>82</sup> Other actions (such as factual determinations) were ordinarily within executive power, and though they occasionally strayed into legislative territory, it should be no surprise that the typical assumption, that they were executive, generally prevailed.<sup>83</sup>

Once one gets past the practices that were within executive power, the evidence becomes elusive. Where are the early federal examples of binding rules or adjudications that were national and domestic? They are difficult to discern.

Consider the Treasury: The first Secretary of the Treasury, Alexander Hamilton, was not shy about espousing expansive federal power. But a close examination of manuscript Treasury records (which I pursued for my book on administrative power) reveals that neither he nor his successors, until late in the nineteenth century, issued rules or other instructions that purported to impose legal obligation.<sup>84</sup> For example, Hamilton and his subordinates issued copious rules and other instructions for customs officers, but even as to them,

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<sup>82</sup> See *supra* note 72.

<sup>83</sup> See *supra* note 71.

<sup>84</sup> HAMBURGER, *supra* note 7, at 86–88 (describing executive regulations, instructions, and orders directing officers, but that were not legally binding on them or the public—compliance being obtained only by threat of dismissal); *id.* at 89–95 (regarding executive interpretation directing subordinates within departments, but not legally binding on them or the public).

such rules and instructions were not legally binding.<sup>85</sup> Instead, they were merely directions that were enforced with threats of dismissal.<sup>86</sup>

So, please forgive a Hamburger for asking: Where's the beef? Not in the Article. Not in other scholarship supportive of administrative power. And not in the very extensive early federal evidence I have studied.<sup>87</sup> If there was a dog, isn't it strange that it did not bark?

*E. Not Merely Delegation and Nondelegation, but Vesting and Divesting*

One of the curiosities of Professors Mortenson and Bagley's Article is its assumption of direct continuity between European thought and American law—such that their misreading of European delegation theory becomes the Constitution's delegation theory, without consideration of what the Constitution actually said. In fact, though the Constitution echoes Lockean anti-delegation principles, it uses different phrasing, thereby establishing its own distinctive version of the old nondelegation analysis.

Rather than speak generically of delegation—let alone, alienation or transfer—the Constitution says “shall be vested.”<sup>88</sup> Indeed, not once, nor twice, but three times, the Constitution *vests* its different powers in the different branches of government.<sup>89</sup> It thereby speaks more forcefully than prior anti-delegation theories and does not leave its meaning to be implied from such theories.

The nondelegation doctrine frames its limitation on transfers of power in terms that obscure the Constitution's vesting principle. For one thing, the nondelegation doctrine leaves the impression that the limit on transfers of power is merely a matter of judicial doctrine, rather than the Constitution itself. This in turn invites speculation about the doctrine's origins in pre-constitutional European theory about delegation, which draws attention further away from the Constitution's principle. Though pre-constitutional European theory about delegation is important for understanding the Constitution and the dangers of permitting shifts in power, the Constitution speaks more emphatically about *vesting* its powers.

Thus, in the Constitution, the generic nondelegation principle becomes a more specific matter of vesting. This is not to say it is entirely wrong to

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<sup>85</sup> *Id.* at 86–87, 90–91, 93.

<sup>86</sup> *Id.*

<sup>87</sup> My book draws on a host of American sources, printed and manuscript, in much greater depth than the Article. Without always spelling this out in the text, the book makes use of extensive research on early federal statutes and regulations, early state manuscript records, and the mass of early manuscript Treasury records in the National Archives.

<sup>88</sup> U.S. CONST. art. I, § 1.

