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## Delegation, Administration, and Improvisation

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# DELEGATION, ADMINISTRATION, AND IMPROVISATION

Kevin Arlyck\*

*Nondelegation originalism is having its moment. Recent Supreme Court opinions suggest that a majority of Justices may be prepared to impose strict constitutional limits on Congress's power to delegate policymaking authority to the executive branch. In response, scholars have scoured the historical record for evidence affirming or refuting a more stringent version of nondelegation than current Supreme Court doctrine demands. Though the debate ranges widely, sharp disputes have arisen over whether a series of apparently broad Founding-era delegations defeat originalist arguments in favor of a more demanding modern doctrine. Proponents—whom I call “nondelegationists”—argue that these historical delegations can all be explained as exceptions to an otherwise-strict constitutional limit.*

*As this Article shows, it is highly doubtful that the Founding generation thought of delegation in such categorical terms. The evidence nondelegationists cite in favor of their preferred classifications—systematically assessed here for the first time—is remarkably thin. More importantly, this Article highlights how, for the Founding generation, building the administrative capacity needed to fulfill the national government's responsibilities was not a quest to trace out hard constitutional boundaries between the branches. It was a dynamic and improvisational experiment in governance, in which Congress sought to mobilize its limited resources to meet the myriad challenges the new nation faced.*

*To recapture early delegation's dynamism, this Article focuses on the Remission Act of 1790. It gave the Secretary of the Treasury broad and unreviewable authority to remit statutory penalties for violations of federal law governing maritime commerce—power a strict nondelegation principle would not have allowed. This arrangement was not the obvious choice, and Congress considered vesting this power in a range of institutional actors before settling on the Secretary. Yet despite deep*

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concerns over the wisdom—and even the constitutionality—of concentrating too much power in the hands of a single executive branch officer, Congress repeatedly affirmed this discretion, and the early Secretaries (including Alexander Hamilton) did not hesitate to use it.

This was a pattern Congress repeated elsewhere, making early delegations of varying breadth across the spectrum of federal administration. This experiment in governance was not easy, nor was it free from controversy. Disputes over how and where to allocate governmental authority were frequent and contentious. But if legislative debates occasionally sounded in a constitutional register, overwhelmingly they turned on the kinds of practical considerations that animated Congress's deliberations over the Remission Act. When it came to designing a workable administrative system for the new federal government, delegation's boundaries were apparently quite expansive.

|                                                             |     |
|-------------------------------------------------------------|-----|
| INTRODUCTION.....                                           | 244 |
| I. THE NONDELEGATION DEBATE.....                            | 252 |
| II. DELEGATING THE REMISSION POWER.....                     | 260 |
| A. <i>Remission and Revenue</i> .....                       | 262 |
| B. <i>Locating Remission</i> .....                          | 266 |
| C. <i>Affirming Remission</i> .....                         | 270 |
| D. <i>Remission and Discretion</i> .....                    | 274 |
| III. JUSTIFYING DELEGATION.....                             | 276 |
| A. <i>Nonlegislative Power</i> .....                        | 277 |
| 1. <i>Judicial Power</i> .....                              | 278 |
| 2. <i>Executive Power</i> .....                             | 282 |
| B. <i>Permissible Delegation of Legislative Power</i> ..... | 286 |
| 1. <i>Foreign Affairs</i> .....                             | 286 |
| 2. <i>Benefits</i> .....                                    | 292 |
| 3. <i>Unimportance</i> .....                                | 296 |
| 4. <i>Necessity</i> .....                                   | 299 |
| IV. DELEGATION AND IMPROVISATION AT THE FOUNDING.....       | 301 |
| A. <i>Delegating to the Executive</i> .....                 | 302 |
| B. <i>Improvising Administration</i> .....                  | 306 |
| CONCLUSION.....                                             | 312 |

## INTRODUCTION

Nondelegation originalism is having its moment. For most of the past century, the Supreme Court has refused to impose any meaningful constitutional limit on Congress's ability to delegate rulemaking authority to the executive branch. Yet recent Court opinions suggest that five Justices might be ready to adopt a more stringent view of the nondelegation doctrine, on originalist grounds. Most notably, in

*Gundy v. United States*,<sup>1</sup> Justice Gorsuch argued in dissent that the Court's longstanding approach to nondelegation—which requires only that Congress provide the executive with an “intelligible principle” to guide administrative rulemaking<sup>2</sup>—“has no basis in the original meaning of the Constitution.”<sup>3</sup> According to Gorsuch, “the framers” believed that Congress cannot delegate to the executive branch “the power to adopt generally applicable rules of conduct governing future actions by private persons.”<sup>4</sup> Given the apparent agreement of four other Justices,<sup>5</sup> Gorsuch's opinion raises the possibility that the Court is prepared to impose significant limits on Congress's ability to delegate authority to administrative agencies. The full implications of such a decision are far from clear,<sup>6</sup> but a reinvigorated nondelegation doctrine could have a significant impact on how the modern administrative state functions.<sup>7</sup>

In light of the stakes, skeptics and supporters of the modern administrative state have recently explored in detail what people in the Founding era thought about Congress's power to delegate legislative authority to the executive.<sup>8</sup> The scholarly debate ranges broadly over

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1 139 S. Ct. 2116 (2019).

2 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928).

3 *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

4 *Id.* at 2133.

5 Chief Justice Roberts and Justice Thomas joined Justice Gorsuch's dissent. *Id.* at 2131. In the same case, Justice Alito said he would be “willing to reconsider” the permissive approach mandated by the Court's precedent. *Id.* (Alito, J., concurring in the judgment). Justice Kavanaugh has since suggested that Justice Gorsuch's “thoughtful” opinion in *Gundy* merited “further consideration.” *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari).

6 See Andrew Coan, *Eight Futures of the Nondelegation Doctrine*, 2020 WIS. L. REV. 141, 147 (discussing “six possible scenarios” for the Court's future nondelegation jurisprudence).

7 See Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 287 (2021) (“[T]he nondelegation doctrine may soon become a genuine limit on Congress's power to enlist agencies in the task of governance.”); Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1296 (2021) (“[R]ulemaking is so ubiquitous that mere doubt about its constitutionality could work major changes in the nondelegation doctrine and administrative law more generally.”).

8 See Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (forthcoming), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3654564](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3654564) [<https://perma.cc/XSU4-D4EQ>]; Aaron Gordon, Note, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718 (2019); Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88 (2020), [https://scholarlycommons.law.northwestern.edu/nulr\\_online/293](https://scholarlycommons.law.northwestern.edu/nulr_online/293) [<https://perma.cc/L2DU-E4MA>]; Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, AM. ENTER. INST. (forthcoming), <https://ssrn.com/abstract=3607159> [<https://perma.cc/SC2D-6KMJ>]; Mortenson & Bagley, *supra* note 7; Parrillo, *supra* note 7; Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021).

a variety of pre-Ratification European and American sources,<sup>9</sup> but some of the sharpest disputes have arisen over the conclusions one can draw from early federal legislation.<sup>10</sup> For good reason: throughout the 1790s (and well into the nineteenth century), Congress passed laws giving the executive branch significant policymaking discretion in a variety of domains—patents, foreign trade, military pensions, land taxation, and the postal system, to name a few.<sup>11</sup> This early legislative output is the best evidence we have of Founding-era views of delegation’s constitutionality, as the other traditional sources of the Constitution’s original meaning—text, structure, and pre-Ratification sources—are largely inconclusive.<sup>12</sup>

Modern scholars disagree deeply about the conclusions we can draw from Congress’s early grants of legislative authority to the executive branch. Delegation’s supporters view the Founding-era statutes as powerful evidence that the Constitution originally imposed a weak limit on Congress’s power to delegate—and perhaps no limit at all.<sup>13</sup> In response, proponents of a more demanding modern

In this Article, I use the term “Founding generation” as shorthand to refer to the people who designed the federal government and put it into motion in the years immediately following the Constitution’s ratification. Of course, the people whose views I characterize in this Article as representing the “Founding generation” are not representative at all. They are all white men from the nation’s political and economic elite. Women, the poor, racial minorities, and other disenfranchised persons had their own ideas about the content of American constitutionalism. In many cases, those views differed from those held by the kind of people I cite here. *See, e.g.*, Farah Peterson, *Constitutionalism in Unexpected Places*, 106 VA. L. REV. 559 (2020). They likely had views on the degree to which Congress should or could delegate legislative authority to the executive branch. Attempting to reconstruct those views would be a worthy endeavor, *see id.* at 608 (critiquing historical research that “restrict[s] one’s focus to official texts, the published letters of great men, legal opinions, and the like”), but would involve a level of historical research that is beyond the scope of this Article.

9 *See, e.g.*, PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* (2014); Mortenson & Bagley, *supra* note 7; Wurman, *supra* note 8, at 1518–50.

10 *See, e.g.*, Mortenson & Bagley, *supra* note 7, at 332–66; Wurman, *supra* note 8, at 1503–14, 1550–56; *see generally* Parrillo, *supra* note 7, at 1298 n.40 (citing sources).

11 *See* Mortenson & Bagley, *supra* note 7, at 332–66.

12 *See* Parrillo, *supra* note 7, at 1299–1300 (“[S]ources bearing on original meaning *besides* early congressional acts—constitutional text, preratification discourse, and structure—say very little about constitutional limits on delegation.”).

13 *See* Chabot, *supra* note 8 (manuscript at 3) (“[T]he theory and practice of delegation in the Founding era never reflected a particularly high constitutional bar.”); Mortenson & Bagley, *supra* note 7, at 332 (“[T]he Founders’ practice reflected [their theory] . . . : [r]egulatory delegations were limited only by the will and judgment of the legislature.”); Parrillo, *supra* note 7, at 1313 (“Vesting power in administrators to make sweeping discretionary decisions with high political stakes was not alien to the federal lawmakers who first put the Constitution into practice.”); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1735 (2002)

doctrine—whom I call “nondelegationists”—have advanced a variety of overlapping theories to explain and justify this early legislation.<sup>14</sup> They argue that, despite the Constitution’s general prohibition on delegation, certain types were originally understood to be permissible: delegations of “nonexclusive” legislative authority shared by the executive,<sup>15</sup> delegations regarding “foreign affairs”<sup>16</sup> or public “benefits,”<sup>17</sup> delegations of authority to “fill up the details” on matters of lesser importance,<sup>18</sup> and delegations made out of “necessity.”<sup>19</sup>

The historical accuracy of these “exceptional” categories of delegation is deeply important, yet largely unexplored in the current scholarship.<sup>20</sup> Without such exceptions, it is difficult—if not

(“[C]onsistent early practice . . . decisively established the permissibility of statutory grants to the president unchecked by any apparent intelligible principle.”).

14 See Ronald A. Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB POLY 147, 157 (2017) (“Outside the realm of foreign affairs . . . [Congress] did not authorize the President . . . to adopt rules that broadly regulated behavior of private individuals or entities . . . .”); Gordon, *supra* note 8, at 750 (asserting that “a few exceptions” to early nondelegation practice “do not reflect a view among the framing generation that no such prohibition existed”); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 398–402 (2002) (arguing that six early examples did not “clearly vest legislative power in executive or judicial actors”); Wurman, *supra* note 8, at 1497 (“Most of this legislation . . . from early Congresses is consistent with modern scholarly accounts of nondelegation.”). All the scholars I describe as “nondelegationists” argue that an originalist approach to constitutional interpretation mandates a more demanding version of the nondelegation doctrine than the Supreme Court’s “intelligible principle” test. They differ widely, however, in terms of the originalist theory they espouse and the test(s) they believe should replace current doctrine. I include Philip Hamburger in this group, even though he does not identify as an originalist, because his argument rests heavily on the notion that a more stringent nondelegation principle inhered in the Founding-era Constitution. See HAMBURGER, *supra* note 9.

15 See Wurman, *supra* note 8, at 1533–36.

16 See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); Cass, *supra* note 14, at 157–58; Gordon, *supra* note 8, at 782–83.

17 See HAMBURGER, *supra* note 9, at 3 n.b., 86–87; Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 178–82 (2019).

18 See Lawson, *supra* note 8 (manuscript at 4) (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)); Wurman, *supra* note 8, at 1502, 1516–17.

19 See Lawson, *supra* note 8 (manuscript at 35–37); cf. Chabot, *supra* note 8 (manuscript at 41–44) (suggesting a “necessity” theory might best explain early delegations).

20 In their recent article, Julian Mortenson and Nicholas Bagley generally deny that such exceptions existed at the Founding, but do not directly address the arguments put forth by nondelegationists. See Mortenson & Bagley, *supra* note 7, at 279–80, 367. In an unpublished supplement to his recent article, Nicholas Parrillo suggests that two exceptions—foreign affairs and privileges/benefits—may be “untenable,” but he does not evaluate all the evidence cited by nondelegationists, and ultimately assumes the exceptions’ validity for purposes of argument. See Nicholas R. Parrillo, Supplemental Paper to: “A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New

impossible—for nondelegationists to reconcile a number of early congressional delegations with a stringent original understanding of nondelegation principles.<sup>21</sup> Whether the justifications are based on foreign affairs, benefits, lack of importance, or some other category, they are essential to the nondelegationist effort to explain the early Congress's apparent willingness to give significant policymaking discretion to the executive branch.

As this Article shows, it is highly doubtful that the Founding generation thought of delegation and its limits in such categorical terms.<sup>22</sup> This Article offers the first systematic assessment of the historical evidence nondelegationists cite in favor of their preferred taxonomies, and finds it remarkably thin.<sup>23</sup> Simply put, no one at the Founding did more than hint at the existence of particular categories of permissible delegations. If that is correct, then the better explanation for why the early Congress routinely delegated legislative power to the executive branch is that no one thought the Constitution prohibited it from doing so.

The nondelegationists' search for a more restrictive original doctrine also poses a deeper problem: it loses sight of the highly uncertain and improvisational nature of early American state-building. As this Article illustrates, for members of the early Congress, building the administrative capacity needed to fulfill the new national government's critical responsibilities was not a quest to trace out hard constitutional boundaries between the branches.<sup>24</sup> It was a dynamic, improvisational, and only partially successful experiment in governance, in which Congress sought to mobilize the limited resources available to it in order to meet the myriad challenges the nation faced. Whatever abstract limits the Constitution might have imposed on Congress's ability to allocate policymaking authority across the institutions of the nascent federal government, they had little apparent impact when it came to actually legislating.

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Evidence from the Federal Tax on Private Real Estate in the 1790s" 16–20 (May 14, 2021) (unpublished manuscript), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696902](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902) [<https://perma.cc/2U7Y-P4WN>]. A recent note explores several early delegations specifically in the realm of foreign affairs, and concludes that “[n]o one suggested the[y] were permissible solely by virtue of their foreign affairs subject matter.” Note, *Nondelegation's Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140 (2021).

21 See Mortenson & Bagley, *supra* note 7, at 367; Parrillo, *supra* note 7, at 1297–98.

22 In this Article, I take no position on whether an originalist approach to interpreting the Constitution is the right one. I simply take it as a given that any Supreme Court revision of the nondelegation doctrine will be premised in significant part on originalist analysis.

23 See *infra* Section III.B.

24 See *infra* Part IV.

This Article seeks to recapture the dynamism of early congressional delegation through the lens of the Remission Act of 1790.<sup>25</sup> The Act was the First Congress's most intriguing grant of legislative authority to the executive branch, yet it has largely been overlooked in the nondelegation literature.<sup>26</sup> In it, Congress gave the Secretary of the Treasury a power to "regulat[e] private conduct" that modern nondelegationists would likely deem constitutionally impermissible.<sup>27</sup> Under the Act, Congress delegated to the Secretary the legislature's authority to modify or waive the statutory penalties imposed on individuals for violations of major federal laws governing customs collection and maritime commerce.<sup>28</sup> As long as the Secretary believed that the lawbreaker had acted without "intention of fraud," he could impose as much or as little of the attendant fine or forfeiture as he "deem[ed] reasonable and just."<sup>29</sup> There was no appeal from the Secretary's decision—not to the courts, not to the President, and not to Congress.<sup>30</sup> In short, shortly after the Constitution was ratified, Congress did what Justice Gorsuch (and others) believe is constitutionally forbidden: it delegated to the executive branch Congress's own authority to determine what financial punishments the government would impose on private individuals for violations of the law.<sup>31</sup>

Agreement on how best to structure such a significant grant of authority did not come easily. Remission of penalties was a legislative power exercised by Congress in the first instance.<sup>32</sup> But at Alexander Hamilton's suggestion, Congress resolved to delegate that power elsewhere. Members had deep concerns over the wisdom of concentrating too much power in the hands of a single person, and

25 See Act of May 26, 1790, ch. 12, 1 Stat. 122.

26 See Gordon, *supra* note 8, at 793 (three sentences); Lawson, *supra* note 14, at 401 (two paragraphs); Mortenson & Bagley, *supra* note 7, at 347 (three sentences); Posner & Vermeule, *supra* note 13, at 1735 (one sentence); Wurman, *supra* note 8, at 1553–54 n.348 (one paragraph). This scholarly inattention is understandable. Congress established the Act in a one-paragraph statute, Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23, and the early Supreme Court only discussed it once. See, e.g., *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291 (1825). As a result, the importance of the early Treasury Secretaries' remission authority only becomes apparent through archival research into how they actually used the power, something I have done in prior work. See Kevin Arlyck, *The Founders' Forfeiture*, 119 COLUM. L. REV. 1449, 1482–98 (2019).

27 Cf. *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting).

28 See Arlyck, *supra* note 26, at 1482–98.

29 See Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23.

30 Arlyck, *supra* note 26, at 1485 & n.215.

31 See *Gundy*, 139 S. Ct. at 2144 (Gorsuch, J., dissenting) (“[I]t’s hard to see how giving the nation’s chief prosecutor the power to write a criminal code rife with his own policy choices might be [constitutionally] permissible.”); see also *infra* Section II.D.