<sup>89</sup> U.S. CONST. art. I, § 1, art. II, § 1, cl. 1, art. III, § 1.

generalize about the people's delegation of legislative powers to Congress and the consequent nondelegation principle. Delegation was the language of much political theory, and the Constitution's vesting language builds upon such theory. So, it is no surprise that Americans have always tended to talk about the problem in terms of delegation. But it is more accurate and specific to recognize that the people of the United States "vested" the nation's legislative powers in Congress and thereby precluded Congress from vesting in others, or divesting itself of, such powers.<sup>90</sup>

This reframing of the problem in the Constitution's terms has many advantages. It places the solution on a more solid foundation than either earlier European ideas or later American judicial doctrine. It recognizes that the problem is not merely congressional, but general to all branches of government—that it arises whenever any power is hived off from any branch of government. And it avoids a strange inquiry into whether Congress can "delegate" judicial power to administrative agencies—as if Congress could delegate a power that does not belong to it. A nondelegation doctrine cannot speak to legislative transfers of judicial power. Therefore, it is fortunate that the Constitution recognizes that in such instances Congress is vesting in agencies, and divesting the courts of, the power that the Constitution vests in the courts.

The inadequacy of delegation talk is especially clear because, when Congress transfers its powers, it cannot always recall them. A delegated power is one that can be resumed at the will or discretion of the delegator.<sup>91</sup> When the Secretary of the Interior, for example, delegates some of her powers to a subordinate, she can recall her power at her own discretion.<sup>92</sup> Similarly, when Congress delegates authority to the Congressional Budget Office, it has full discretion to retrieve any of the delegated authority. But when Congress authorizes the Executive to exercise legislative power, even if only temporarily, Congress cannot predictably recover that power, as it may have to overcome a Presidential veto.<sup>93</sup> It thus becomes clear that congressional shifts of legislative power to the Executive cannot accurately be considered delegations—this being yet another reason why it is fitting that the Constitution speaks of vesting rather than delegating.

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<sup>90</sup> See Brief of The New Civil Liberties Alliance as Amicus Curiae in Support of Petitioner at 5–10, *Gundy v. United States*, 139 S. Ct. 2116 (2019) (No. 17-6086), 2018 WL 2684383, [hereinafter *NCLA Gundy Brief*]. I am grateful to Jonathan Mitchell for bringing to my attention the point about discretion in delegation.

<sup>91</sup> See *id.* at 6.

<sup>92</sup> See *id.*

<sup>93</sup> See *id.*

In sum, a focus on vesting more sharply delineates what is at stake. Although the Constitution could have simply echoed the old language about delegating powers, it instead more accurately and emphatically *vested* powers in the branches of government.<sup>94</sup> And precisely because of the historical prevalence of delegation analysis, it is especially clear that the Constitution is not merely echoing delegation talk when focusing on *vesting*.

This locution has at least two implications. First, because the Constitution vests all legislative powers in Congress, Congress cannot vest any such powers elsewhere. Second, Congress cannot divest itself of the powers that the Constitution vests in it. A full exposition of these points must await another publication. But even in this Essay, it should be possible to anticipate how much might flow from the Constitution's use of language about *vested* powers in place of the more familiar language about *delegated* powers.

## II. NOT AN EMPTY VESSEL, BUT THE NATION'S ACTION, STRENGTH, OR FORCE

One ordinarily might stop here, but in the course of justifying the delegation of legislative power, the Mortenson and Bagley article also says much about executive power. The Article proposes that the Constitution's executive power was historically an "empty vessel."<sup>95</sup> It adds that this was a power to "execute law," by which the Article means, however, the power of carrying out legislative authorizations or instructions.<sup>96</sup> The definition of executive power thus seems to confirm the legitimacy of delegating legislative power.

To be precise, the Article argues that "[t]he founders *unanimously* understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power," and then quotes Rutherford in support, as if he were a "founder."<sup>97</sup> On this sort of foundation, the Article claims that "the executive power was simply the power to execute the laws—an empty vessel for Congress to fill, rather than a subject matter category with a well-defined set of real-world referents."<sup>98</sup> Accordingly, "it's not just confused but incoherent to ask whether an executive action is so legislative in nature as to fall outside of that basket. *Any* action authorized by law was an exercise of 'executive power' inasmuch as it served to execute

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<sup>94</sup> U.S. CONST. pmbl.

<sup>95</sup> Mortenson & Bagley, *supra* note 1, at 4.

<sup>96</sup> *Id.* ("[T]he executive power was simply the power to execute the laws—an empty vessel for Congress to fill.")

<sup>97</sup> Mortenson & Bagley, *supra* note 1, at 40–41 (emphasis added).

<sup>98</sup> *Id.* at 4–5 (echoing an earlier article by Mortenson: Mortenson, *supra* note 6, at 1234).



the law.”<sup>99</sup> It sounds like a powerful attack on nondelegation, but the foundation—the assumption about executive power—is rather shaky.

#### A. *Action, Strength, or Force*

Another definition, which was familiar in the eighteenth century, viewed executive power as a nation’s lawful action, strength, or force.

This definition has deep foundations in European philosophy, which long distinguished between the two faculties of the soul or mind—will and judgment—and contrasted these with action, strength, or force, which was the faculty or capacity of the body.<sup>100</sup> Indeed, these tripartite faculties of an individual became the basis for recognizing such powers—including executive action, strength, or force—in the people and ultimately in their government.<sup>101</sup>

Executive power thus could be described simply as a nation’s *force*, in the sense of its physical actions, in contrast to its legislative will or its judicial judgments. Such force included not merely warfare, but all sorts of physical activity, including speech, the conduct of prosecutions in court, the enforcement of judgments, distraint, and the purchasing of supplies.<sup>102</sup>

But the Article (and the earlier scholarship by Professor Mortenson on which it relies) does not really consider the possibility of lawful executive action, strength, or force. It is not even mentioned as a competing definition of executive power.<sup>103</sup>

Strikingly, this old vision of executive power is plainly evident from one of the Article’s own quotations. The Article quotes Rousseau on the “body politic” to the effect that “force and will are distinguished, will under

<sup>99</sup> Mortenson & Bagley, *supra* note 1, at 5.

<sup>100</sup> HAMBURGER, *supra* note 7, at 327. Will was alternatively understood as passion, and judgment as intellect or understanding. Force could be viewed as action or strength. For will and judgment, see NORMAN FIERING, *MORAL PHILOSOPHY AT SEVENTEENTH-CENTURY HARVARD* 106–09 (1981); PHILIP HAMBURGER, *LAW AND JUDICIAL DUTY* 159–60 (2008); Dan D. Crawford, *Intellect and Will in Augustine’s Confessions*, 24 *RELIGIOUS STUD.* 291 (1988); Norman S. Fiering, *Will and Intellect in the New England Mind*, 29 *WILLIAM & MARY Q.* 523, 529–30 (1972). For force or what has been translated in Aquinas as the sovereign’s “coercive power,” including the coercion of law, see, for example, THOMAS AQUINAS, *SUMMA THEOLOGICA* II.I, question 96, art. 5, at 2326 (Christian Classics Ethereal Library, 1981) (1274).

<sup>101</sup> HAMBURGER, *supra* note 7, at 327.

<sup>102</sup> Of course, there was disagreement about the division of government powers, as some theorists considered the judicial power to be part of the executive power. But even these commentators—as evident from Locke and Rutherford—could view executive power as the nation’s force. See *infra* notes 114, 124.

<sup>103</sup> Mortenson’s earlier work comes closest when it says that “executive power has never been anything less than the nation’s force mustered in service of the nation’s will.” Mortenson, *supra* note 6, 1271. But this seems more a statement of realism than a recognition that executive power is defined as the nation’s lawful action, strength, or force.

the name of legislative power and force under that of executive power.”<sup>104</sup> From this quotation it is apparent that executive power is the “force” of the body politic. But not having even entertained such a possibility, the Article persists in its empty vessel and law-executing definition.

More pertinent for Americans, the Article quotes Rutherford:

It belongs to the legislative power, considered as the common understanding, or joint sense of the body politic, to determine and direct what is right to be done: and it belongs to the executive power, considered as the common or joint strength of the same body, to carry what is so determined and directed into execution.<sup>105</sup>

This quotation sounds promising for the law-execution and empty vessel theory; and recall that the Article views the quotation as justifying “agency rulemaking pursuant to statutory authorization.”<sup>106</sup> But this twists Rutherford to justify delegation.