32 See *infra* Section II.B.



the legislature considered vesting it in a shifting array of institutional actors—local federal officials, district court judges, a panel of cabinet officers, and even the Justices of the Supreme Court—before settling on the Treasury Secretary.<sup>33</sup> Reluctant to commit to this arrangement, Congress repeatedly reauthorized the Act on a temporary basis, and it was subject to renewed challenge—including on nondelegation grounds—before finally becoming permanent in 1800.<sup>34</sup>

As contested as the Act was, members of Congress did not think that the Constitution had much to say about it. To the contrary, they largely debated the Act on the basis of nonconstitutional values—efficiency, consistency, expertise, neutrality, and capacity—which often cut in different directions. They argued over how best to balance the government’s law enforcement priorities against the obligation to treat citizens with justice. In so doing, they apparently felt free to experiment with various institutional arrangements, to come up with solutions to the challenges of national governance that best balanced the competing considerations at play.<sup>35</sup>

As this Article explains, this was a pattern Congress repeated in other areas, making delegations of varying breadth to a range of government officials, across the spectrum of federal administration. In areas as diverse as revenue collection, disaster relief, and military development (among others), Founding-generation Americans displayed tremendous creativity in building a federal government that would be limited in its objects but vigorous in pursuing them.<sup>36</sup>

This “extended improvisation” in governance was not easy, nor was it free from controversy.<sup>37</sup> Disputes over how and where to allocate governmental authority were frequent and contentious. And debaters occasionally advanced nondelegation arguments, rendering it at least plausible that Founding-era constitutional understandings included some theoretical limit on Congress’s ability to delegate its authority to the executive branch.<sup>38</sup> But whatever nondelegation principles such interlocutors may have had in mind, there is little evidence that they imposed anything more than a weak constraint on Congress’s discretion. When it came to the nitty-gritty of designing a workable administrative system for the new federal government, delegation’s boundaries were expansive indeed.

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33 See *infra* Section II.B.

34 See *infra* Section II.C.

35 See *infra* Section IV.A.

36 See *infra* Section IV.B.

37 Daniel J. Hulsebosch, *The Founders’ Foreign Affairs Constitution: Improvising Among Empires*, 53 ST. LOUIS U. L.J. 209, 213 (2008).

38 See Mortenson & Bagley, *supra* note 7, at 282 (“[C]reative lawyers did very occasionally express their opposition to proposed legislation in constitutional terms.”).

This Article proceeds as follows. Part I reviews the current debate over whether the modern, permissive nondelegation doctrine is consistent with an originalist interpretation of the Constitution. The Part focuses particular attention on the various ways in which nondelegationist scholars have sought to reconcile the best evidence of the Constitution's original meaning—early federal statutes—with a stringent view of constitutional limits on delegation.

Part II describes the Remission Act's origins, revealing the challenge Congress faced in designing a system for remitting statutory penalties that would balance protection of federal revenue against lenity for unintentional lawbreakers. In light of deep concerns about the wisdom of concentrating legislative power in a single executive-branch official, Congress considered a number of different options before ultimately conferring broad and unreviewable authority on the Treasury Secretary. Despite ongoing objections to this arrangement, Congress repeatedly reauthorized the Act throughout the 1790s, and the early Treasury Secretaries—including Alexander Hamilton—did not hesitate to use their power to waive statutory penalties set by Congress.

In light of this history, Part III uses the Remission Act as a vehicle for assessing the various theories advanced by nondelegationists to reconcile early legislation with a stringent version of the doctrine. The Part first concludes that the Act itself cannot be explained satisfactorily by any of the theories. Even if remission might resemble an exercise of traditional executive authority (such as prosecutorial discretion or pardon), or can be seen as relating to foreign affairs or the provision of public benefits, the Act does not fit easily into any proposed exceptional category.

In so doing, Part III also answers a more important question: Did these “exceptions” to a stringent nondelegation principle really exist? By carefully considering the limited evidence cited by proponents, and the significant evidence against, Part III concludes that they almost certainly did not. As a result, there are a number of early delegations by Congress, in addition to the Remission Act, that can only be explained by the conclusion that there was not much of a limit on delegation at the Founding at all.

Part IV steps back, to consider how and why the early Congresses granted the remission power to the Treasury Secretary in the first place. In struggling to design an administrative system for commercial regulation and revenue collection, Congress considered a variety of arrangements that might strike the right balance between different administrative values. Delegation to the Treasury Secretary was not the obvious choice—it was simply the best one Congress could come up with. As this Part shows, the same was true with respect to other

delegations that have figured prominently in the nondelegation scholarship. In other words, across the domains of federal administration, strict constitutional limits on what powers and responsibilities the legislature could delegate to another branch were not what shaped the early regime.

## I. THE NONDELEGATION DEBATE

For nearly all of its history in the Supreme Court, nondelegation has done little to limit Congress's ability to delegate legislative authority to the executive branch.<sup>39</sup> The Court has only ruled three times that a statute was an unconstitutional delegation, all in the New Deal era.<sup>40</sup> The Court's long-established test for delegation requires only that Congress provide the executive branch with an "intelligible principle" to guide administrative rulemaking,<sup>41</sup> and it has repeatedly upheld very broad delegations in the face of constitutional challenge.<sup>42</sup> Given this history, more than one commentator has declared the nondelegation doctrine to be a dead letter.<sup>43</sup>

Recently, nondelegation has experienced a revival. Building on a strand of legal scholarship insisting that the Supreme Court's "intelligible principle" test is incompatible with Founding-era views about the delegation of legislative authority,<sup>44</sup> a majority of the current Court may be prepared to adopt a more stringent version of the doctrine. Without a doubt, the view recently articulated by Justice Gorsuch in *Gundy* would represent a significant change in approach. According to Justice Gorsuch, Congress cannot give the President or

39 See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000) ("We might say that the conventional doctrine has had one good year, and 211 bad ones (and counting).").

40 See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541–42 (1935); *Pan. Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

41 *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality opinion).

42 See, e.g., *Nat'l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) ("public interest, convenience, or necessity" (quoting Communications Act of 1934, ch. 652, §§ 309(a), 312(b), 48 Stat. 1064, 1085, 1087 (1934) (codified as amended at 47 U.S.C. §§ 309(a), 312(b) (2018))); *Whitman v. Am. Trucking Ass'n, Inc.*, 531 U.S. 457, 472 (2001) ("requisite to protect the public health" with "an adequate margin of safety" (quoting 42 U.S.C. § 7409(b)(1) (2000))).

43 See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 132–33 (1980); Posner & Vermeule, *supra* note 13, at 1722.

44 See HAMBURGER, *supra* note 9; Cass, *supra* note 14; Gordon, *supra* note 8; Lawson, *supra* note 14; Joseph Postell & Paul D. Moreno, *Not Dead Yet—or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41 (2018); Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL. L. REV. 265 (2001); Wurman, *supra* note 8.

an agency the discretion to “adopt generally applicable rules of conduct governing future actions by private persons”<sup>45</sup>—which it has done in countless statutes, including several upheld by the Court in the past.<sup>46</sup> As a number of commentators have noted, the Supreme Court’s adoption of this test would call into question the constitutionality of major delegations of legislative authority.<sup>47</sup> Even assuming the Court would hesitate before striking down important federal legislation on nondelegation grounds,<sup>48</sup> a more demanding doctrine could have significant repercussions for the administrative state more generally.<sup>49</sup>

Justice Gorsuch justified his test based on what he understands to be the Constitution’s “original meaning”<sup>50</sup> and the “guiding principles” left to us by “the framers.”<sup>51</sup> Yet the historical evidence he cited in *Gundy* does little to support his proposed version of nondelegation. His opinion includes several references to the Federalist, a quotation from John Locke, and citation to three early nineteenth-century cases.<sup>52</sup> Justice Thomas’s 2015 opinion in *Department of Transportation v. Ass’n of American Railroads* relies more heavily on citations to prerevolutionary English precedent (stretching back to Magna Carta), and a sprinkling of Founding-era sources (mostly from the Federalist).<sup>53</sup> At best, these materials suggest that a prohibition on delegations of legislative power to the executive is consistent with separation of powers principles more generally.<sup>54</sup>

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45 *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). The rules articulated by Justices Thomas and Gorsuch are not identical, but they are substantively similar. *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) (stating that Congress cannot delegate authority to “formulate generally applicable rules of private conduct”).

46 *See* *Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (citing examples).

47 *See Gundy*, 139 S. Ct. at 2130 (plurality opinion) (asserting that if SORNA is unconstitutional, “then most of Government is unconstitutional”); *Mortenson & Bagley*, *supra* note 7, at 287–88.

48 *See* *Coan*, *supra* note 6, at 142 (“A sweeping revolution in U.S. constitutional law is unlikely to be imminent.”).

49 *See* *Bamzai*, *supra* note 17, at 169 (suggesting that, following *Gundy*, the Court may read delegating statutes more narrowly to avoid a constitutional difficulty).

50 *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

51 *Id.* at 2135–36.

52 *Id.* at 2133–34.

53 575 U.S. 43, 69–76 (2015) (Thomas, J., concurring in the judgment).

54 *See Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (“[T]here can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates.” (quoting THE FEDERALIST NO. 47, at 302 (Madison) (Clinton Rossiter ed., 1961))).

None of these sources articulate anything like the test the Justices purport to derive from the historical record.<sup>55</sup>

In *Gundy*, Justice Gorsuch also cited a handful of scholars who argue that the Court's twentieth-century nondelegation doctrine is incompatible with Founding-era views.<sup>56</sup> In *Gundy*'s wake, these skeptics have been joined by several more.<sup>57</sup> In response, several defenders of the modern doctrine have engaged in their own deep investigations into Founding-era sources.<sup>58</sup> The collective result is a far richer exploration of the historical evidence than found in recent Supreme Court opinions.

The challenge is that the usual sources of originalist evidence are largely unhelpful in identifying nondelegation's precise contours.<sup>59</sup> As conceded on all sides, the constitutional text itself tells us virtually nothing.<sup>60</sup> Article I says that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States," but does not say anything about whether Congress can delegate those powers to nonlegislative actors.<sup>61</sup> Arguments from constitutional structure do

55 See Mortenson & Bagley, *supra* note 7, at 289 ("[T]he only actual quotes from historical sources [in Justice Gorsuch's *Gundy* opinion] either speak generally to the undesirability of vesting all constitutional powers in one body or recite the familiar reasons that the Constitution makes legislating hard." (citing *Gundy*, 139 S. Ct. at 2133–35, 2144)).

56 See *Gundy*, 139 S. Ct. at 2135–40 (Gorsuch, J., dissenting) (citing, e.g., Cass, *supra* note 14, at 153; HAMBURGER, *supra* note 9, at 378; Lawson, *supra* note 14, at 340).

57 See *supra* notes 8, 14 and accompanying text.

58 See *supra* note 8 and accompanying text.

59 Nicholas Parrillo cogently makes this argument in a recent unpublished paper. See Parrillo, *supra* note 20 (manuscript at 3–13).

60 See, e.g., Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2127 (2004) ("The text of the Constitution is . . . silent on the question whether or to what extent legislative power may be shared."); Lawson, *supra* note 14, at 335 ("[T]here is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power.").

61 U.S. CONST. art. I, § 1. Even if a limit on delegation could be implied, *cf.* Hamburger, *supra* note 8, at 90 ("The Constitution vests legislative powers in Congress, and that body therefore cannot . . . divest itself of[] the powers that the Constitution vests in it."), the text offers no indication of what delegations that limit might permit or prohibit. See Parrillo, *supra* note 20 (manuscript at 4 n.7). Because one cannot derive a rule against nondelegation from the constitutional text itself, some originalists would likely take the position that the task of formulating such a rule would require "construction" rather than "interpretation" of the text. See, e.g., Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 4 (2018) (discussing the "interpretation and construction" distinction); Lawrence B. Solum, *The Interpretation-Construction Distinction*, 27 CONST. COMMENT. 95, 96 (2010) (same). *But see* JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 142–43 (2013) (viewing resort to "construction" and other "sources of law extrinsic to the Constitution" as being inconsistent with originalism). No nondelegationist describes their effort to derive constitutional principle from historical discourse and practice as an exercise

not get us much further. A stringent view of nondelegation might generally be consistent with a tripartite division of governmental authority<sup>62</sup> (or with other features of American constitutionalism, like federalism<sup>63</sup>). But even proponents of a structural basis for nondelegation concede that such an approach provides little clarity as to how the doctrine might apply in practice.<sup>64</sup> Finally, pre-Ratification discourse suffers from similar flaws. While scholars on both sides of the debate devote significant attention to statements made by British and American legal and political thinkers in the seventeenth and eighteenth centuries,<sup>65</sup> the most such sources can tell us is that there was *some* limit on the legislature's power to give away rulemaking authority.<sup>66</sup> They do not offer standards for assessing the constitutionality of particular delegations.<sup>67</sup>

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in “construction,” but given their general acknowledgement of the text's limited informational value, that appears to be an accurate description of their analytical approach.

62 See *Gundy v. United States*, 139 S. Ct. 2116, 2133–37 (2019) (Gorsuch, J., dissenting); Rappaport, *supra* note 44, at 305–10. But see Mortenson & Bagley, *supra* note 7, at 289–332 (original understandings of legislative and executive power do not imply any limit on delegation except permanent alienation of legislative power).

63 See Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019).

64 See, e.g., Rappaport, *supra* note 44, at 312 (conceding his structure-derived test is “vague and difficult to apply”). But cf. Lawson, *supra* note 8 (manuscript at 7–8) (arguing that a prohibition on delegations involving “important subjects” is implicit in the Constitution's nature as a fiduciary instrument governed by agency law principles (quoting *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825))); *infra* notes 341–42 and accompanying text (discussing Lawson's argument).

65 See, e.g., Gordon, *supra* note 8, at 737–44; Mortenson & Bagley, *supra* note 7, at 289–332; Wurman, *supra* note 8, at 1518–26.

66 See Parrillo, *supra* note 20 (manuscript at 3) (“[C]onstitutional text, pre-ratification discourse, and structure might possibly indicate that some unspecified constitutional limit on delegation exists in the abstract . . .”). For example, the fact that scholars can draw profoundly different conclusions about the import of a paragraph from John Locke's *Second Treatise* highlights the indeterminacy of the principles pre-Ratification sources supposedly express. Compare Wurman, *supra* note 8, at 1518–22 (discussing JOHN LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 71 (J.W. Gough ed., Basil Blackwell & Mott, Ltd. 1948) (1690)), with Mortenson & Bagley, *supra* note 7, at 307–09 (same).

67 As Nicholas Parrillo points out, the British tradition of parliamentary supremacy over the English constitution also raises doubts about the probative value of *any* pre-Revolutionary sources when interpreting the U.S. Constitution. Parrillo, *supra* note 20 (manuscript at 5–6); see also Hamburger, *supra* note 8, at 93–94 (critiquing Mortenson and Bagley for relying on European sources). According to Parrillo, the secondary literature on nondelegation identifies only a handful of American sources from the period between 1774 and 1788, and none of them say anything revealing about the nondelegation doctrine's “content, stringency, or practical application.” Parrillo, *supra* note 20 (manuscript at 7–8).

The lack of specificity in much of the historical evidence presents a significant problem for an originalist approach to nondelegation. As everyone from James Madison,<sup>68</sup> to John Marshall,<sup>69</sup> to Antonin Scalia<sup>70</sup> has recognized, what bedevils the nondelegation doctrine is the difficulty of formulating a test that consistently and predictably distinguishes permissible delegations from impermissible ones.<sup>71</sup> Indeed, the difficulty of this line-drawing exercise is one of the reasons the Supreme Court adopted the “intelligible principle” test in the first place.<sup>72</sup>

The difficulty of deriving a workable rule from text, structure, and pre-Ratification discourse is—or at least should be—a particular concern for nondelegationists. After all, they want to *overrule* the Court’s current precedent, and replace the “intelligible principle” test with a more demanding one.<sup>73</sup> As a result, they bear the burden of proving that the Court’s longstanding approach to nondelegation contravenes the Constitution’s original meaning. How heavy a burden is subject to debate.<sup>74</sup> But the Court has recently reaffirmed that, at minimum, *stare decisis* requires “something more than ‘ambiguous

68 3 ANNALS OF CONG. 238–39 (1791) (statement of Rep. Madison) (conceding the difficulty of “determin[ing] with precision the exact boundaries of the Legislative and Executive powers”).

69 See *Wayman*, 23 U.S. at 46 (finding the “precise boundary of” the legislature’s authority to “commit something to the discretion of the other departments” was “a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily”).

70 See *Mistretta v. United States*, 488 U.S. 361, 415 (1989) (Scalia, J., dissenting) (saying that because “no statute can be entirely precise . . . the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree”).

71 See *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (“[T]he exact line between policy and details, lawmaking and fact-finding, and legislative and non-legislative functions ha[s] sometimes invited reasonable debate . . .”).

72 See *Whitman v. Am. Trucking Ass’ns, Inc.*, 531 U.S. 457, 474–75 (2001) (“[W]e have ‘almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.’” (quoting *Mistretta*, 488 U.S. at 416 (Scalia, J., dissenting))).

73 See *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting) (“[T]he ‘intelligible principle’ remark has no basis in the original meaning of the Constitution . . .”).

74 There is much scholarly debate as to whether the principle of *stare decisis* is compatible with an originalist theory of constitutional interpretation. In particular, commentators diverge on when—if ever—a precedent that is wrong on originalist grounds can nonetheless be left intact. See, e.g., Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257 (2005); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803 (2009); Michael Stokes Paulsen, *The Intrinsicly Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005). See generally William Baude, *Is Originalism Our Law?*, 115 COLUM. L. REV. 2349, 2358–59 (2015) (citing sources).

historical evidence” before the Court will “flatly overrule . . . major decisions.”<sup>75</sup>

Given the indeterminacy of text, structure, and pre-Ratification discourse, scholars have devoted significant attention to the early Congress’s practices—in particular, the passage (or defeat) of legislation delegating rulemaking authority to the executive branch.<sup>76</sup> This evidence has two significant advantages over other sources.<sup>77</sup> First, it offers actual examples of delegations the early Congresses made to the executive branch, which can help us understand more precisely which *kinds* of delegations were understood to be constitutionally permissible in the Founding era.<sup>78</sup> Second, examining the output of a representative legislature reduces the danger of relying on statements made by individuals, which may represent idiosyncratic views.<sup>79</sup> In addition, delegations that gained support across political divides and that endured over time—like the Remission Act<sup>80</sup>—are unlikely to be aberrational.<sup>81</sup> Instead, they are likely the most instructive evidence we have of what limits—if any—the Founding

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75 *Gamble v. United States*, 139 S. Ct. 1960, 1969 (2019) (quoting *Welch v. Tex. Dep’t of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987)).

76 *See* Chabot, *supra* note 8 (manuscript at 18–49); Mortenson & Bagley, *supra* note 7, at 332–66; Parrillo, *supra* note 7, at 1318–45; Wurman, *supra* note 8, at 1503–18, 1550–56.

77 *See* Wurman, *supra* note 8, at 1501 (stating that scholarship examining early legislative practices “make[s] a particularly important contribution to the originalist debate over nondelegation”); John O. McGinnis & Michael Rappaport, *Original Interpretive Principles as the Core of Originalism*, 24 CONST. COMMENT. 371, 378–79 (2007).

78 *See* Parrillo, *supra* note 20 (manuscript at 11–12).

79 *See* Posner & Vermeule, *supra* note 13, at 1736 n.61 (“[A]ctual statutory enactments . . . presumptively embody a judgment by the whole Congress, not just by individuals, about the permissibility of delegation.”).

80 *See infra* Section II.C.

81 To be sure, partisan politics or individual self-interest might lead legislators to vote in favor of particular legislation that they actually believe to be unconstitutional (or vice-versa). *See* Lawson, *supra* note 14, at 398 (asserting that early federal statutes are “at best weak evidence of original [constitutional] meaning,” because members of Congress “are not disinterested observers”). But the fact that the early Congresses repeatedly delegated broad authority to the executive branch would seem to mitigate such concerns. In any event, even skeptics of early legislation concede that it has *some* probative value. *See id.* (examining early delegation statutes because “doubts about their value go to weight rather than admissibility”); Steven G. Calabresi & Saikrishna B. Prakash, *The President’s Power to Execute the Laws*, 104 YALE L.J. 541, 555 (1994) (“Th[e] use of the First Congress’ actions to shed light on the meaning of the Constitution is not without precedent (or justification) in constitutional law.”). If one agrees that other sources of original constitutional meaning are generally unhelpful in determining what kinds of delegations the Constitution was originally understood to allow or prohibit, then early legislation becomes all the more important. *But see* Lawson, *supra* note 14, at 403 (asserting that the value of early congressional practice “pales before the available evidence from text, structure, and design”).



generation thought the Constitution imposes on delegations of legislative power.

The difficulty for nondelegationists is that Congress's early practice is not in their favor. For starters, there is little affirmative evidence in favor of a more stringent test for nondelegation than the Court's current "intelligible principle" formulation. By my count, nondelegationists point to only four examples of Congress modifying or rejecting a Founding-era legislative proposal on nondelegation grounds. As I explain later in this Article, there is no indication nondelegation concerns shaped three of the enactments at all.<sup>82</sup> Nondelegation was more clearly at issue in the fourth episode, which involved a well-studied 1792 statute establishing the federal postal system. But the evidence from that episode is contradictory at best.<sup>83</sup> It is possible that a stringent view of nondelegation influenced the early Congress in unspoken ways—by influencing members' votes *sub silentio*, or dissuading them from proposing broad delegations in the first place. Such possibilities, however, are not actual *evidence* of a robust Founding-era doctrine.<sup>84</sup>

The greater problem for nondelegationists is that there *is* affirmative evidence supporting an expansive Founding-era view of delegation. As a recent scholarship has shown, throughout the early period Congress repeatedly gave the executive branch broad authority

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82 See *infra* notes 417–27 and accompanying text (1793 Patent Act); *infra* note 306 (1809 and 1810 embargo legislation). Ilan Wurman and Aaron Gordon also cite the debates over the Alien Act of 1798 as evidence that the Constitution contained a nondelegation principle. See Wurman, *supra* note 8, at 1512–14; Gordon, *supra* note 8, at 747. Of course, that statute *passed*, so the nondelegation challenges it faced were not strong enough to persuade a majority of Congress. Wurman speculates that Congress simply did not think that the Constitution's general prohibition against delegation applied to this particular legislation, but offers no explanation why it did not. See Wurman, *supra* note 8, at 1514. Gordon argues that the act was "widely condemned as unconstitutional at the time," and that the verdict of history agrees. See Aaron Gordon, Nondelegation Misinformation: A Rebuttal to "Delegation at the Founding" and its Progeny 50–51 (June 4, 2021) (unpublished manuscript) (citing 1832 statement by John Calhoun that the act's unconstitutionality had been settled in public opinion, JOHN C. CALHOUN, LETTER TO GENERAL HAMILTON ON THE SUBJECT OF STATE INTERPOSITION (1832), *reprinted in* REPORTS AND PUBLIC LETTERS OF JOHN C. CALHOUN 144, 161 (Richard K. Crallé ed., New York, D. Appleton & Co. 1855)), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3561062](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3561062). That may be true, but the Alien and Sedition Acts were subject to a range of constitutional objections, and nondelegation appears to have been a lesser one. See Mortenson & Bagley, *supra* note 7, at 365 ("[T]he legislative debate over the constitutionality of the Alien and Sedition Acts raged in Congress for days—but *not over delegation*.").

83 See *infra* notes 396–411 and accompanying text.

84 See Mortenson & Bagley, *supra* note 7, at 291 ("The original public meaning of constitutional text . . . can't be a secret or hidden meaning.").

to fashion rules governing private conduct.<sup>85</sup> Though the Remission Act is largely overlooked in this literature, it is a compelling example.<sup>86</sup>

Nondelegationists respond to this evidence by asserting that, even though the Constitution generally barred Congress from giving legislative authority to the executive, certain *kinds* of delegations *were* permissible at the Founding.<sup>87</sup> Justice Gorsuch, for example, believes there were several caveats to the general prohibition on delegation. Congress could authorize another branch to “fill up the details” of a statutory scheme, as long as it first made “the policy decisions . . . regulating private conduct.”<sup>88</sup> Scholars have echoed that view, arguing that Congress could not delegate rulemaking authority over “important” matters, but could with respect to less-important “details.”<sup>89</sup> Justice Gorsuch also invoked an exception allowing delegation when the power in question “overlaps” with authority the Constitution vests in another branch—for example, with respect to foreign affairs<sup>90</sup> (another category echoed by commentators).<sup>91</sup>

85 Mortenson and Bagley document this phenomenon in detail. Mortenson & Bagley, *supra* note 7, at 332–66; *see also* Parrillo, *supra* note 20 (manuscript at 13–16) (listing examples); JERRY L. MASHAW, *CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW* 5 (2012) (“From the earliest days of the Republic, Congress delegated broad authority to administrators, armed them with extrajudicial coercive powers, created systems of administrative adjudication, and specifically authorized administrative rulemaking.”).

86 *See infra* Section II.D.

87 In addition to the exceptions discussed here, Justices Gorsuch and Thomas suggest that Congress can make application of a rule governing private conduct depend on executive fact-finding. *See Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 78–79 (2015) (Thomas, J., concurring in the judgment). The classic example is “contingent legislation”—a statute that goes into effect on the occurrence of a particular event, the identification of which is a “factual” question permissibly left to the executive branch. *See Field v. Clark*, 143 U.S. 649, 693 (1892) (“[T]he president was . . . the mere agent of [Congress] . . . to ascertain and declare the event upon which its expressed will was to take effect.”). As even nondelegationists concede, successfully applying such a distinction depends “on the clarity of the line between fact and law, and that is decidedly not a clear line.” Gary Lawson, “*‘I’m Leavin’ It (All) Up to You’*: *Gundy and the (Sort-of) Resurrection of the Subdelegation Doctrine*, 2018–2019 CATO SUP. CT. REV. 31, 66–67.

88 *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 43 (1825)). Justice Gorsuch justified this exception by invoking John Marshall’s 1825 opinion in *Wayman v. Southard*, in which the Chief Justice suggested, in passing, a distinction between statutes on “important subjects, which must be entirely regulated by the legislature itself,” and “those of less interest,” in which Congress could delegate authority to the executive to “fill up the details.” 23 U.S. at 43.

89 *See* Lawson, *supra* note 8 (manuscript at 4); Wurman, *supra* note 8, at 1502, 1516–17.

90 *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

91 *See* Gordon, *supra* note 8, at 782; Rappaport, *supra* note 44, at 352–54; Wurman, *supra* note 8, at 1549 n.322.

Several scholars have also suggested that Congress could delegate authority to regulate the provision of public benefits, but not private rights<sup>92</sup>—a position Justice Thomas seems to endorse.<sup>93</sup> Finally, several scholars have suggested that Congress historically could delegate authority to the executive branch when it was “necessary”—i.e., when the task delegated was one Congress simply could not perform itself.<sup>94</sup>

These exceptions are profoundly important for the nondelegationist position, yet they are deeply flawed. As I explain in detail in Part III, without them nondelegationists have difficulty explaining a number of broad delegations made by the early Congress.<sup>95</sup> To be sure, these exceptions may not sufficiently explain all instances in which Congress granted legislative authority to the executive. There are Founding-era delegations—including the Remission Act itself<sup>96</sup>—that do not fit easily into any exceptional category.<sup>97</sup> More important, it is highly doubtful whether these exceptions actually existed at the Founding. As I further explore in Part III, there is virtually no evidence in their favor, and meaningful evidence against.<sup>98</sup> If that analysis is correct, the originalist argument in favor of a more stringent nondelegation doctrine seems to be unsound. It simply cannot account for a number of broad delegations of legislative authority at the Founding.

## II. DELEGATING THE REMISSION POWER

Before assessing the historical viability of various nondelegationist arguments, this Part sets the stage by detailing what arguably was the

92 See HAMBURGER, *supra* note 9, at 3 n.b, 85–87; Bamzai, *supra* note 17, at 182 (“A distinction between rights and privileges might explain several laws enacted in early Congresses that delegated authority to the executive branch . . .”); Wurman, *supra* note 8, at 1548 (“Perhaps Congress had more power to delegate authority to establish public privileges.”).

93 *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 83 n.7 (2015) (Thomas, J., concurring in the judgment).

94 See Chabot, *supra* note 8 (manuscript at 42–46); Lawson, *supra* note 8 (manuscript at 35–37); Wurman, *supra* note 8, at 1542, 1544, 1545.

95 See, e.g., Hamburger, *supra* note 8, at 107 (saying delegation defenders “do[] not point to any early instance when the Executive . . . made binding rules or adjudications that were national and domestic in their scope”); Gordon, *supra* note 82 (manuscript at 35) (“[E]very enactment [delegation defenders] discuss either falls into one of the well-established ‘exceptions’ to the principle of nondelegation or is obviously not a delegation of legislative power at all.” (quoting Hamburger, *supra* note 8, at 106)); Wurman, *supra* note 8, at 1550–54 (describing several early delegations as addressing subjects that were not “important”).

96 See *infra* Part III.

97 See, e.g., Parrillo, *supra* note 7, at 1301–02 (arguing that a 1798 land tax does not fall into either the foreign affairs or privileges exceptions).

98 See *infra* Section III.B.

First Congress's most significant delegation—the Remission Act of 1790. For a statute granting such important power, the Remission Act's origins were innocuous enough. On January 19, 1790, Alexander Hamilton sent a letter to the House of Representatives.<sup>99</sup> His ostensible purpose was to report on the petition of Christopher Saddler, an American mariner seeking relief from a fine imposed for his noncompliance with customs regulations Congress had recently enacted. The House committee charged with responding to Saddler's petition referred it to Hamilton for a recommendation. In his brief report, Hamilton had little to say about Saddler himself. Though Hamilton thought that relief was likely justified, he wanted more information about the case before making a formal recommendation.<sup>100</sup>

Hamilton did not stop there, however. Instead, he urged the House to develop a comprehensive solution to the problem of unintentional customs violations.<sup>101</sup> There were many cases in which persons who had unknowingly broken the law incurred “considerable forfeitures.”<sup>102</sup> In Hamilton's view, this state of affairs made it a “necessity” that Congress “vest[] somewhere a discretionary power of granting relief.”<sup>103</sup> Hamilton did not say *to whom* Congress should give such power. Given its potential impact on the federal fisc, the question was of such “delicacy and importance” that it should be the subject of “mature deliberation.”<sup>104</sup> But Hamilton clearly did not think Congress should retain the power for itself, if only to avoid the “inconvenience” of having to rule on individual applications for relief.<sup>105</sup>

Hamilton's lobbying effort bore fruit several months later, when Congress passed the Remission Act of 1790.<sup>106</sup> The Act transferred to the Treasury Secretary the legislature's own authority to spare from punishment those who unintentionally violated important federal revenue laws.<sup>107</sup> As this Part explains, the question of where to locate such an important power provoked intense debate in Congress, which considered numerous configurations of authority before settling on

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99 *Report on the Petition of Christopher Saddler, 19 January 1790*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Jan. 19, 1790) [hereinafter *Saddler Report*], <https://founders.archives.gov/documents/Hamilton/01-06-02-0089> [<https://perma.cc/2VJL-PYDA>].

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.*

106 *See* Act of May 26, 1790, ch. 12, 1 Stat. 122.

107 *Id.*

the Treasury Secretary.<sup>108</sup> Uncertainty and dispute continued through the 1790s, even as the first Treasury Secretaries—Hamilton included—exercised the power to its fullest extent.<sup>109</sup> Ultimately, however, remission became a permanent feature of the early administrative landscape, bestowing upon the executive a discretionary authority that rivals the powers modern nondelegationists find so objectionable.<sup>110</sup>

### A. *Remission and Revenue*

At its core, remission was about revenue. When Congress convened in 1789, one its first orders of business was to pass legislation regulating the collection of customs duties on goods imported into the United States by sea.<sup>111</sup> This was no small matter. Customs duties were the federal government's lifeblood, constituting more than ninety percent of total revenue for the first two decades following Ratification.<sup>112</sup> It is no exaggeration to say that, without an effective means of collecting such duties, the federal government would have been unable to function.<sup>113</sup>

There were two principal statutes regulating customs collection. The Collection Act of 1789 served three purposes: it detailed the duties owed on various categories of goods, it announced regulations on the manner of importation, and it prescribed rules governing federal officers' collection of duties owed.<sup>114</sup> Its companion, the Registering Act of 1789, had a narrower scope, but was no less important: it specified the requirements for registering a ship as a "vessel of the United States," a status that exempted the owner from payment of the duties on imports specified in the Collection Act.<sup>115</sup>

Crucially, both statutes prescribed fines and forfeitures for violations of many of the acts' provisions. These penalties ranged broadly, from a one hundred dollar fine for lesser offenses, to forfeiture of goods and vessels themselves (often worth thousands of dollars).<sup>116</sup> To impose a statutorily prescribed penalty, the government

108 See *infra* Section II.B.

109 See *infra* Section II.C.

110 See *infra* Section II.D.

111 See Mascott, *supra* note 63, at 1394 ("Congress felt it was so critical to quickly raise revenue that it enacted laws imposing customs duties prior to establishing the Treasury Department and other executive agencies.").

112 See Arlyck, *supra* note 26, at 1466 & n.96.

113 See GAUTHAM RAO, NATIONAL DUTIES: CUSTOM HOUSES AND THE MAKING OF THE AMERICAN STATE 6–8 (2016) ("[C]ustoms revenue almost singlehandedly funded the federal government.").

114 See Act of July 31, 1789, ch. 5, 1 Stat. 29 (repealed 1790).

115 See Act of Sept. 1, 1789, ch. 11, 1 Stat. 55.

116 See, e.g., *id.* § 30; Act of July 31, 1789 § 12.

had to go to federal district court, which had exclusive jurisdiction over all suits for “penalties and forfeitures” under federal law.<sup>117</sup>

It was essential that the government be able to penalize customs violators. Whenever someone failed to pay the duties they owed, revenue suffered. But collection was difficult. According to many historians, early Americans were inveterate smugglers—a tradition that dated back to the colonial period and continued forward through the War of 1812 and beyond.<sup>118</sup> The Atlantic coastline’s sheer length presented a huge challenge to the skeletal staff of customs officers responsible for collecting duties.<sup>119</sup> The fact that customs officers often lacked critical enforcement tools did not help matters.<sup>120</sup> Given these difficulties, deterrence depended on the prospect of significant penalties. Fines and forfeitures were financially important in another way. By law, the three principal customs officers for the district in which a seizure took place shared half of any penalty amongst themselves<sup>121</sup>—a significant financial inducement for federal officers whose compensation was otherwise low.<sup>122</sup> Similarly, informants who helped identify customs evaders could also share in the recovery.<sup>123</sup>

The challenge the Founding generation faced was how to balance rigorous enforcement of important federal laws with the need to provide justice to individuals. As Hamilton and his contemporaries recognized (in 1790 and later), there was a real danger of significant fines and forfeitures resulting from unintentional violations of the customs laws.<sup>124</sup> Indeed, the first Collection Act created largely a strict liability regime. With a few exceptions, those who violated the Act were

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117 Judiciary Act of 1789, ch. 20, § 9, 1 Stat. 73, 76–77.

118 See, e.g., THOMAS C. BARROW, *TRADE AND EMPIRE: THE BRITISH CUSTOMS SERVICE IN COLONIAL AMERICA, 1660–1775* (1967); CATHY MATSON, *MERCHANTS AND EMPIRE: TRADING IN COLONIAL NEW YORK* (1998); JOSHUA M. SMITH, *BORDERLAND SMUGGLING: PATRIOTS, LOYALISTS, AND ILLICIT TRADE IN THE NORTHEAST, 1783–1820* (2006); THOMAS M. TRUXES, *DEFYING EMPIRE: TRADING WITH THE ENEMY IN COLONIAL NEW YORK* (2008).

119 SMITH, *supra* note 118, at 10–12.

120 See Act of Aug. 4, 1790, ch. 35, § 62, 1 Stat. 145, 175 (repealed 1799) (permitting President to order construction of only ten revenue cutters, at a cost of no more than \$10,000). Perhaps more importantly, while officers could search any vessel without a warrant (and any building with one), see Arlyck, *supra* note 26, at 1466–67, Congress did not grant them legal authority to search merchant books and papers until 1863. Act of Mar. 3, 1863, ch. 76, § 7, 12 Stat. 737, 740. This made it difficult for customs officers to ferret out instances where importers paid lower duties by deliberately undervaluing their goods. See NICHOLAS R. PARRILLO, *AGAINST THE PROFIT MOTIVE: THE SALARY REVOLUTION IN AMERICAN GOVERNMENT, 1780–1940*, at 235–36 (2013); RAO, *supra* note 113, at 184–86 (discussing problems early customs officers had in accurately valuing imported goods).