For starters, Rutherford viewed executive power not merely as law execution, but as the society’s “joint strength.”<sup>107</sup> Second, he did not embrace the delegation of legislative power to the executive, for he thought that “the executive power, in the nature of the thing, is not discretionary in any part.”<sup>108</sup> Third, he recognized that constitutions could vary from the assumption he drew from nature, and he argued that constitutions frequently had to leave the executive wide discretion, unconfined by legislation, in the external or foreign application of the society’s joint strength.<sup>109</sup>

When applied internally, the society’s joint strength served to protect rights and duties, and when applied externally, it more broadly protected against foreign threats.<sup>110</sup> As Rutherford explained:

Now, the executive power is a power of acting with this joint strength, in order to obtain the purposes for which such strength was formed. And, consequently,

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<sup>104</sup> Mortenson & Bagley, *supra* note 1, at 25. Indeed, Mortenson’s earlier work relies on Rousseau’s similar statement: “The body politic has . . . two motive powers—and we can make the same distinction between will and strength—the former is *legislative power* and the latter *executive power*.” Mortenson, *supra* note 6, at 1235.

<sup>105</sup> Mortenson & Bagley, *supra* note 1, at 40–41.

<sup>106</sup> *Id.* at 41.

<sup>107</sup> See quotation in text at *supra* note 105.

<sup>108</sup> RUTHERFORTH, *supra* note 52, at 279.

<sup>109</sup> See *infra* text accompanying notes 111–16.

<sup>110</sup> Rutherford also wrote: “The natural use of the joint strength which a civil society forms, is either to preserve the rights and enforce the duties of the members of such society, in respect of one another, and of the public; or else to protect the whole and the several parts of it against such injuries as other civil societies, or other individuals, who still continue in a state of nature, or who are members of other civil societies might do them; to prevent such injuries from proceeding, where they are begun; or to procure reparation, and inflict punishment, where they are completed.” RUTHERFORTH, *supra* note 52, at 273.

the executive power is either internal or external. We may call it internal, when it is exercised upon objects within the society; when it is employed in securing the rights, or enforcing the duties of the several members, in respect either of one another, or of the society itself. And we may call it external executive power, when it is exercised upon objects out of the society; when it is employed in protecting either the body or the several members of it against external injuries, in preventing such injuries from being done, or in procuring reparation, or in inflicting punishment for them, after they are done.<sup>111</sup>

Thus, whereas the Article claims that Rutherford has a law-executing definition of executive power, in the sense that the executive carries out legislative authorizations and instructions, Rutherford reveals that he views executive power as a matter of the society's joint strength—a power that internally is confined to securing rights and enforcing duties, but that is not always so confined externally.

That Rutherford thought much external executive power was not a matter of carrying out legislative directives is further evident from his account of an executive's constitutional discretion. In many societies, he observed, the executive needed the constitution to assure areas of executive discretion or prerogative—internally in pardons, and externally in matters of war, peace, and treaties:

[W]here the legislative and executive power are lodged in different hands, it is usual, especially if the legislative body is a large one, to allow those who have the executive power, to act discretionally in some cases; that is, it is usual for them to have, in some instances, such a discretionary power as is called prerogative.<sup>112</sup>

By “prerogative,” Rutherford meant a discretionary power. The “constitution of government” was what authorized and protected this discretion, primarily in external issues.<sup>113</sup> He thus anticipated that an executive might enjoy substantial realms of constitutionally authorized discretion in exercising his nation's strength externally—a discretion that, being constitutional, cannot easily be understood as “simply the power to execute the laws—an empty vessel for Congress to fill.”<sup>114</sup>

In other words, the Article persistently misreads Rutherford. It fails to recognize his conception of executive power as the society's joint strength. In quoting him on the domestic application of executive power, it fails to see

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<sup>111</sup> RUTHERFORTH, *supra* note 52, at 273–74. See also Rutherford's comment about understanding “the notion of executive power to consist in a power of using and applying the joint force of a civil society.” *Id.* at 275.