121 Act of July 31, 1789, ch. 5, § 38, 1 Stat. 29, 48 (repealed 1790).

122 See Arlyck, *supra* note 26, at 1469, 1510 n.352.

123 Act of July 31, 1789 § 38.

124 See *infra* notes 136–44 and accompanying text.

subject to penalties irrespective of whether they intended to evade paying the duties they owed.<sup>125</sup>

For many contemporaries, this rigidity was essential. According to the Remission Act's chief congressional proponent, Fisher Ames, Congress had two choices in designing the customs system. It could make the laws "loosely," which would give customs officers "considerable discretion" in executing them.<sup>126</sup> Or it could make the rules "so strict as to be in some degree rigid."<sup>127</sup> For Ames, the latter was the better approach,<sup>128</sup> as effective revenue collection depended on the consistent application of "certain rule[s]."<sup>129</sup> Hamilton agreed; as he had explained to the New York legislature in 1787, "certainty" was one of the two "great objects" of any taxation system.<sup>130</sup>

The need for "certainty" was especially acute with respect to the penalties for customs violations. As Hamilton explained to Congress, "the security of the revenue" could not depend on voluntary compliance with the customs laws.<sup>131</sup> Lax enforcement would merely encourage those who owed duties on imported goods to "avoid . . . payment."<sup>132</sup> Accordingly, as Hamilton's successor later instructed customs collectors, they had to execute the laws "without reference to

125 For example, of the dozens of prohibitions in the first Collection Act, only two depended on the offender's state of mind. See Act of July 31, 1789, ch. 5, § 16, 1 Stat. 29, 41 (repealed 1790) (providing a \$200 fine for discrepancies between the manifest and goods actually delivered, unless it was due to "unavoidable necessity or accident, and not with intention to defraud the revenue"); *id.* § 23 (allowing forfeiture of packaged goods if the contents differed from the entry made at the customhouse due to "intention to defraud the revenue").

126 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames).

127 *Id.*

128 See *id.* ("He thought the latter the best mode.").

129 See 1 ANNALS OF CONG. 1166 (1790) (Joseph Gales ed., 1834) (statement of Rep. Ames).

130 Alexander Hamilton, *New York Assembly. Remarks on an Act for Raising Certain Yearly Taxes Within This State* (Feb. 17, 1787), in 4 PAPERS OF ALEXANDER HAMILTON 95 (Harold C. Syrett & Jacob E. Cooke eds., 1962). The other "great object[]" of taxation was "[e]quality." *Id.*

131 *Final Version: First Report on the Further Provision Necessary for Establishing Public Credit [13 December 1790]*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Dec. 13, 1790) (emphasis omitted), <https://founders.archives.gov/documents/Hamilton/01-07-02-0227-0003> [<https://perma.cc/H2TX-XMPZ>]. Though Hamilton expressed confidence that respectable merchants would pay the duties they owed, to maintain confidence in the system as a whole it was "essential[] . . . that every possible guard should be set on the fraudulent few." *Report on Defects in the Existing Law of Revenue, 22 April 1790*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Apr. 22, 1790), <https://founders.archives.gov/documents/Hamilton/01-06-02-0248> [<https://perma.cc/FH6G-75UN>]. And he was generally skeptical about public virtue as a sound basis of republican government. See GERALD STOURZH, *ALEXANDER HAMILTON AND THE IDEA OF REPUBLICAN GOVERNMENT* 70–75 (1970).

132 *Final Version, supra* note 131.

any circumstances of fraud or innocence.”<sup>133</sup> Only the “strictest method” of enforcement could prevent the revenue system “from being deranged.”<sup>134</sup> Or, in the words of one of the Remission Act’s original proponents in Congress, imposition of the fines and forfeitures prescribed for customs violations should be “nearly inevitable,” to ensure “safe and effectual collection of the revenue.”<sup>135</sup>

As everyone recognized, strict enforcement of the customs laws could result in manifest injustice.<sup>136</sup> Indeed, Hamilton urged Congress to create a mechanism for remitting fines and forfeitures precisely because violators would run afoul of the law simply due to “inadvertence” or “want of information.”<sup>137</sup> This problem was especially acute in the early days of a new regulatory regime, when merchants were still learning the rules.<sup>138</sup> But the customs regulations’ complexity would inevitably lead to the imposition of unwarranted penalties, therefore requiring the “constant existence” of a “power capable of affording relief.”<sup>139</sup>

Members of Congress agreed that remission was essential to the healthy functioning of the revenue system. “[N]o person,” argued one, “ought to be liable . . . who is not guilty of a violation of the laws intentionally or willfully.”<sup>140</sup> Granting relief in such cases would not be a question of “mercy”—it was instead a matter of “justice.”<sup>141</sup> Accordingly, if the rules governing customs collection were to be

133 Frederick Arthur Baldwin Dalzell, *Taxation with Representation: Federal Revenue in the Early Republic* 168 (Oct. 1993) (unpublished Ph.D. dissertation, Harvard University) (ProQuest) (quoting Draft Letter from Oliver Wolcott, Sec’y of the Treasury, Dep’t of the Treasury, to Robert Purviance, Collector, Dep’t of the Treasury (May 6, 1797) (on file with the Connecticut Historical Society, Oliver Wolcott, Jr. Papers, box 17, folder 16)).

134 *Id.* (quoting Draft Letter from Oliver Wolcott, *supra* note 133).

135 2 ANNALS OF CONG. 1475 (1790) (statement of Rep. Lawrence). Such comments echoed the views of Cesare Beccaria, a leading eighteenth-century theorist of criminal punishment whose views were highly influential in the early United States. *See* CESARE BECCARIA, ON CRIMES AND PUNISHMENTS AND OTHER WRITINGS 63 (Richard Bellamy ed., Richard Davies, Virginia Cox & Richard Bellamy trans., Cambridge Univ. Press 1995) (1764) (“The certainty of even a mild punishment will make a bigger impression than the fear of a more awful one which is united to a hope of not being punished at all.”); John D. Bessler, *Revisiting Beccaria’s Vision: The Enlightenment, America’s Death Penalty, and the Abolition Movement*, 4 NW. J.L. & SOC. POL’Y 195, 206–15 (2009) (discussing Beccaria’s early influence in the United States).

136 *See* 2 ANNALS OF CONG. 1475 (1790) (statement of Rep. Lawrence) (arguing fines and forfeitures for customs violations “ought to be as nearly inevitable as is in any ways consistent with mercy to individuals”).

137 *Saddler Report*, *supra* note 99.

138 *Id.*

139 *Id.*

140 1 ANNALS OF CONG. 1167 (1790) (Joseph Gales ed., 1834) (statement of Rep. Sturges).

141 *Id.*



“strict,” then it was necessary to provide “some relaxation” in deserving cases.<sup>142</sup> Indeed, as one representative noted, it would be “impossible to get along” without “a power placed somewhere to remit penalties.”<sup>143</sup> In that sense, remission was a power “co-existent with the revenue laws” themselves.<sup>144</sup>

### B. *Locating Remission*

The remission power may have been necessary, but it was also dangerous. If not exercised carefully, it would lessen the certainty of rule-enforcement and hamper revenue collection more than it would benefit deserving individuals.<sup>145</sup> To members of Congress, it was therefore a “delicate power,”<sup>146</sup> to be exercised with “a great deal of circumspection.”<sup>147</sup> Indeed, some representatives opposed the Remission Act entirely on the ground that it would undermine customs collection and harm the federal fisc.<sup>148</sup> Therefore, the goal in structuring the remission power, according to Ames, was to grant relief while creating “the least risk of injuring the revenue.”<sup>149</sup>

For Congress, the hard part lay in figuring out where to locate this “delicate power.”<sup>150</sup> When Hamilton tendered his proposal, the task of balancing the need for certainty against the demands of justice had fallen on the legislature itself. Before passage of the Remission Act (and after), individuals who thought they did not deserve punishment for their statutory violations sought relief directly from Congress.<sup>151</sup>

142 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames); *see also* 1 ANNALS OF CONG. 1167 (1790) (Joseph Gales ed., 1834) (statement of Rep. Lawrence) (saying without remission, “persons absolutely violating the laws, whether intentionally or through ignorance, would . . . be precluded from all relief”); 6 ANNALS OF CONG. 2291 (1797) (statement of Rep. Coit) (saying the original 1790 Remission Act was “necessary” because “[i]t was made the duty of officers to prosecute in all cases”).

143 6 ANNALS OF CONG. 2287 (1797) (statement of Rep. Coit).

144 *Id.* at 2285 (statement of Rep. Sitgreaves).

145 *See* 1 ANNALS OF CONG. 1168 (1790) (Joseph Gales ed., 1834) (statement of Rep. Stone).

146 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames).

147 2 ANNALS OF CONG. 1475 (1790) (statement of Rep. Lawrence).

148 *See* DAILY ADVERTISER, Feb. 6, 1790, *as reprinted in* 12 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: JANUARY–MARCH 1790, at 175 (Helen E. Veit, Charlene Bangs Bickford, Kenneth R. Bowling & William Charles DiGiacomantonio eds., 1994) [hereinafter 12 DHFFC] (“[A] few were of opinion, that the passing any act for the remission of fines, would operate to the great disadvantage of the public revenue . . .”).

149 1 ANNALS OF CONG. 1166 (1790) (Joseph Gales ed., 1834) (statement of Rep. Ames).

150 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames).

151 *See, e.g.*, 8 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: PETITION HISTORIES AND NONLEGISLATIVE OFFICIAL DOCUMENTS 421–

Such legislative relief for individuals was common at the Founding. Before and after ratification of the Constitution, at both the state and national level, individuals typically presented their claims against the government to the legislature.<sup>152</sup> This was true not only with respect to requests for government largesse, as with military pensions<sup>153</sup> and disaster relief,<sup>154</sup> but also for those seeking respite from the allegedly unjust application of general laws.<sup>155</sup> Indeed, as recent scholarship has shown, one of the early Congresses' most important functions was responding to individual petitions seeking legislative favor.<sup>156</sup> To that end, one of the First Congress's initial actions was to develop a system for receiving and responding to petitions, which generally involved referral to a congressional committee or to an executive branch official.<sup>157</sup> The referee would investigate and prepare a report and recommendation; Congress would then decide whether to grant the requested relief, usually via private bill or resolution.<sup>158</sup>

Hamilton's proposal, however, prompted Congress to do something unusual—divest itself entirely of the responsibility for granting individual relief from customs fines and forfeitures. In this period, Congress experimented with various arrangements for addressing the thousands of petitions it received each year.<sup>159</sup> At times it delegated decision-making authority to officials from the executive branch and judiciary. For instance, Congress authorized Treasury Department officers to decide certain classes of contract claims against the government,<sup>160</sup> and it delegated responsibility for deciding Revolutionary War pension claims to the judges of the federal circuit courts.<sup>161</sup> Crucially, however, Congress retained the ability to revisit

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22, 423, 426–27 [hereinafter 8 DHFFC] (Kenneth R. Bowling, William Charles diGiacomantonio & Charlene Bangs Bickford eds., 1998) (describing pre-Remission Act petitions submitted to the First Congress); 6 ANNALS OF CONG. 1788 (1797) (statement of Rep. Swanwick) (considering two 1797 petitions seeking remission of penalties for “having sold wine and spirits by retail, without license”).

152 See Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 637 (1985).

153 See Maggie McKinley, *Petitioning and the Making of the Administrative State*, 127 YALE L.J. 1538, 1586–87 (2018).

154 See MICHELE LANDIS DAUBER, *THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE* 1–16 (2013).

155 See Maggie Blackhawk, *Equity Outside the Courts*, 120 COLUM. L. REV. 2037, 2042 (2020).

156 See McKinley, *supra* note 153, at 1547–48.

157 See *id.* at 1587.

158 *Id.*

159 See *id.* at 1579–1600.

160 See Shimomura, *supra* note 152, at 644–45.

161 Act of Mar. 23, 1792, ch. 11, § 2, 1 Stat. 243, 244 (repealed 1793); see McKinley, *supra* note 153, at 1587 (discussing the Pension Act).

their decisions, either via appeal or through the appropriation process (i.e., by refusing to pay amounts awarded by referees).<sup>162</sup>

In light of this history, Congress had a hard time agreeing in whom to vest the remission power. Under the first bill introduced in the House, a panel of judicial officers—the local federal district judge, district attorney, and marshal—would handle petitions for relief.<sup>163</sup> A subsequent version of the bill gave the district judge alone the power to remit, though the Secretary of the Treasury, the Secretary of State, and the Attorney General had to approve any remission of a penalty greater than \$5,000.<sup>164</sup> But when the Senate returned its amended version of the bill, the district judge's role was reduced to hearing evidence and transmitting a statement of facts to the same three cabinet officers, who then made the decision as to whether remission was warranted.<sup>165</sup> The reasons for the change are not clear, though it appears that the Senate modeled its proposal on British practice, in which a central administrative board had the power to “relax” the revenue laws in “cases of hardship.”<sup>166</sup> Hamilton himself suggested as much in his initial recommendation: creating a discretionary power to grant relief would align the United States with “the usual policy of Commercial Nations.”<sup>167</sup> Hamilton did not mention Great Britain

162 See McKinley, *supra* note 153, at 1588; Shimomura, *supra* note 152, at 644–45.

163 1 ANNALS OF CONG. 1166 (1790) (Joseph Gales ed., 1834).

164 Mitigation of Fines Bill, H.R. 45, 1<sup>st</sup> Cong. (as reported, Mar. 8, 1790), *reprinted in* 6 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA: LEGISLATIVE HISTORIES, MITIGATION OF FINES BILL [HR-38] THROUGH RESOLUTION ON UNCLAIMED WESTERN LANDS 1482–84 [hereinafter 6 DHFFC] (Charlene Bangs Bickford & Helen E. Veit eds., 1986).

165 Mitigation of Fines Bill, H.R. 45, 1<sup>st</sup> Cong. (as amended by the Senate, Mar. 19, 1790), *reprinted in* 6 DHFFC, *supra* note 164, at 1484, 1485. Under the Senate proposal, only two of the three executive officers needed to agree in order to grant remission. *Id.* An earlier proposal in the Senate envisioned a more complicated procedure, in which the district judge made the initial determination as to whether fraud was involved, then the three cabinet officials decided whether relief was warranted in light of the facts, and then the judge made the final decision as to the “reasonable” quantum of relief to be granted (but no greater than the amount approved by the executive officers). H.R. 45 (as recommended by Senate committee report, Mar. 19, 1790), *as reprinted in* 6 DHFFC, *supra* note 164, at 1483 n.12.

166 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames); *see also* 1 ANNALS OF CONG. 1167 (1790) (Joseph Gales ed., 1834) (statement of Rep. Fitzsimons) (urging Congress to consider “the practice in England, where . . . application for relief is made to the commissioners”); *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 295 (1825) (“The powers given by this statute to the [British] Commissioners of the Treasury, are very analogous to those given by our act to the Secretary of the Treasury . . .”). By statute, British commissioners had broad authority to restore forfeited goods that “arose without any [d]esign or [i]ntention of [f]raud.” An Act for the More Effectual Prevention of Smuggling in This Kingdom, 27 Geo. 3 c. 32, § 15 (1787) (UK).

167 *Saddler Report*, *supra* note 99.

specifically in his report, but he often modeled his approach to customs collection on British practice.<sup>168</sup>

Whatever its genesis, the Senate's switch to centralized decisionmaking caused consternation in the House. Critics argued that delegating authority to executive officers in Philadelphia would delay needed respite for merchants located far from the seat of government.<sup>169</sup> The Senate proposal also gave the power to cabinet officials who were less responsive than district judges to local concerns and conditions.<sup>170</sup> In response, the amendment's defenders conceded that the new proposal would "lengthen" the remission process.<sup>171</sup> But that was a necessary evil. Centralized decisions were essential to ensuring that the government enforced the laws governing maritime commerce consistently and predictably. As one House member put it, putting remission in the hands of the executive branch would "eventually produce strict justice, and tend more effectually to secure the revenue."<sup>172</sup>

Critics also questioned the amendment's constitutionality. Specifically, two House members argued that the Senate proposal improperly granted "judiciary powers" to executive branch officials.<sup>173</sup> The precise basis for these objections is unclear,<sup>174</sup> but they may have had some traction. After debate on the Senate version of the bill, the House responded with a version that vested remission power in the individual Justices of the Supreme Court.<sup>175</sup>

168 See, e.g., *Treasury Department Circular to the Collectors of the Customs, 30 November 1789*, NAT'L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Nov. 30, 1789), <https://founders.archives.gov/documents/Hamilton/01-05-02-0364> [<https://perma.cc/FT4C-QZW8>] (discussing "practice of the british Customs" regarding fee collection by customs officers, because Britain is the "nation from whom we derive our language & in a great measure our usages of business"); see also RAO, *supra* note 113, at 53 ("Hamilton . . . wanted to pattern the new federal government on the blueprint of the British state.").

169 2 ANNALS OF CONG. 1475 (1790) (statement of Rep. Goodhue).

170 *Id.* (statement of Rep. Jackson).

171 *Id.* at 1474 (statement of Rep. Sherman).

172 *Id.*

173 *Id.* at 1475 (statement of Rep. Gerry); see also *id.* (statement of Rep. Huntington) (the Senate bill "referr[ed] matters of judicial determination to a Chancellorate unknown to the Constitution").

174 Compare *id.* (statement of Rep. Gerry) (suggesting that designating the heads of executive departments as "Judges" in deciding on remission petitions infringed on the President and Senate's combined power to appoint federal judges), with *id.* (statement of Rep. Sedgwick) (responding to Gerry's objection by pointing out that the designated department heads had already been constitutionally appointed).

175 See *Mitigation of Forfeitures*, H.R. 57, 1st Cong. (as read in the House, Apr. 29, 1790), *reprinted in* 6 DHFFC, *supra* note 164, at 1488–89.

Yet for reasons unknown,<sup>176</sup> the final version of the Act doubled down on its concentration of power in the executive branch. It gave the remission power to the Treasury Secretary alone. Under the Act, the Secretary could remit any penalty incurred under the customs laws if, “in his opinion,” the violation was committed “without wilful negligence or any intention of fraud.”<sup>177</sup> The Secretary could remit the *entire* penalty, including the customs officers’ share—a power not included in the original House proposal. And, most important, he could remit the whole penalty or “any part thereof . . . upon such terms or conditions as he may deem reasonable and just.”<sup>178</sup> In other words, once the Secretary determined that the petitioner had incurred a penalty without fraudulent intent, he had complete discretion to restore to the petitioner as much or as little of his property as the Secretary thought reasonable. And it really was *complete* discretion. The Act did not provide for review of the Secretary’s decisions—not by the judiciary, not by the President, and not by Congress.<sup>179</sup> Federal judges were still involved in the process, but only to the extent that they heard evidence and transmitted a statement of facts to the Secretary.<sup>180</sup> The decision of whether to impose all, some, or none of the prescribed penalty lay entirely in the executive branch.

### C. *Affirming Remission*

Hamilton and his successors did not hesitate to use the broad power Congress gave them. As I have demonstrated elsewhere, from 1790 to 1807 the Treasury Secretaries granted relief in over ninety percent of the remission cases presented to them.<sup>181</sup> In most of those cases, they granted nearly complete relief, only withholding a small

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176 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122. No explanation for the change is recorded in the published legislative record. I discuss the possibilities in Part IV.

177 *Id.* at 122–23.

178 *Id.*

179 See *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 285 (1825) (concluding that “no one can question” the Secretary’s determination regarding a petitioner’s fraudulent intent: “It is a subject [committed] to his sound discretion.”); *The Margareta*, 16 F. Cas. 719, 722 (C.C.D. Mass. 1815) (No. 9072) (Story, J.) (finding the Secretary’s determination that the facts stated by the district court are sufficient to justify remission “is conclusive, and cannot be overhauled in any collateral inquiry”). I am aware of no court case involving a challenge to a remission decision by a disappointed petitioner. Cf. *Morris*, 23 U.S. at 288–89 (rejecting customs officer’s challenge to the Act’s grant of authority to remit the portion of a fine or forfeiture due to the officer). The only way a petitioner could “appeal” the Secretary’s refusal to grant remission would be to petition Congress for relief subsequently. I am aware of no instance in which a petitioner did so.

180 See Arlyck, *supra* note 26, at 1484 & n.212.

181 See *id.* at 1452.

percentage of the penalty to pay court costs.<sup>182</sup> But in roughly a third of these cases the Secretaries exercised their authority to grant whatever partial relief they deemed “just” and “reasonable.”<sup>183</sup> The level of partial remission varied widely; in most cases the Secretaries remitted all but a small portion of the penalty, but in certain cases the government retained substantial sums.<sup>184</sup>

Despite—or perhaps because of—the Secretaries’ willing exercise of their power, remission became more entrenched over the next decade. The 1790 Act was supposed to expire after a year.<sup>185</sup> As a member of the House later explained, Congress included this sunset provision as a concession to those who had concerns about “the propriety of the law.”<sup>186</sup> Yet the legislature repeatedly reauthorized the remission statute in the 1790s,<sup>187</sup> and added parallel remission provisions to other laws related to revenue and commerce.<sup>188</sup>

That said, when Congress sought to consolidate and expand the Treasury Secretary’s authority in 1797, a brief but sharp debate erupted over extension of such broad and unreviewable authority.<sup>189</sup> The legislation’s proponents leaned heavily on precedent. The new bill, they argued, largely confirmed the authority the Secretary had exercised from the days of the First Congress—and had exercised properly.<sup>190</sup> In response, critics acknowledged that the Secretary’s powers under the proposed bill were substantially the same as before. What they questioned was “the principle of the law.”<sup>191</sup> For the most part, they doubted whether it was a good idea to concentrate so much power in the hands of a single individual.<sup>192</sup> Doing so gave him great

182 *See id.* at 1488.

183 *See id.* at 1487–88.

184 *See id.* at 1485, 1488.

185 Act of May 26, 1790, ch. 12, § 2, 1 Stat. 122, 123.

186 6 ANNALS OF CONG. 2287 (1797) (statement of Rep. Coit).

187 Act of Mar. 2, 1795, ch. 37, 1 Stat. 425, 425; Act of May 8, 1792, ch. 35, § 1, 1 Stat. 275, 275; Act of Mar. 3, 1791, ch. 24, § 1, 1 Stat. 218, 218.

188 *See, e.g.*, Act of March 3, 1791, ch. 15, § 43, 1 Stat. 199, 209 (power to remit fines and forfeitures incurred for violating act regulating distilled spirits); Act of Feb. 9, 1799, ch. 2, § 6, 1 Stat. 613, 615 (same for violations of 1799 embargo against France).

189 In addition to remitting fines and forfeitures, the 1797 Act gave the Secretary the additional power to remit “disabilit[ies]”—for instance, if a ship was denied an American registry (entitling it to lower tonnage duties), the Secretary could order that it be provided one. *See* Act of Mar. 3, 1797, ch. 13, § 1, 1 Stat. 506, 506; 6 ANNALS OF CONG. 2285 (1797) (statement of Rep. Sitgreaves) (1797 expansion of remission power was meant to include laws for registering and licensing vessels).

190 6 ANNALS OF CONG. 2290–91 (1797) (statement of Rep. Coit).

191 *Id.* at 2285 (statement of Rep. Livingston).

192 *See id.* at 2287 (statement of Rep. W. Lyman) (arguing the authority to remit all revenue-related penalties was a power “too great to be left to any one man”); *id.* at 2287 (statement of Rep. Swanwick) (“[T]he powers proposed to be placed in the Secretary of

“influence,” which he might use for the benefit of the wealthy and powerful and to the detriment of the public interest.<sup>193</sup> This was especially true because the Secretary’s decision was wholly unreviewable; with no one to “call him to account,” nothing prevented him from exercising his discretionary authority in ways that favored a chosen few.<sup>194</sup>

Remission’s most vocal critic, Edward Livingston, went further. In his view, the entire remission scheme was unconstitutional—because it delegated legislative authority to an executive branch officer. The power to remit penalties was originally “lodged” in the legislature, and Congress had no right to “delegate it to another.”<sup>195</sup> He noted his colleagues’ argument that Congress needed to free itself from the burdensome responsibility of responding to individual petitions, but he rejected it.<sup>196</sup> Their constituents had elected them precisely to attend to such matters. “Were [members of Congress] to get rid of [this] business, by throwing it upon their officers?” he asked.<sup>197</sup> No—remission was “Legislative business” which “should not be transferred from [Congress’s] hands.”<sup>198</sup>

Livingston’s nondelegation critique was forceful, but it did not last long. Perhaps sensing that his colleagues did not share his constitutional scruples, he quickly switched gears. If the burden of responding to individual claims for relief was “too great . . . [for] the Legislature,” then the better option would be for remission to be exercised by a multi-member board, whose decisions would be subject to appeal.<sup>199</sup> When the House decisively voted down that amendment, Livingston changed course again, arguing—rather incoherently—that the 1797 bill effectively gave the Treasury Secretary “the power to . . . pardon crimes,” which the Constitution vested only in the President.<sup>200</sup>

In the end, Livingston’s constitutional and policy arguments failed to defeat the bill. He was not alone in his opposition—other

the Treasury were . . . too large to be put in the hands of any one person . . . .”); *id.* at 2286 (similar).

193 *Id.* at 2286 (statement of Rep. Livingston).

194 *Id.* at 2291 (statement of Rep. Livingston).

195 *Id.* at 2285; *see also id.* at 2284–86 (statement of Rep. Livingston) (the remission bill “place[d] in the hands of the Secretary of the Treasury Legislative business”).

196 *Id.* at 2285 (statement of Rep. Livingston).

197 *Id.*

198 *Id.* at 2287 (statement of Rep. Livingston).

199 *Id.* at 2287–89 (statements of Rep. Livingston). Specifically, Livingston proposed that the Vice-President, the Secretaries of State and Treasury, and the Attorney General collectively rule on remission, to guard against the pernicious effect that “influence” could have on one person. *Id.* Livingston did not specify to whom the board’s decisions should be appealed.

200 *Id.* at 2290–92 (statements of Rep. Livingston).

members of the House voiced doubts about reauthorizing the Act in its same form,<sup>201</sup> and the vote in favor of the bill was fifty to thirty-four.<sup>202</sup> The vote was partisan, though not entirely so; of the yeas, ten Republicans joined thirty-nine Federalists and one independent in supporting the bill (only one Federalist voted in opposition).<sup>203</sup> To mollify the objectors' concerns, the Act was set to expire in 1801.<sup>204</sup> But in 1800 Congress made the Remission Act permanent.<sup>205</sup> Moreover, in future years, Republican-controlled Congresses included parallel remission provisions in other statutes.<sup>206</sup>

Ironically, the person most affected by Congress's steady expansion of the remission power was one of the 1797 Act's opponents, Albert Gallatin. As a first-term representative from western Pennsylvania, Gallatin voted against the bill.<sup>207</sup> Though his reasons for opposing it are unknown, a year later Gallatin argued (unsuccessfully) that a bill giving the President broad discretion to raise a provisional army of up to twenty thousand troops was an unconstitutional delegation of legislative authority to the executive branch.<sup>208</sup> Yet when the Republicans swept into power in 1800 and Gallatin became Treasury Secretary, he used the remission authority as extensively as his Federalist predecessors.<sup>209</sup> Indeed, when a Federalist member of Congress accused Gallatin of not granting relief generously enough during the War of 1812, an investigating House committee concluded that he had exercised the remission authority in a manner both "liberal" and "just."<sup>210</sup>

201 *Id.* at 2287 (statement of Rep. W. Lyman); *id.* (statement of Rep. Swanwick); *id.* at 2292 (statement of Rep. Nicholas).

202 *Id.* at 2292.

203 I used the *Biographical Directory of the U.S. Congress, 1774–Present*, <https://bioguideretro.congress.gov/> [<https://perma.cc/U4VG-976E>], to determine party affiliations for the House members who voted on the 1797 bill.

204 Act of Mar. 3, 1797, ch. 13, § 4, 1 Stat. 506, 507 (continuing remission power through the end of the next session of Congress); 6 ANNALS OF CONG. 2288 (1797) (statement of Rep. Swanwick) (the sunset provision was "was the only thing which would make [the bill] in any degree palatable").

205 Act of Feb. 11, 1800, ch. 6, 2 Stat. 7, 7.

206 *See, e.g.*, Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (authorizing remission of "all fines, penalties, and forfeitures" incurred under the Jeffersonian embargo laws); Act of Jan. 9, 1808, ch. 8, § 6, 2 Stat. 453, 454 (power to remit fines and forfeitures incurred for violating Embargo Act).

207 6 ANNALS OF CONG. 2292 (1797).

208 *See* 8 ANNALS OF CONG. 1538–39 (1798) (statement of Rep. Gallatin); Mortenson & Bagley, *supra* note 7, at 359–62.

209 *See* Arlyck, *supra* note 26, at 1488, 1488 n.228.

210 25 ANNALS OF CONG. 1282 (1813) (report of Rep. Quincy).



#### D. Remission and Discretion

To recap: less than a year after the Constitution's ratification, Congress delegated broad authority to a single executive branch official. That power allowed the Treasury Secretary to modify penalties Congress had designated for violations of critically important federal law, in whatever way the official deemed "reasonable and just" (including imposing no penalty at all).<sup>211</sup> The power delegated was a core legislative power: Congress's authority to waive enforcement of the laws it had enacted, in response to individual petitions for relief. There was no mechanism for reviewing the Secretary's decisions. In addition, Congress made—and repeatedly affirmed—this delegation in the face of serious concerns about the wisdom of concentrating too much power in the hands of an unaccountable government officer, and over objections that such vesting was constitutionally impermissible.

To appreciate the breadth of this delegation, we can compare it to the statute that Justice Gorsuch found so objectionable in *Gundy*. The Sex Offender Registration and Notification Act (SORNA) requires individuals convicted of a sex offense to register in a national system, and sets forth the registration requirements they must fulfill.<sup>212</sup> Yet the statute gives the Attorney General authority to decide which requirements apply to individuals convicted of a qualifying offense prior to SORNA's enactment.<sup>213</sup> Justice Gorsuch complained that this discretion effectively empowered the nation's chief law enforcement officer "to write his own criminal code" governing numerous citizens.<sup>214</sup> Making matters worse, the Attorney General was "free to change his mind at any point" about which requirements to impose on pre-Act offenders.<sup>215</sup>

The discretion Congress afforded the Treasury Secretary in 1790 was remarkably similar. Like the Attorney General under SORNA, the

211 There is no indication that the term "reasonable and just" was a legal term of art with a specific meaning the Secretary could readily apply to a particular set of facts. See Parrillo, *supra* note 7, at 1369–70 (phrase "just and equitable" was not a term of art in the late 18th century (quoting Act of July 9, 1798, ch. 70, § 22, 1 Stat. 580, 589)); *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 79 n.4 (2015) (Thomas, J., concurring in the judgment) (suggesting that application of the terms "unequal" and "unreasonable" "could be said to call for the President to exercise policy judgment" (quoting *Field v. Clark*, 143 U.S. 649, 692 (1892))). See generally *supra* note 87 (discussing nondelegationists' view that the Constitution allows Congress to make application of a statutory rule depend on executive fact-finding).

212 *Gundy v. United States*, 139 S. Ct. 2116, 2122 (2019) (plurality opinion).

213 *Id.*

214 *Id.* at 2131 (Gorsuch, J., dissenting).

215 *Id.* at 2143.

Secretary had free reign to decide the extent to which particular statutory provisions would apply to those who violated the law. The Secretary was “free to change his mind at any point” about what penalties to impose on offenders.<sup>216</sup> In fact, unlike the Attorney General under SORNA, the Remission Act allowed the Treasury Secretary to change his approach on a case-by-case basis.<sup>217</sup> And he similarly made such decisions with no guidance from Congress as to what portion of a penalty to remit, other than whatever amount he deemed “reasonable and just.”<sup>218</sup>

There were limits to the Secretary’s discretion under the Remission Act, but the same is true of the Attorney General under SORNA. The Secretary could only grant remission to a congressionally defined subset of offenders—those who had acted “without . . . any intention of fraud.”<sup>219</sup> SORNA similarly gives the Attorney General discretion only with respect to persons who committed a sex offense prior to the Act’s passage.<sup>220</sup> Under the Remission Act, the Secretary could only choose a penalty within the statutory bounds set by Congress. That is just like what Justice Gorsuch found so objectionable in SORNA; it allows the Attorney General to impose on pre-Act offenders “all of the statute’s requirements, some of them, or none of them.”<sup>221</sup> Finally, the Secretary had to grant remission that was, in his view, “reasonable and just.” Though SORNA’s text includes no like

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216 *Id.*

217 In practice, it appears that the early Treasury Secretaries may have been more consistent in their approach to remission than the Attorneys General were regarding the application of SORNA’s registration requirements. Compare Arlyck, *supra* note 26, at 1487–89 (describing broadly consistent rates of remission across two decades), with Gundy, 139 S. Ct. at 2132 (Gorsuch, J., dissenting) (detailing post-SORNA shifts in Attorney General policy). But the possibility that the Treasury Secretaries happened to exercise their discretion consistently does not make the initial delegation any less capacious.

218 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123; see Gundy, 139 S. Ct. at 2143 (Gorsuch, J., dissenting) (“In the end, there isn’t a single policy decision concerning pre-Act offenders on which Congress even tried to speak . . .”).

219 Act of May 26, 1790, § 1.

220 34 U.S.C. § 20913(d) (2018). Arguably, the Treasury Secretary had greater discretion under the Remission Act than the Attorney General does under SORNA, in that the Secretary *himself* had the power to decide who qualified for remission in the first place, limited only by the capacious “intention of fraud” standard in the Remission Act. See 6 ANNALS OF CONG. 2291 (1797) (statement of Rep. Livingston) (critiquing the Remission Act for giving the Treasury Secretary unreviewable authority to decide whether a violation was committed with fraudulent intent or not). In contrast, the Attorney General cannot decide for himself whether someone was convicted prior to SORNA’s enactment.

221 Gundy, 139 S. Ct. at 2143 (Gorsuch, J., dissenting); see also Rappaport, *supra* note 44, at 317–18 (arguing that “permissive” appropriations violate the nondelegation doctrine).

qualifier, Justice Gorsuch rejected the argument that a similarly vague limitation would render SORNA's delegation permissible.<sup>222</sup>

To be sure, SORNA and the Remission Act are not identical.<sup>223</sup> But the nondelegation “alarms” that Justice Gorsuch thinks SORNA rings so loudly are likewise audible from the Remission Act.<sup>224</sup> As in 2006, in 1790 Congress effectively gave a cabinet officer with important law enforcement responsibility “the power to write a criminal code rife with his own policy choices.”<sup>225</sup> In other words, the First Congress delegated to the Treasury Secretary authority analogous to a modern power that at least three Justices of the current Supreme Court believe contravenes the Founding-era understanding of nondelegation.

### III. JUSTIFYING DELEGATION

So, how might a modern nondelegationist explain the Remission Act? The scholarly literature on delegation reveals several possibilities. One is that Congress did not actually grant the Secretary legislative authority, or at least not legislative authority that only Congress can exercise. Instead, it gave him a form of judicial power, or it merely confirmed a power the executive branch already permissibly exercised (albeit in different form than previously).<sup>226</sup> A second possibility is that the Remission Act *was* a delegation of legislative authority, but a *permissible* one—because it fell into one of the several “exceptions” to a constitutional prohibition on delegation that nondelegationists have advanced to explain early congressional practice.<sup>227</sup>

As this Part demonstrates, none of these explanations are satisfactory. Remission certainly bears a resemblance to exercises of

222 See *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) (arguing that the *Gundy* plurality's inferred statutory command to register pre-Act offenders “to the maximum extent feasible” had “many possible meanings,” and thus left the Attorney General “free to make all the important policy decisions” (quoting 47 U.S.C. § 903(d)(1))); cf. Lawson, *supra* note 14, at 340 (describing a hypothetical statutory command to “promote goodness and niceness” as being “so vacuous that any attempt to implement this law would amount to creation of a new law”).

223 One difference is that the Remission Act delegated authority over penalties, while SORNA grants discretion regarding substantive liability (i.e., the registration requirements applicable to pre-SORNA offenders). But nothing in Justice Gorsuch's *Gundy* opinion suggests that a delegation of authority to rewrite the penalties that attach to a statutory violation would be constitutionally permissible. See *Gundy*, 139 S. Ct. at 2144–45 (Gorsuch, J., dissenting) (“To allow the nation's chief law enforcement officer to write the criminal laws he is charged with enforcing . . . would be to mark the end of any meaningful enforcement of our separation of powers . . .”).

224 *Id.* at 2144.

225 *Id.*

226 See *infra* Section III.A.

227 See *infra* Section III.B.

authority that we typically associate with the judicial or executive branch (like prosecutorial discretion or pardon). And if one squints hard enough, remission might qualify as permissible exercise of legislative power under one exception or another. But in truth the Remission Act does not fit comfortably into any of these categories.

More important, no one at the Founding justified remission on these grounds. Indeed, as this Part shows, there is almost no evidence that members of the Founding generation thought about—let alone justified—early delegations in these terms.<sup>228</sup> This is a crucial point, for if contemporaries did not distinguish between lawful and unlawful delegations in the ways that nondelegationists assert they did, then it is difficult (perhaps impossible) to reconcile a number of important early delegations with a stringent original understanding of nondelegation. In other words, the Remission Act is just one of many Founding-era delegations that instead point to a permissive original understanding of Congress's authority to grant legislative power to the executive branch.