<sup>112</sup> *Id.* at 280 (echoing LOCKE *supra* note 38, at 392–93).

<sup>113</sup> *Id.* at 279–80.

<sup>114</sup> *Id.* at 4–5 (echoing an earlier article by Mortenson: Mortenson, *supra* note 6, at 1234).

that his law-executing vision precludes the delegation of legislative power. And as to the external application of executive power, the Article omits to mention Rutherford's view of constitutionally established discretionary executive power, which did not involve the execution of congressional instructions.

The methodological point is that, not for the first time, the Article fails to consider the range of competing views evident among European theorists. As I have written elsewhere:

The definition of executive power . . . remained open to dispute even as late as the founding of the United States.

Some commentators understood it to be at least the power of executing the law, and from this perspective they said it was ministerial. . . . Others recognized that, if this power was not legislative or judicial . . . it was the entire power of exercising the physical force of the government.<sup>115</sup>

If the Article had simply been more careful in reading the authors it quotes, it might have noticed that some Europeans defined executive power as the nation's action, strength, or force.<sup>116</sup>

### B. *The Constitution*

Of course, European theory is not the same as the Constitution. Though the framers were familiar with at least some European theories, they made their own choices. In fact, the Framers made deliberate departures from European theory and practice in many instances. So, whatever the weight of different opinions in different parts of Europe, one must ultimately focus on the Constitution, its framing, and its ratification.

Where does this more focused inquiry lead? Not to a law-executing power, let alone an empty vessel.

In accord with what was already the conventional default mode of conveying powers,<sup>117</sup> the Constitution vests the executive power in the President, and then clarifies or adjusts this power with various additions and limitations, including the limit that the President "shall take Care that the

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<sup>115</sup> HAMBURGER, *supra* note 7, at 328 n.a.

<sup>116</sup> Ideas of force also underlay John Locke's vision. He explained:

Though, as I said, the *executive* and *federative power* of every community be really distinct in themselves, yet they are hardly to be separated, and placed, at the same time, in the hands of distinct persons. For both of them requiring the force of the society for their exercise, it is almost impracticable to place the force of the commonwealth in distinct, and not subordinate hands. . . .

LOCKE, *supra* note 38, at 384.

<sup>117</sup> For the default allocation of power, including discussions from before the adoption of the Constitution, see HAMBURGER, *supra* note 7, at 328–30.

Laws be faithfully executed.”<sup>118</sup> The Constitution thus addresses law execution as one of the President’s duties, not as one of his powers. A law-executing authority undoubtedly could be implied from the duty, but this only reinforces the difference between the executive power and the authority to execute the law. Evidently, the Constitution does not consider the law-executing authority to be the same as the executive power. This means either that the law-executing authority stands apart from the executive power or, much more probably, that it is merely an element of the executive power—all of which is consistent with the view that the executive power is the nation’s action, strength, or force.

Reinforcing this conclusion is Alexander Hamilton’s statement in *Federalist No. 78* that the Constitution divides the government’s powers into those of “force,” “will,” and “judgment”—that is, executive force, legislative will, and judicial judgment.<sup>119</sup> The Article does not even mention this statement. Yet the *Federalist* was the most widely circulated and admired exposition of the Constitution during its ratification, and the distribution of the *Federalist* was thought to be crucial for the Constitution’s adoption.<sup>120</sup> Its summary of executive power is therefore significant. Amid evidence of contested European opinions, one must look at the Constitution and its framing and ratification to understand the choices made by Americans, and there is little better evidence from the ratification than the *Federalist*.

What is one to say about a discussion of executive power that does not wrestle with the Constitution’s language? Or that does not mention the possibility, notably discussed even in the *Federalist*, that executive power is the nation’s action, strength, or force?