#### A. *Nonlegislative Power*

One way to explain the Remission Act is to consider it as an exercise of nonlegislative power. Depending on how one frames what the Remission Act authorized the Treasury Secretary to do, he might have been exercising either judicial or executive authority. As explained in this subpart, remission was sufficiently different from authority usually exercised by the judicial or executive branch that it cannot easily be explained as belonging to either category. And, with one passing exception, no one in Congress defended the Remission Act's constitutionality on the ground that it merely conferred judicial or executive power on the Treasury Secretary. In fact, in the 1790s, remission's resemblance to judicial power was an argument for its *unconstitutionality*.

Of course, the most important reason to doubt that remission was an exercise of judicial or executive power is that, at the Founding, it was almost certainly a form of legislative authority. Members of Congress described it as such<sup>229</sup>—indeed, that was the basis of Edward

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228 See *infra* Section III.B.

229 See 6 ANNALS OF CONG. 2285 (1797) (statement of Rep. Sitgreaves) (remission was “a power co-existent with the revenue laws”); *id.* at 2287 (statement of Rep. Livingston) (“[Remission] was a question, whether a penalty incurred ought to be remitted, as far as it respected a particular individual; it was not, therefore, a Judicial, but a Legislative question.”).

Livingston's nondelegation objection.<sup>230</sup> In addition, both before and after passage of the 1790 Act, remission was exercised in the first instance *by the legislature*.<sup>231</sup> Indeed, as discussed in Part IV, Congress repeatedly extended the Act in no small part because it wanted to divest itself of the responsibility of deciding such petitions.<sup>232</sup> The legislative power to grant relief from undeserved penalties may not have been precisely the *same* power as the authority to enact prospective legislation.<sup>233</sup> But if equity is now generally associated with courts,<sup>234</sup> the early Congresses routinely exercised this sort of authority—primarily through the petitioning process.<sup>235</sup> Whether they supported the Act or opposed it, members of Congress recognized that they had “transferred” to the Secretary their collective authority to adjust statutory penalties in individual cases as they saw fit.<sup>236</sup>

## 1. Judicial Power

Nevertheless, maybe the Remission Act passed constitutional muster because it transferred something akin to judicial power to the executive. After all, the Act required the Treasury Secretary to apply a legal standard set by Congress to particular facts: before granting remission, the Secretary had to conclude that the statutory violation at

230 See *id.* at 2285 (statement of Rep. Livingston) (“He believed the power they were about to give to the Secretary of the Treasury was lodged in them, and that they had no right to delegate it to another.”).

231 See *supra* Section II.B. The fact that remission was exercised by Congress in the first instance does not conclusively establish that it was a “legislative power.” See Julian Davis Mortenson, *Article II Vests the Executive Power, Not the Royal Prerogative*, 119 COLUM. L. REV. 1169, 1235, 1237–38, 1244 (2019) (arguing that, at the Founding, “executive power” referred to “a conceptual power” of executing the laws, not the suite of authorities exercised by the executive branch as an institution (emphasis omitted)). But that fact certainly suggests that the Founding generation understood remission to be an exercise of legislative authority.

232 See *infra* Section IV.A.

233 See 6 ANNALS OF CONG. 2288 (1797) (statement of Rep. Ames) (likening remission to a sort of “chancery power”).

234 See Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989) (describing equity’s deviation from the “general rule of law” as the province of the courts).

235 See Blackhawk, *supra* note 155, at 2043 (describing “equity outside the courts” as a dynamic process “that has long been integral to American lawmaking”); McKinley, *supra* note 153, at 1576–78, 1601–02 (describing how until the mid-twentieth century, “private bills” passed by Congress were a primary “means of resolving petitions for private claims”).

236 6 ANNALS OF CONG. 2287 (1797) (statement of Rep. Livingston); see also *id.* at 2286 (statement of Rep. Ames) (noting the “delicate power” of remission was “better placed in one of our Executive Officers . . . than that House should exercise it”).

issue occurred “without wilful negligence or any intention of fraud.”<sup>237</sup> In addition, the Act granted the Secretary discretion in imposing a penalty for lawbreaking, a power the federal courts traditionally enjoyed<sup>238</sup> (at least until the advent of the federal sentencing guidelines).<sup>239</sup> Moreover, in practice the early remission process was an alternative forum to the courts for determining what penalties would attach to violations of the customs laws.<sup>240</sup> This resemblance is perhaps why two members of Congress suggested in 1790 that the Act granted “judiciary powers” to executive branch officials.<sup>241</sup>

There is no indication that this similarity is what persuaded the early Congress that the Remission Act was constitutionally permissible. Indeed, for the 1790 critics, bestowing “judiciary powers” on executive branch officials rendered remission *unconstitutional*.<sup>242</sup> The fact that the Act nevertheless passed—repeatedly—suggests that members of Congress did not believe that remission was judicial power. For good reason. Notably, remission could operate before or after judgment in federal district court.<sup>243</sup> In addition, the Treasury Secretary did not decide liability. As the Supreme Court explained in 1825, the Act “presuppose[d]” that the petitioner had committed the offense in question, and merely provided an avenue for relief for inadvertent violations.<sup>244</sup> This is likely why the Act’s fiercest critic, Edward Livingston, rejected the analogy to judicial power in 1797, and the possibility never again seemed to trouble the early Congress.<sup>245</sup>

237 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123. See *Murray’s Lessee v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 280 (1856) (stating that any administrative duty involving the application of law to fact can be understood as “a judicial act”). Some nondelegationists suggest that applying law to fact may also be an executive act. See Gordon, *supra* note 8, at 755; Lawson, *supra* note 14, at 364. And at the Founding the distinction between executive and judicial power was somewhat unclear. See Mortenson, *supra* note 231, at 1238 (discussing Founding-era “uncertainty about whether to classify judicial power as a distinct authority or as a subset of executive power”).

238 See Wurman, *supra* note 8, at 1553 n.348 (stating that the Treasury Secretary’s power under the Remission Act “is strikingly similar to the power of judges to impose fines or sentences within the range left by law”).

239 See *Mistretta v. United States*, 488 U.S. 361, 366–68 (1989) (discussing the advent of the Sentencing Guidelines).

240 See Arlyck, *supra* note 26, at 1485–86. For example, claimants defending against a government forfeiture suit filed a remission petition with the court, which stayed its proceedings until the Treasury Secretary ruled on the petition. *Id.* And the remission process itself had some of the trappings of proceedings in court. *Id.*

241 See *infra* note 173.

242 See *id.*

243 *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 287 (1825); *Power of the Exec. to Remit Forfeitures*, 4 Op. Att’y Gen. 573, 574 (1847).

244 *Morris*, 23 U.S. at 291.

245 See 6 ANNALS OF CONG. 2287 (1797) (statement of Rep. Livingston) (concluding that the power granted to the Treasury Secretary was “not . . . of a judicial nature”).

Even if remission did not partake of “judicial power,” perhaps its adjudicatory *qualities* can explain why the Act did not offend nondelegation principles. In *Gundy*, Justice Gorsuch characterized nondelegation as a constitutional prohibition on delegations of power to establish “generally applicable rules . . . governing future actions.”<sup>246</sup> Presumably what Justice Gorsuch had in mind is the sort of formal rulemaking authority one associates with modern administrative agencies—the kind of authority at issue in *Gundy* itself.<sup>247</sup> In contrast, remission decisions were individualized and retrospective. So even if the Treasury Secretary’s remission power derived from Congress, perhaps the Constitution permits delegation of case-by-case adjudicatory authority.

A distinction between adjudication and rulemaking cannot be what spared the Remission Act from invalidation on nondelegation grounds. For starters, the Secretaries’ remission decisions operated as a form of “adjudicatory precedent” that shaped the future conduct of the government and private parties.<sup>248</sup> The Secretaries applied general rules across cases,<sup>249</sup> and appeared to treat past decisions as precedent to follow when ruling on future petitions.<sup>250</sup> Remission decisions were

246 *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting); *see also* *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) (arguing an originalist reading of the Constitution prohibits Congress from giving the executive branch “the discretion to formulate generally applicable rules of private conduct”). *But see* *Mortenson & Bagley*, *supra* note 7, at 294–95 (arguing that the “standard understanding of legislative power” at the Founding was much broader than Gorsuch’s formulation).

247 *See* 34 U.S.C. § 20913(d) (granting the Attorney General “to prescribe rules for . . . registration”).

248 *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) (administrative agencies have the choice to establish rules “by general rule or by individual, *ad hoc* litigation”); Peter L. Strauss, *The Rulemaking Continuum*, 41 DUKE L.J. 1463, 1473 (1992) (saying “adjudicatory precedent” establishes principles “to which the public may be held unless the agency is persuaded not to apply it”). For a recent overview of the variety of forms of administrative agency adjudication, *see* generally Christopher J. Walker & Melissa F. Wasserman, *The New World of Agency Adjudication*, 107 CALIF. L. REV. 141 (2019).

249 For example, even when granting complete remission, the Secretaries withheld a small portion of the penalty to cover court costs, except in rare cases of “great hardship.” Letter from Albert Gallatin, Sec’y, Dep’t of the Treasury, to Josiah Quincy, Chairman, H. Comm. on Fines, Penalties, & Forfeitures (Feb. 12, 1812), in 25 ANNALS OF CONG. 1286 (1813). In other words, the Secretaries adopted and consistently applied a rule—mandatory payment of court costs, except in hardship cases—that was not in the Remission Act itself.

250 When he went to western Pennsylvania in 1794 to help put down the Whiskey Rebellion, Hamilton worried that there was not enough time to explain to his deputy “the principles which have governed [remission] in the past.” So he told the deputy to decide difficult cases by “consulting the most recent precedents.” *From Alexander Hamilton to Oliver Wolcott, Junior, 29 September 1794*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Sept. 29, 1794), <https://founders.archives.gov/documents/Hamilton/01-17->

not formally made public, but it appears that members of the merchant community learned about them, and shaped their behavior accordingly.<sup>251</sup> The guidance that the Secretaries and the public took from past decisions may not have been administrative “rules” in the modern sense—binding regulations subject to the notice and comment procedures of the Administrative Procedure Act.<sup>252</sup> But they were general and they did operate prospectively.

More importantly, a deficit of typical rule-like qualities cannot be what spares the Remission Act from scrutiny on nondelegation grounds. Whether by formal regulations or individual determinations, the Treasury Secretary regulated private conduct based on nothing more than his opinion about what quantum of penalty a petitioner should pay.<sup>253</sup> If anything, the case-by-case exercise of executive branch power to alter legislatively prescribed penalties should be *more* troubling than the power to adjust them prospectively via general rules (as with SORNA). The latter, at least, provides “fair warning” to regulated parties regarding the legal consequences of their conduct.<sup>254</sup> This may be why a nondelegationist like Justice Thomas believes that “ad hoc” executive decisions “based on a policy judgment” violate the nondelegation doctrine as much as prospective regulations,<sup>255</sup> and why

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02-0263 [<https://perma.cc/7GFF-3RJJ>]; *see also id.* (noting the “course of policy” Hamilton had taken with respect to remissions).

251 *See* Arlyck, *supra* note 26, at 1511–12 (discussing merchants’ knowledge of Hamilton’s generous approach to granting remissions).

252 *See* 5 U.S.C. § 553 (2006). This formulation vastly oversimplifies the ways in which administrative agencies can articulate “rules” governing private conduct. *See* Strauss, *supra* note 248, at 1466–69 (describing four types of administrative rulemaking, not all of which involve notice-and-comment).

253 *Cf.* Gundy v. United States, 139 S. Ct. 2116, 2144 (2019) (Gorsuch, J., dissenting) (critiquing SORNA giving the Attorney General “the power to write a criminal code rife with his own policy choices”).

254 *Bouie v. City of Columbia*, 378 U.S. 347, 350 (1964); *see also* Eric A. Posner, *Balance-of-Powers Arguments, the Structural Constitution, and the Problem of Executive “Underenforcement,”* 164 U. PA. L. REV. 1677, 1712 (2016) (“Categorical pronouncements have frequently been used to direct executive branch subordinates, and they provide greater transparency, predictability, and guidance than case-by-case delegation does.”).

255 *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 80 (2015) (Thomas, J., concurring in the judgment). Nondelegationist scholars seem to agree. For example, the Patent Act of 1790 gave the Secretary of State, the Secretary of War, and the Attorney General the power to grant patents to any new invention those officers deemed “sufficiently useful or important.” *See* Mortenson & Bagley, *supra* note 7, at 339 (quoting Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110); *see generally infra* Section IV.B (discussing the Patent Act). Nondelegationists have tried to justify this broad delegation of authority, but not on the basis of its adjudicatory nature. *See* Wurman, *supra* note 8, at 1549 (arguing that the Patent Act was consistent with nondelegation principles because it “surely addressed most” of the important issues the Act implicated); Gordon, *supra* note 8, at 795–98 (arguing (incorrectly) that the Act was modified in response to nondelegation objections).



James Madison raised nondelegation objections to the 1798 Alien Act's grant of adjudicatory authority to the President.<sup>256</sup> However much remission resembled an exercise of judicial authority, that cannot be the reason it survived constitutional scrutiny.

## 2. Executive Power

If an analogy to judicial authority does not do the trick, maybe the Remission Act passed constitutional muster because of its similarity to *executive* authority. Remission looks like prosecutorial discretion or the pardon power—executive acts that affect legal liability but have never been thought to violate nondelegation principles. In that sense, the remission power might be what Ian Wurman describes as a “nonexclusive” legislative power—one that Congress can exercise itself or can delegate to the executive branch,<sup>257</sup> because it is akin to other powers the Constitution vests in the executive branch.<sup>258</sup>

These explanations for the Remission Act also fail, as remission was different from both prosecutorial discretion and the pardon power in meaningful ways. Take the former. As Gary Lawson has suggested, remission looks a lot like executive authority not to seek penalties for lawbreaking.<sup>259</sup> Though the timing is different, the effect is functionally the same. And as discussed below,<sup>260</sup> there is evidence suggesting that some members of Congress saw the Remission Act as a means of centralizing law enforcement discretion in a single person, rather than allowing front-line officers to use it in potentially inconsistent or corrupt ways.<sup>261</sup> In fact, the Act itself expressly granted the Treasury

256 The Alien Act of 1798 empowered the president to deport individual aliens “he shall judge dangerous to the peace and safety of the United States.” Alien Enemy Act, ch. 58, § 1, 1 Stat. 570, 570–71 (1798). Madison argued that the statute was unconstitutional in part because it lacked “any precise rules” cabining the president’s discretion. *The Report of 1800, [7 January] 1800*, NAT’L ARCHIVES: FOUNDERS ONLINE (James Madison) (Jan. 7, 1800), <https://founders.archives.gov/documents/Madison/01-17-02-0202> [https://perma.cc/DK6P-A7X5].

257 See Wurman, *supra* note 8, at 1532–50 (discussing the distinction between exclusive and nonexclusive legislative powers). I address Wurman’s distinction in subsection III.B.3, *infra*.

258 See U.S. CONST. art. II, § 2 (granting the President the power “to grant Reprieves and Pardons for Offenses against the United States”); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (“[T]he decision of a prosecutor in the Executive Branch not to indict [is] a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to ‘take Care that the Laws be faithfully executed.’” (quoting U.S. CONST. art. II, § 3)).

259 Lawson, *supra* note 14, at 401; see also Wurman, *supra* note 8, at 1553–54 n.348 (describing remission as a “kind of prosecutorial discretion”).

260 See *infra* Section IV.A.

261 See 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames) (giving the Secretary authority to relax application of strict rules was preferable to making them “loosely” and

Secretary the power both to remit penalties incurred and to “discontinue[.]” prosecutions.<sup>262</sup> Perhaps remission therefore poses no delegation problem because it was, as Lawson argues, merely “a routine part of the executive function.”<sup>263</sup>

Or consider another possibility—that remission was simply an instantiation of the pardon power.<sup>264</sup> This theory also has intuitive appeal, given that remission operated as a form of forgiveness for legal liability already “incurred” (though not yet formally adjudicated).<sup>265</sup> Perhaps this is why Joseph Story, in his famous *Commentaries* of 1833, stated in passing that “remission of fines, penalties, and forfeitures” was “included” in the pardon power, whether exercised by the President directly or granted to the Treasury Secretary by statute.<sup>266</sup> Story wrote more than four decades after Ratification, but perhaps his intuition was correct.

If the Remission Act merely affirmed a power the Constitution already conferred on the executive branch, one imagines the Act’s Founding-era defenders would have made that argument in response to constitutional doubts. With one exception, they did not.<sup>267</sup> As discussed in Part IV, remission proponents justified the Act on

giving “considerable discretion to the officers in the[ir] execution”); *id.* at 2291 (statement of Rep. Coit) (“It was made the duty of officers to prosecute in all cases, and it was necessary, therefore, in some to remit the fines.”). Hamilton made the connection explicit in instructions he sent to the customs collectors: customs officers had a “duty” to enforce the penalties for violations; the “powers of mitigation and remission”—i.e., *his* power under the Remission Act—would be the means by which allowances could be made for innocent mistakes. *Treasury Department Circular*, *supra* note 168.

262 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123.

263 Lawson, *supra* note 14, at 401; *see also* *Reynolds v. United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting) (“giv[ing] the Attorney General the power to reduce congressionally imposed requirements” would not pose a nondelegation question because “such a power is little more than a formalized version of the time-honored practice of prosecutorial discretion” (emphasis omitted)).

264 *See* Gordon, *supra* note 8, at 793 (making this argument).

265 *See* *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291 (1825) (the Remission Act “presupposes[.] that the offence has been committed,” and simply “affords relief for . . . unintentional error”).

266 3 JOSEPH STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 353–54 (Boston, Hilliard, Gray, & Co. 1833); *see also* WILLIAM RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 177 (Philadelphia, Philip H. Nicklin, 2d ed. 1829) (1825) (“The remission of fines, penalties, and forfeitures, under the revenue laws, is included in [the pardon power].”).

267 At one point in the 1797 debate, the Act’s most vocal proponent, Fisher Ames, described remission as “Executive business,” not “Legislative,” 6 *ANNALS OF CONG.* 2286 (1797) (statement of Rep. Ames), and later speculated that remission was perhaps a form of “chancery power.” *Id.* at 2288 (statement of Rep. Ames). But he did not pursue such arguments, and focused his defense on functional considerations instead. *Id.*

functional grounds.<sup>268</sup> In fact, for Edward Livingston, an analogy between remission and the pardon power *created* constitutional difficulties.<sup>269</sup> This may be why Congress in 1791 expressly disclaimed that remission affected the President's pardon power.<sup>270</sup> It is possible that the members of Congress who consistently voted in favor of remission did so because they secretly thought it was a power the executive branch already enjoyed. But the historical record gives us no indication this was so.