This much is clear: it is difficult to understand the Constitution’s executive power merely as a matter of executing the law. And it is more than slightly mistaken to assert that “[t]he founders *unanimously* understood executive power as the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.”<sup>121</sup> On both grounds, the

<sup>118</sup> U.S. CONST. art. II, § 3.

<sup>119</sup> Alexander Hamilton, *Federalist No. 78*, in *THE FEDERALIST* 523–24 (Jacob E. Cooke ed., Wesleyan Univ. Press 1961) (“The Executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.”).

<sup>120</sup> For the circulation of the *Federalist* in book form, not to mention newspaper reprintings, “throughout America,” see 19 *THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION* 141 (John P. Kaminski, Gaspare J. Saladino, Richard Leffler, Charles H. Schoenleber, & Margaret A. Hogan eds., 2003).

<sup>121</sup> Mortenson & Bagley, *supra* note 1, at 40 (emphasis added).

Article's vision of executive power is a poor basis for attacking nondelegation.

### III. FROM MISDIRECTED ATTACKS TO A RELEVANT DEBATE

The Article's attack on the nondelegation doctrine is strangely misplaced. Rather than challenging decaying Supreme Court doctrine on nondelegation or offering improbable visions of what the Executive can do, the debate needs to come to terms with the Constitution's principles of vesting and executive power.

The Article is misdirected both personally and conceptually. The Article takes aim at my 2014 book for attempting to "give originalist bona fides to the nondelegation doctrine."<sup>122</sup> But this is puzzling. For one thing, my book expressly disclaims reliance on originalism.<sup>123</sup> More centrally, I have always opposed the nondelegation doctrine.

My 2014 book already argued that "it is utterly misleading to frame the debate in terms of 'the nondelegation doctrine'"—because "the focus on 'the nondelegation doctrine' reduces the controversy to one of mere doctrine, as if no larger principle were at stake."<sup>124</sup> More recently, my arguments have gone further, observing that the Constitution does not speak in terms of delegation and nondelegation. Instead, it *vests* its powers. It thus must be considered whether a congressional transfer of legislative powers violates the Constitution's vesting of such powers in Congress and, in addition, divests Congress of the power vested in it.<sup>125</sup>

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<sup>122</sup> *Id.* at 15 ("The latest installment in the campaign to give originalist bona fides to the nondelegation doctrine came in Philip Hamburger's *Is Administrative Law Unlawful?*, published in 2014.").

<sup>123</sup> HAMBURGER, *supra* note 7, at 10 ("[A]lthough some defenses of administrative law complain about original intent, this inquiry rests on something closer to original sin. Whatever one thinks about intent—especially if one fears it as a return to the constitutional past—it should be kept in mind that this inquiry focuses on something very different: the danger that the government already has returned to the preconstitutional past. Thus, rather than appeal to any interpretative doctrine, whether the living constitution or original intent, this book draws attention to one of the central dangers that prompted the development of constitutions. Much will be said about the history of the Constitution, but the argument here mainly concerns the revival of a historically dangerous sort of power.").

Incidentally, Mortenson and Bagley also say that my 2014 book was part of a "campaign" on behalf of the nondelegation doctrine. Mortenson & Bagley, *supra* note 1, at 15 ("The latest installment in the campaign to give originalist bona fides to the nondelegation doctrine came in Philip Hamburger's *Is Administrative Law Unlawful?* . . ."). Who knew!

<sup>124</sup> HAMBURGER, *supra* note 7, at 378–79.

<sup>125</sup> See *NCLA Gundy Brief*, *supra* note 90, at 5–10. Incidentally, the Article also accuses originalists of the "nonsense . . . that there was anything intrinsically non-delegable about legislative power. The people already delegated it once. Adherents of the nondelegation doctrine must therefore be arguing for a non-redelegation principle." Mortenson & Bagley, *supra* note 1, at 27. Curiously, that is exactly my position, for my book prominently argues that "the difficulty is not delegation, but subdelegation."