There is a better explanation for why no one at the Founding justified remission as an aspect of enforcement discretion or the pardon power: remission was different from both. For example, under the Remission Act, the Secretary could remit an *entire* forfeiture or fine, including the half share to which customs officers were statutorily entitled. That was something that contemporaries agreed the President could not do via pardon,<sup>271</sup> likely because pardons could not infringe on private rights vested by statute.<sup>272</sup> As a result, if Joseph Story was suggesting that remission derived from the pardon power, he was simply wrong.

Remission also does not fit comfortably under the rubric of prosecutorial or enforcement discretion. First, such discretion is limited by the policy choices Congress has already made. Modern prosecutors can choose from a limited menu of charging options, or

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268 See *infra* Section IV.A.

269 In the 1797 debates Livingston complained that remission effectively gave the Treasury Secretary the power to pardon crimes. See 6 ANNALS OF CONG. 2290 (1797) (statement of Rep. Livingston). As others observed, the Constitution reserved this power for the President alone. See *id.* at 2292 (statement of Rep. Nicholas).

270 See Act of Mar. 3, 1791, ch. 24, § 3, 1 Stat. 218, 218 (“[N]othing in the said act shall be construed to limit or restrain the power of the President of the United States, to grant pardons for offences against the United States.”).

271 See *To Alexander Hamilton from Richard Harison, 24 May 1791*, NAT’L ARCHIVES: FOUNDERS ONLINE (Richard Harison) (May 24, 1791), <https://founders.archives.gov/documents/Hamilton/01-08-02-0326> [<https://perma.cc/S3LM-9SLV>]. Though the author of this opinion was not “assured” that he was correct, *id.*, the Washington Administration adhered to his view. See *To George Washington from Alexander Hamilton, 9 June 1794*, NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (June 9, 1794), <https://founders.archives.gov/documents/Washington/05-16-02-0167> [<https://perma.cc/CC7Z-U8AY>] (recommending a pardon for a customs infraction, “which would operate to remit one half the penalty incurred”). So did later administrations. See, e.g., Power of the Exec. to Remit Forfeitures, *supra* note 243, at 576–77 (unlike remission, the pardon power does not extend to officer’s share of a forfeiture).

272 See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 568 (2007) (discussing the nineteenth century view that a pardon cannot “release and acquit . . . private rights” (alteration in original) (quoting Passenger Laws.—Pardoning Power, 6 Op. Att’y Gen. 393, 403 (1854))).

they can decide not to charge at all.<sup>273</sup> But they cannot invent new prohibitions and penalties, and then impose them.<sup>274</sup> In contrast, the remission power gave the Treasury Secretary discretion to decide what penalty was “reasonable and just,” subject only to a statutory cap that was often quite high.<sup>275</sup> The Secretary did not simply choose among fixed legislative options; he made a policy decision about what punishment fit the crime.<sup>276</sup> This distinction between a limited menu and a blank check is important, as it may be what reconciles a strong version of nondelegation with historical toleration of executive enforcement discretion. It is the delegated power to *make* rules, rather than simply choose among them, that supposedly offends nondelegation principles.<sup>277</sup>

Second, unlike garden-variety enforcement discretion, remission was apparently binding on the government. Ordinarily, a prosecutorial choice not to enforce the law does not bar later enforcement for the same violation (perhaps by a successor administration).<sup>278</sup> In contrast, a grant of remission seems to have permanently foreclosed the government’s ability to impose a penalty for the violation in

273 See *United States v. Batchelder*, 442 U.S. 114, 124 (1979) (“[W]hat charge to file or bring before a grand jury are decisions that generally rest in the prosecutor’s discretion.”).

274 The same is arguably not true for enforcement discretion’s cousin, settlement authority. At least when it comes to civil penalties, the government and the defendants can agree to any punishment within statutory and regulatory limits. See, e.g., Joseph A. Grundfest, *Fair or Foul?: SEC Administrative Proceedings and Prospects for Reform Through Removal Legislation*, 85 *FORDHAM L. REV.* 1143, 1181 (2016) (“The vast majority of SEC enforcement actions . . . are settled simultaneously with the initiation of the action.”). And government agencies can seek and impose such penalties via administrative proceedings, rather than in court. See *id.* at 1145 (discussing SEC administrative proceedings). Of course, originalist-minded critics of the administrative state are no more comfortable with this state of affairs than they are with a permissive nondelegation doctrine. See, e.g., HAMBURGER, *supra* note 9, at 227 (“[A]dministrative adjudication dangerously restores an extralegal judicial regime.”).

275 See Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123.

276 Notably, the early Congress knew how to limit the Treasury Secretary’s discretion when it wanted. See Act of Feb. 27, 1813, ch. 33, § 1, 2 Stat. 804, 805 (“direct[ing]” the Secretary to remit “all fines, penalties, and forfeitures” incurred under various embargo acts, if the imported goods were American property and properly reported).

277 Gary Lawson suggests as much. In his view, “[t]he executive department always has prosecutorial discretion to decide . . . what levels and kinds of *statutorily-permitted* penalties to seek.” Lawson, *supra* note 14, at 401 (emphasis added); see also *Reynolds v. United States*, 565 U.S. 432, 448–50 (2012) (Scalia, J., dissenting) (stating that a hypothetical version of SORNA that imposed all registration requirements on pre-Act offenders but granted the Attorney General discretion to make case-by-case exceptions would be acceptable as “a formalized version of the time-honored practice of prosecutorial discretion”).

278 In certain cases, nonenforcement effectively will be made permanent through the operation of an outside force—for example, if the statute of limitations runs in the interim, or if the government pledges not to enforce the law against someone in the future through a nonprosecution agreement.

question.<sup>279</sup> This distinction also seems important, at least for nondelegationists who suggest that enforcement discretion is constitutionally tolerable because it does not alter the regulated party's underlying legal liability.<sup>280</sup> Accordingly, the Remission Act should trouble nondelegationists even if they think ordinary enforcement discretion poses no constitutional problem.<sup>281</sup> At minimum, there is little evidence that remission's resemblance to familiar forms of executive power is what spared it from constitutional objection at the Founding.

### B. *Permissible Delegation of Legislative Power*

Perhaps instead of viewing remission as a nonlegislative power, we can understand it as a legislative power that Congress could delegate, because it qualified under one of several "exceptions" to nondelegation principles. To be clear, there is no record of anyone in the Founding era suggesting that remission was justifiable on such grounds, and no nondelegationist argues that now. But the idea is worth exploring nonetheless, for an assessment of the Remission Act offers an opportunity to interrogate these exceptions more broadly. If they are a modern invention—as the historical evidence strongly suggests—then several *additional* Founding-era statutes also cannot be reconciled with a stringent version of the nondelegation doctrine.

#### 1. Foreign Affairs

It is common currency among nondelegationists that there was an exception to nondelegation for grants of discretionary authority touching on military and foreign affairs.<sup>282</sup> There is a good reason for

279 See *The Margareta*, 16 F. Cas. 719, 722 (C.C.D. Mass. 1815) (No. 9072) (Story, J.) (noting the Secretary's grant of remission "is conclusive, and cannot be overhauled in any collateral inquiry"). I am aware of no case in which a grant of remission by the Treasury Secretary was subsequently reversed or modified.

280 See Gordon, *supra* note 8, at 808–09 (arguing that prosecutorial discretion is consistent with nondelegation because the executive branch's decision not to enforce the law does not shield the lawbreaker from future prosecution by a different administration, or from collateral consequences of the violation, such as civil suit by a private party under a private right of action); HAMBURGER, *supra* note 9, at 122 (noting that a prosecutor's decision to forbear does not shield the violator from other consequences (including civil), whereas administrative waiver—which Hamburger thinks is unlawful—"relieve[s] persons from the obligation of the law itself").

281 See HAMBURGER, *supra* note 9, at 123 ("[P]rosecutorial discretion . . . may be worrisome, but [administrative] waivers are much worse.").

282 See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); Gordon, *supra* note 8, at 782; Rappaport, *supra* note 44, at 352–54; David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1260 (1985); *cf.*

this enthusiasm. Without such an exception, it is difficult—perhaps impossible—to explain several significant Founding-era delegations of legislative authority to the executive branch.<sup>283</sup> Accordingly, nondelegationists have invoked this exception to justify exceptionally broad grants of authority regarding restrictions on foreign commerce<sup>284</sup> and trade with Native peoples.<sup>285</sup> Such an exception might also justify early statutes that nondelegationists have not directly addressed, such as those involving military build-ups<sup>286</sup> and enforcement of quarantines against foreign vessels.<sup>287</sup>

The argument in favor of a “foreign affairs exception” to nondelegation is seductive. Article II of the Constitution grants the President substantial authority in war and foreign relations, so delegations in those areas can be understood as “already within the scope of executive power.”<sup>288</sup> In other words, statutes giving the executive broad discretion in military and foreign relations are not *really* delegations of legislative authority. They merely confirm power the executive already enjoys under the Constitution (if perhaps shared

HAMBURGER, *supra* note 9, at 105 (statutory licensing regimes the Founders used for “cross-border or offshore problems” did not contravene the nondelegation principle).

283 See *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (early nineteenth-century embargo statute can be explained as “permissible [executive] lawmaking” in the area of foreign affairs); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 80 (2015) (Thomas, J., concurring in the judgment) (observing 1794 embargo statute did not violate nondelegation principles because it “involved the external relations of the United States”); *Cass*, *supra* note 14, at 157 (“Outside the realm of foreign affairs . . . [Congress] did not authorize the President or the courts or other governmental officers to adopt rules that broadly regulated behavior of private individuals . . . .”); Gordon, *supra* note 8, at 784–85 (a foreign affairs exception is the best way to “harmonize” several early delegations with a robust nondelegation doctrine); Rappaport, *supra* note 44, at 352–54 (“tentative[ly]” suggesting that early delegations to the executive in military and foreign affairs can be explained as an “exception” justified by constitutional structure and purpose).

284 See Gordon, *supra* note 8, at 784 & n.219 (citing Act of June 4, 1794, ch. 41, 1 Stat. 372; Act of Mar. 3, 1795, ch. 53, 1 Stat. 444; Act of June 18, 1798, ch. 53, § 5, 1 Stat. 566; Act of Feb. 9, 1799, ch. 2, § 4, 1 Stat. 613, 615).

285 See Lawson, *supra* note 14, at 397, 401–02 (citing Act of July 22, 1790, ch. 33, § 1, 1 Stat. 137, 137); Rappaport, *supra* note 44, at 354 (same); Wurman, *supra* note 8, at 1543 (same statute can be explained by reference to “the President’s Treaty and Commander-in-Chief powers”).

286 See Act of Mar. 17, 1791, ch. 28, § 8, 1 Stat. 222, 223; Act of Mar. 5, 1792, ch. 9, §§ 2, 3, 1 Stat. 241, 241–42; Act of Nov. 29, 1794, ch. 1, § 1, 1 Stat. 403, 403; Act of May 28, 1798, ch. 47, § 3, 1 Stat. 558, 558. Wurman and Gordon both recognize that the 1798 Act was passed despite nondelegation challenges, but do not argue that this was due to the existence of a military or foreign affairs exception. See Gordon, *supra* note 8, at 749–50; Wurman, *supra* note 8, at 1515.

287 See Act of May 27, 1796, ch. 31, 1 Stat. 474.

288 *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting) (quoting Schoenbrod, *supra* note 282, at 1260).

with Congress).<sup>289</sup> The argument has obvious flaws—most notably, the early statutes nondelegationists seek to explain all involve powers the Constitution expressly grants to *Congress*, not to the President.<sup>290</sup> But if we allow that, broadly speaking, military and foreign relations are areas of “overlap[ping]” legislative and executive authority, a carve-out for delegations in this area makes some intuitive sense.<sup>291</sup>

A Founding-era nondelegation exception for military and foreign affairs cannot explain the Remission Act, for two reasons. First, it is difficult to categorize the Secretary’s power as one concerning military and foreign affairs. It was a power related to foreign *commerce*, in that the customs laws regulated imports. But the Constitution gives Congress the power to regulate foreign commerce, not the President.<sup>292</sup> In addition, the early remission power extended to penalties incurred for purely domestic infractions. For example, the Secretary could remit penalties for violations of statutes regulating the “coasting trade”<sup>293</sup>—i.e., trade *within* United States waters—and statutes prescribing domestic excise taxes on spirits.<sup>294</sup>

Second, and more important, a foreign affairs exception to nondelegation simply did not exist at the Founding.<sup>295</sup> The limited evidence nondelegationists cite is actually no support at all. For example, nondelegationists rely heavily on the Supreme Court’s statement in *United States v. Curtiss-Wright* that delegations of discretion are more permissible with respect to foreign affairs.<sup>296</sup> Decided in 1936, *Curtiss-Wright* itself is not evidence of a Founding-era foreign

289 See *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (saying the President does not need an act of Congress to act “as the sole organ of the federal government in the field of international relations”).

290 See U.S. CONST. art. I, § 8, cls. 3, 12 (granting Congress power to “raise and support Armies” and “regulate Commerce with foreign Nations . . . and with the Indian Tribes”).

291 *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

292 U.S. CONST. art. I, § 8; see also *Mortenson*, *supra* note 231, at 1174 (arguing that as an originalist matter, the Vesting Clause of Article II does not give the President “a free-floating and indefeasible foreign affairs power”).

293 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122.

294 See Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209.

295 See Note, *supra* note 20, at 1140 (“No one [at the Founding] suggested th[at] delegations were permissible solely by virtue of their foreign affairs subject matter.”).

296 *United States v. Curtiss-Wright Exp. Corp.*, 299 U.S. 304, 320 (1936) (“[C]ongressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved.”); see also *Gundy*, 139 S. Ct. at 2137 n.42 (Gorsuch, J., dissenting) (citing *Curtiss-Wright* as support for foreign relation exception, 299 U.S. at 320); *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 80 n.5 (2015) (Thomas, J., concurring in the judgment) (same).

affairs exception.<sup>297</sup> In upholding a 1934 congressional resolution granting the President the power to ban certain arms sales, the Court discussed Founding-era statutes granting the President broad authority to enact or rescind restrictions on foreign commerce related to armed conflict.<sup>298</sup> In light of this “unbroken legislative practice,” the Court had little trouble concluding that the 1934 provision was constitutional.<sup>299</sup> But the fact that a number of early statutes were *consistent* with a supposed foreign affairs exception does not make such enactments *evidence* of such an exception. There is no historical evidence suggesting that such statutes would have been prohibited but for their connection to foreign affairs, and their existence is entirely consistent with a permissive Founding-era understanding of nondelegation generally.<sup>300</sup>

The other evidence cited by nondelegationists is no more probative of a foreign affairs exception. A 1790 statement by a member of Congress,<sup>301</sup> an 1803 treatise passage,<sup>302</sup> and an 1808 district court

297 There is also reason to believe that the *Curtiss-Wright* Court invented the foreign affairs exception to justify the delegation in that case, which would otherwise have been invalid under the Court’s nondelegation rulings the year before. See Note, *supra* note 20, at 1149–51.

298 *Curtiss-Wright*, 299 U.S. at 322–24.

299 *Id.* at 322.

300 Indeed, Philip Hamburger concedes that several Founding-era embargo statutes violated nondelegation principles. See HAMBURGER, *supra* note 9, at 108–09 & n.48 (noting 1794, 1799, 1800, and 1808 statutes). Hamburger does not justify these statutes on the basis of a foreign relations exception. Instead, he notes that Congress later granted the President less discretionary authority, in 1809 and 1810 embargo statutes. *Id.* at 109 & n.51. According to Hamburger, these later statutes demonstrate that Congress “recognized the constitutional problem” with its earlier delegations, and fixed it. *Id.* at 109. But it is telling that it took Congress fifteen years to realize that its actions were unconstitutional. And on Hamburger’s account, Congress continued to delegate broad authority to the President to limit foreign commerce *after* it had supposedly seen the errors of its ways. See *id.* (noting congressional “lapse[]” in 1822, among others).

301 See Gordon, *supra* note 8, at 784–85. The 1790 statement arose in a debate over whether Congress could statutorily require the President to seek the Senate’s consent when setting compensation for American diplomatic officials out of appropriated funds. See GAZETTE OF THE U.S., Jan. 27, 1790, as reprinted in 12 DHFFC, *supra* note 148, at 70, 71–72. In other words, the discussion was not about whether Congress could more broadly *grant* legislative authority to the executive when “foreign relations” were involved. It was about whether Congress could *limit* the President’s Article II authority to direct U.S. diplomacy. See *id.* at 72 (“[I]ntercourse with foreign nations is a trust specially committed to the President of the United States; and after the Legislature has made the necessary provision to enable him to discharge that trust, the manner how it shall be executed must rest with him . . .”).

302 See Gordon, *supra* note 8, at 784–85. The passage from St. George Tucker’s edition of Blackstone’s *Commentaries* says nothing about delegations of legislative authority. As Tucker makes very clear, he was discussing a 1793 controversy over whether President Washington had improperly exercised the power to “declare War” granted to Congress, see



opinion are not actually about delegation.<sup>303</sup> An 1829 treatise passage—published forty years after Ratification—does suggest that Congress can more broadly delegate in the realm of foreign affairs.<sup>304</sup> But the writer extrapolated this principle from a single 1813 decision of the Supreme Court that did not discuss a foreign relations exception to nondelegation; indeed, the opinion did not directly address delegation at all.<sup>305</sup>

Just as importantly, there is also strong evidence *against* a foreign affairs exception to nondelegation. On multiple occasions in the first

U.S. CONST. art. I, § 8, cl. 11, when he announced that the United States would remain neutral in the growing war between France and Great Britain. See 1 St. George Tucker, *Appendix to BLACKSTONE'S COMMENTARIES* 346–47 & n.‡ (Philadelphia, William Young Birch, & Abraham Small 1803). This dispute was not about delegation, as Congress had not legislated at all, let alone purported to grant the president the power to declare war.