The Article's failure to engage with the vesting and divesting point is all the more striking because it frames its argument as a response to *Gundy v. United States* and especially Justice Gorsuch's dissenting opinion.<sup>126</sup> That is precisely the case in which I argued that the Court should abandon the nondelegation doctrine and instead recognize that the Constitution bars any divesting of its powers.<sup>127</sup> That is also the case in which Justice Gorsuch moved toward this argument, saying "we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities" and that "Congress may not divest itself of its legislative power by transferring that power to an executive agency."<sup>128</sup>

What, then, is one to make of an article that does not even notice the implications of the Constitution's *vesting* of powers?<sup>129</sup> If the debate was really still the same as in the 1930s, the Article would be on point. But given that the debate is evolving in its focus from delegation and nondelegation to vesting and divesting, an attack on nondelegation seems at best a distraction—an assault more on the dead than the living.

Similarly, in ignoring the possibility that executive power is the nation's action, strength, or force, the Article does not address the strongest alternative point of view. Unlike the Constitution's vesting of powers, the vision of executive power as the nation's action, strength, or force has not yet risen to prominence in a judicial opinion. But that is not to say it is entirely obscure.<sup>130</sup> And it is distinctively consistent with both the Constitution and the lived experience of the Executive, from the founding to the present. Rather than confront this perspective, however, the Article takes aim at more stereotyped and vulnerable arguments. The result, once again, is an odd failure to engage with the arguments that demand attention.

What is needed are debates not about strawmen, but about the Constitution's principles of vesting and executive power. These principles are evident from the Constitution itself, and they echo notable prior theories. There is no excuse for ignoring them.

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HAMBURGER, *supra* note 7, at 377. Indeed, an entire chapter is entitled "Subdelegated." The point is not that the Article needs to cite my book, but rather that it should not generalize about the "nonsense" propounded by other scholars.

<sup>126</sup> Mortenson & Bagley, *supra* note 1, at 2–3, 6, 17–23, 30, 32, 68–70, 75–76, 78–79, 83, 87, 97, 105, 109 (regarding *Gundy v. United States*, 139 S. Ct. 2116 (2019)); *id.* at 3, 17–21, 22, 24–25, 31, 68–70, 75, 79, 83–84, 87, 105, 107 (regarding Justice Gorsuch's opinion in *Gundy*).

<sup>127</sup> *NCLA Gundy Brief*, *supra* note 90, at 5–10.

<sup>128</sup> *Gundy*, 139 S. Ct. at 2135, 2142 (Gorsuch, J., dissenting).

<sup>129</sup> The Article once quotes Justice Gorsuch on *divesting*, but without noticing that such terminology might be significant. Mortenson & Bagley, *supra* note 1, at 68.

<sup>130</sup> *Id.*; *NCLA Gundy Brief*, *supra* note 90, at 5–10.

CONCLUSION

It has been seen that Professors Mortenson and Bagley's article is problematic on several grounds. Most basically, its own evidence often contradicts its conclusions. Equally telling is the evidence it omits—whether in European theory, the Constitution, or the *Federalist*. Underlying all of this is a deeper failure to explore ideas with greater openness to alternative viewpoints. Indeed, the Article does not even respond to the strongest and most recent arguments on the other side—it does not even mention them.

All the same, the Mortenson and Bagley article is conceptually valuable, for it serves as a reminder of the possibilities it leaves unexplored. This Essay, therefore, recalls a pair of inadequately appreciated constitutional principles. First, rather than generically delegate its powers, the Constitution more specifically vests them. It thereby bars Congress from vesting its powers in other bodies and from divesting itself of such powers. Second, the Constitution establishes an executive power that is not confined to law execution, but that instead encompasses the nation's action, strength, or force.

Of course, this Essay can only briefly present the logic and constitutional foundation of these ideas. But there is much to be said for them, and they now at least have been tabled in such a manner that they can no longer be brushed aside.