303 See Gordon, *supra* note 8, at 784–85. The 1808 opinion regarding the constitutionality of the Jeffersonian embargo was not about whether Congress could permissibly delegate authority to the President to suspend the embargo. The court mentioned the President's power to suspend the embargo only once, in passing. *United States v. The William*, 28 F. Cas. 614, 622 (D. Mass. 1808) (No. 16,700). The constitutional issue the court discussed was whether Congress had the power under Article I to institute such broad restrictions on foreign commerce in the first place. See *id.* at 620–24 (“It is contended, that congress is not invested with powers, by the constitution, to enact laws, so general and so unlimited, relative to commercial intercourse with foreign nations, as those now under consideration.”). The court concluded, in part, that Congress's power to declare war justified an “expanded range” of “legislative discretion” to restrict foreign commerce by statute in order to avoid war. *Id.* at 622. The court was not suggesting that Congress had “expanded” discretion to make delegations to the executive branch when foreign affairs were at issue.

304 See RAWLE, *supra* note 266, at 196 (“Among other incidents arising from foreign relations, it may be noticed that congress, which cannot conveniently be always in session, may devolve on the president, duties that at first view seem to belong only to themselves.”).

305 See RAWLE, *supra* note 266, at 196 n.\* (citing *The Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382 (1813)). *The Aurora* involved an 1810 law that empowered the President to put an embargo on foreign commerce into effect if he determined that France or Great Britain was violating United States neutrality by seizing American ships. See 11 U.S. at 382. The owner argued that Congress could not give the President the power to put the embargo into effect. *Id.* at 386. In response, the attorney for the government argued that Congress had not “transfer[red] any power of legislation to the President.” *Id.* at 387. It had only empowered him to determine, as a factual matter, whether the warring powers were violating United States neutrality. *Id.* The Court did not address the issue directly. All it said was that it could “see no sufficient reason, why the legislature should not exercise its discretion in reviving the act . . . either expressly or conditionally, as their judgment should direct.” *Id.* at 388. Nondelegationists have described *The Aurora* as a “foundational” case, Bamzai, *supra* note 17, at 182, and suggested that it *could* have been decided on the ground of a foreign relations exception. See *Gundy v. United States*, 139 S. Ct. 2116, 2137 (2019) (Gorsuch, J., dissenting); Bamzai, *supra* note 17, at 182 n.118. At best, the opinion implicitly endorses the principle that conditional legislation does not offend nondelegation principles. See Posner & Vermeule, *supra* note 13, at 1737 (“Nothing in *The Brig Aurora* endorses the delegation metaphor . . .”).

two decades following Ratification, federal legislators made nondelegation arguments against proposed legislation giving the executive broad discretion related to military and foreign affairs.<sup>306</sup> For example, the 1798 Alien Act empowered the President to order the removal of any foreign citizen he deemed “dangerous to the peace and safety of the United States.”<sup>307</sup> Other proposed legislation that year authorized him to raise an army of up to twenty thousand troops “whenever he shall judge the public safety shall require the measure.”<sup>308</sup> An 1808 law allowed the President to suspend a statutory embargo on foreign commerce whenever he concluded that the actions of warring European powers “render[ed] . . . the United States sufficiently safe.”<sup>309</sup> An 1810 proposal would have given the President apparently standardless authority to deploy naval ships to “protect[] the commerce of the United States.”<sup>310</sup>

Notably, proponents of this proposed legislation did not defend it on grounds of a delegation exception for military and foreign affairs. This is puzzling, to say the least. If this exception was “well-established” at the Founding,<sup>311</sup> why didn’t supporters invoke it to defend these bills’ constitutionality?<sup>312</sup> If it was consensus in the Founding era that

306 See DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801*, at 186–87 (1997) (1794 bill allowing the President to decide the size of the army); *id.* at 244–48 (1798 bill authorizing to the President to raise an additional volunteer military force); HAMBURGER, *supra* note 9, at 107–08 (1808 bill allowing the President to suspend a statutory embargo on foreign commerce); Gordon, *supra* note 8, at 747–48 (1798 bill empowering the President to order the removal of aliens); *id.* at 748–49 (1810 bill giving the President standardless authority to deploy naval ships to protect “the commerce of the United States” (quoting 21 ANNALS OF CONG. 2022 (1810))).

307 Alien Enemy Act, ch. 58, § 1, 1 Stat. 570, 571 (1798); see also 8 ANNALS OF CONG. 2007–08 (1798) (statement of Rep. Livingston) (arguing the Act unconstitutionally combined “Legislative, Executive, and Judicial powers”).

308 8 ANNALS OF CONG. 1525, 1631 (1798); see also *id.* at 1538 (statement of Rep. Gallatin) (arguing that the bill “improper[ly] . . . vested Legislative power in the President of the United States”); Mortenson & Bagley, *supra* note 7, at 359–62 (reviewing debate over the bill).

309 Act of Apr. 22, 1808, ch. 52, 2 Stat. 490 (repealed 1809); see also 18 ANNALS OF CONG. 2125 (1808) (statement of Rep. Key) (“[W]e cannot transfer the power of legislating from ourselves to the President . . .”).

310 21 ANNALS OF CONG. 2022 (1810); see also *id.* (statement of Rep. J.G. Jackson) (“All legislative power is by the Constitution vested in Congress. They cannot transfer it.”).

311 See Gordon, *supra* note 82 (manuscript at 33, 35).

312 As Aaron Gordon notes, see Gordon, *supra* note 82 (manuscript at 30), in 1808 one member of Congress defended a grant of executive discretion in an embargo bill on the ground that the President was better able to respond to rapidly changing conditions in foreign commerce, though it is not clear whether the speaker was making that point to defend the bill’s “constitutionality” or instead to highlight its “expediency.” 18 ANNALS OF CONG. 2224, 2228–30 (1808) (statement of Rep. Findley); see also Note, *supra* note 20, at 1145 (“Findley’s argument was functionalist, not formalist—and concerned the regulation of foreign commerce, not foreign affairs generally.”).

Congress has significant latitude to delegate in the realms of military and foreign affairs, it seems odd that members of Congress did not think this was worth mentioning at the time.

The obvious solution to this puzzle is that such an exception to nondelegation did not exist. Indeed, it is not all clear that Founding-era Americans would have understood “foreign affairs” to constitute a distinct category of legislative authority in the first place. In an era when constant international armed conflict threatened the nation’s commerce and security (as well as providing opportunities for American aggrandizement), concern over foreign relations impacted virtually all “domestic” policymaking.<sup>313</sup> The foreign affairs exception to the nondelegation principle is almost certainly a modern invention—either by the *Curtiss-Wright* Court in 1936, or by originalist scholars seeking to explain how a Founding generation supposedly committed to stringent limits on delegation could have repeatedly sanctioned broad grants of authority to the executive. Perhaps a military and foreign affairs exception to nondelegation makes sense on structural or functional grounds.<sup>314</sup> But it is difficult to justify as an originalist matter.

## 2. Benefits

Remission also cannot be explained by resort to a second exceptional category nondelegationists identify: one for delegations relating to government privileges and benefits. Under this theory, a legislative delegation is unconstitutional only when the rules issued by the executive pursuant to the delegation “bind” or “constrain” individuals. Rules that merely regulate the provision of privileges and benefits do not have such “binding” force, and therefore can lawfully be created by the executive.<sup>315</sup> Justice Gorsuch appeared to subscribe to this theory in *Gundy*, as he deemed unconstitutional most executive-issued rules “governing private conduct.”<sup>316</sup> Here, too, there is good

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313 See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 155–56 (2009) (“With borders shifting daily and trade subjected to the whims of powerful nations that dominated the sea lanes, the distinction between domestic and foreign policy was meaningless.”); Parrillo, *supra* note 7, at 1319–20 (1798 federal land tax prompted by need to finance military preparations for war with France).

314 Rather than relying on the President’s powers under Article II, Michael Rappaport argues that a military and foreign affairs exception to the nondelegation doctrine makes sense for structural reasons. See Rappaport, *supra* note 44, at 352–54.

315 See HAMBURGER, *supra* note 9, at 3 n.b., 84–85.

316 *Gundy v. United States*, 139 S. Ct. 2116, 2143 (2019) (Gorsuch, J., dissenting); see also Bamzai, *supra* note 17, at 182 (“A distinction between rights and privileges might explain several laws enacted in early Congresses that delegated authority to the executive

reason for nondelegationists to theorize such an exception, as a constraints/benefits distinction helps make sense of several early federal statutes that otherwise appear to violate nondelegation principles.<sup>317</sup>

As an originalist explanation for the Remission Act, this theory suffers from similar flaws as the foreign relations exception. First, leaving aside the fact that no one in Congress justified the Act on the ground that it merely provided a benefit, it seems doubtful whether such an exception actually existed. Its modern proponents cite no Founding-era evidence suggesting the existence of such an exception.<sup>318</sup> And again, early legislation that seemingly would have qualified as regulating “benefits” was attacked by opponents on nondelegation grounds.<sup>319</sup> For example, in a 1791 episode often cited by nondelegationists as evidence of a robust Founding-era principle,<sup>320</sup> James Madison and others criticized as unconstitutional a proposal that would have given the President broad discretion to designate

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branch . . . .”); Wurman, *supra* note 8, at 1548–49 (“Perhaps Congress had more power to delegate authority to establish public privileges.”).

317 See HAMBURGER, *supra* note 9, at 86 (1790 act empowering the President to set rates for military pensions); Bamzai, *supra* note 17, at 182 (1790 act allowing executive branch to license and regulate trade with Indian tribes); *id.* (1790 act authorizing executive officials to issue patents); Postell & Moreno, *supra* note 44, at 47 (asserting that most Founding-era delegations resulted in executive regulations that “did not . . . bind” the public (quoting HAMBURGER, *supra* note 9, at 87)). Not all nondelegationists fully subscribe to the constraints/benefits distinction. See Wurman, *supra* note 8, at 1548–49 (noting a distinction between private rights and public privileges “cannot be dispositive,” though Congress might have “some additional leeway” to delegate when privileges are at issue); Rappaport, *supra* note 44, at 356–57 (nonmilitary benefits statutes are subject to the nondelegation doctrine). Accordingly, they justify the early “benefits” statutes on different grounds. See, e.g., Wurman, *supra* note 8, at 1534 (arguing that 1790 military pensions statute actually delegated little authority to the executive); *id.* at 1543 (suggesting that 1790 statute governing trade with Native peoples was “a delegation in the context of the President’s Treaty and Commander-in-Chief Powers”); Gordon, *supra* note 8, at 795–98 (asserting that Congress in 1793 significantly circumscribed the executive branch’s discretion in granting patents).

318 See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 83 n.7 (2015) (Thomas, J., concurring in the judgment) (discussing *United States v. Grimaud*, 220 U.S. 506 (1911)); HAMBURGER, *supra* note 9, at 3 n.b., 84–85 (citing only John Locke and Edward Coke); Bamzai, *supra* note 17, at 178–82 (identifying *Grimaud* as “the key precedent” supporting a rights/privilege distinction for nondelegation). The one potential exception, noted by Wurman, came from James Madison in 1800. See Wurman, *supra* note 8, at 1555. He suggested that a law that invaded “personal liberty” would require greater “details, definitions, and rules” to avoid merging the “appropriate powers of the distinct departments.” *The Report of 1800*, *supra* note 256.

319 Parrillo, *supra* note 20 (manuscript at 19–20).

320 See Lawson, *supra* note 14, at 402–03; JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE’S CHALLENGE TO CONSTITUTIONAL GOVERNMENT 75–77 (2017); Wurman, *supra* note 8, at 1506–12.

“post roads” along which the mails would run.<sup>321</sup> If there had been a consensus view that Congress could broadly delegate legislative authority to the executive when “benefits” were at issue, Madison’s nondelegation critique would have been pointless. And the proposal’s supporters would likely have invoked the exception, instead of defending the proposal on the ground they actually did—that Congress generally had the authority to make such an expansive delegation.<sup>322</sup>

Moreover, even if a benefits exception did exist at the Founding, the Remission Act is an awkward fit. Formally, it might make sense; the Act assumed that a penalty has already been “incurred,”<sup>323</sup> so one can view remission granted by the Treasury Secretary as merely bestowing upon the petitioner a government “benefit” to which he had no legal right.<sup>324</sup> But that is not how remission worked in the real world. As described above, the remission mechanism was effectively an alternative, executive branch procedure for assigning penalties for customs violations.<sup>325</sup> When someone filed a petition seeking remission, no actual penalty was decided upon or imposed until the Treasury Secretary made his decision.

The difficulty of cleanly categorizing remission as a “benefit” also illustrates the larger problem with the constraint/benefit distinction. As its leading proponent, Philip Hamburger, acknowledges, some denials of benefits “operate in the manner of a constraint,” and should be treated as such for constitutional purposes.<sup>326</sup> Though Hamburger does not offer a way of distinguishing “pure” benefits from “benefits-as-constraints,” it seems safe to assume that a benefit that was, in reality,

321 Mortenson & Bagley, *supra* note 7, at 349–56. I discuss the “post roads debate” at greater length in Section IV.B.

322 See 3 ANNALS OF CONG. 232 (1791) (statement of Rep. B. Bourne) (“The Constitution meant no more than that Congress should possess the exclusive right of doing that, by themselves or by any other person, which amounts to the same thing.”).

323 Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 123; see also *United States v. Morris*, 23 U.S. (10 Wheat.) 246, 291 (1825) (saying the Remission Act “presupposes[] that the offence has been committed,” and simply “affords relief for . . . unintentional error”).

324 Cf. Gordon, *supra* note 82, at 38 n.234 (arguing that the Act was “justifiable . . . because it merely conferred upon the Secretary the power to return specified sums of government money . . .”).

325 See *supra* notes 237–41 and accompanying text.

326 HAMBURGER, *supra* note 9, at 3 n.b (first citing *Goldberg v. Kelly*, 397 U.S. 254 (1970); and then citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)); see also Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 732 (1994) (book review) (noting the “difficulty” of distinguishing “rules of private conduct from those merely affecting or encouraging private conduct”).

a penalty imposed for violating the law would count as a “constraint.”<sup>327</sup>

Accordingly, the Remission Act should have run afoul of the Founding-era nondelegation doctrine that Hamburger and others espouse. But it did not. Nor did other examples of Founding-era “benefits” legislation that delegated broad policymaking power to the executive. For example, a 1790 statute gave the President unfettered authority to prescribe regulations governing licenses given to persons who wanted to trade with Native peoples.<sup>328</sup> Because such trading was prohibited without a license,<sup>329</sup> the statute clearly allowed the executive to impose “constraints.” So too with the Patent Act of 1790, which empowered executive branch officials to issue patents granting inventors the “*exclusive* right . . . [to their] discover[ies]”—i.e., the executive could “constrain” others from engaging in conduct the patent covered.<sup>330</sup> In short, on multiple occasions the early Congresses gave the executive branch broad authority to regulate the provision of “benefits” in ways that actually placed meaningful limits on private conduct.

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327 Indeed, Hamburger argues that, in the English tradition, laws that “obliged”—i.e., that coerced—“included those that *relaxed* legal duties.” HAMBURGER, *supra* note 9, at 84 (emphasis added). On his account, any executive “alteration of a legally binding duty” was “unlawful.” *Id.*

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

329 *Id.*; see also Wurman, *supra* note 8, at 1543 (“This was indeed a broad statute that delegated authority to regulate private conduct.”).

330 Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (emphasis added). Hamburger argues that patents were historically not considered “binding,” because the patent only prevented other people from engaging in conduct the patent covered; otherwise, they could do what they liked. HAMBURGER, *supra* note 9, at 201–02. Of course, the fact that a patent only *partially* constrained others does not make it less of a “constraint,” and Hamburger admits that the distinction is “artificial.” *Id.*

The Supreme Court has recently held that patent grants involve “public rights,” because they confer a government benefit on the patentee. See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1373 (2018) (“[T]he decision to grant a patent is a matter involving public rights—specifically, the grant of a public franchise.” (emphasis omitted)). The Court, however, only considered the interests of the grantee. See *id.* (“By ‘issuing patents,’ the [Patent and Trademark Office] ‘take[s] from the public rights of immense value, and bestow[s] them *upon the patentee.*’” (alteration in original) (emphasis added) (quoting *United States v. Am. Bell. Tel. Co.*, 128 U.S. 315, 370 (1888)) (omitting “the” from first quote)). From the perspective of those who are constrained by a grant the government makes to someone else, a patent clearly affects private rights. See Wurman, *supra* note 8, at 1548 (noting that executive branch rules governing patent issuance under the 1790 Patent Act “alter the rights of private persons”).

### 3. Unimportance

A third possibility for explaining the Remission Act is that Congress simply thought remission was not that important. Taking their cue from an 1825 opinion by Chief Justice Marshall, Gary Lawson and Ilan Wurman have suggested that Congress cannot delegate authority over “important subjects,” but it can over matters of “less interest.”<sup>331</sup> Justice Gorsuch echoed this view in *Gundy*, when he allowed that the executive branch can “fill up the details” of a regulatory scheme, as long as Congress has made the key “policy decisions” first.<sup>332</sup>

As a theory of nondelegation, an “important subjects” approach makes some sense. If we assume there was *some* Founding-era limit on Congress’s power to delegate legislative authority, requiring Congress to make “important” policy decisions before delegating “details” to the executive is at least consistent with constitutional separation of powers principles.<sup>333</sup> If nothing else, an important-subjects theory of nondelegation seems more plausible than a general prohibition on delegation riddled with various subject-matter exceptions.

Yet this approach, too, is fraught with difficulty. The first problem is conceptual (and obvious): “importance” is very much in the eye of the beholder.<sup>334</sup> As recognized by Chief Justice Marshall and modern scholars on all sides of the debate, distinguishing important “policy decisions” from unimportant “details” in a principled, consistent way is challenging, to the say the least.<sup>335</sup> Wurman, for example, offers no

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331 *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825); see Lawson, *supra* note 14, at 376–77 (“Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts.”); Wurman, *supra* note 8, at 1497 (“[T]he picture the Founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over ‘important subjects’ . . . .” (quoting *Wayman*, 23 U.S. at 43)).

332 *Gundy v. United States*, 139 S. Ct. 2116, 2136 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. at 43); see Paul v. United States, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting the denial of certiorari) (“[M]ajor national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.”).

333 See Wurman, *supra* note 8, at 1555.

334 See Mortenson & Bagley, *supra* note 7, at 287 (noting an important-subject theory “would force courts to make subjective and contestable judgments about what counts as a detail and what counts as something more”); cf. Lisa Heinzerling, *The Power Canons*, 58 WM. & MARY L. REV. 1933, 1982–1990 (2017) (critiquing on similar grounds the “major questions” exception to *Chevron* deference).

335 See *Wayman*, 23 U.S. at 43 (“The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest . . . .”); Lawson, *supra* note 14, at 361 (“Surely . . . the constitutionality of legislative authorizations to executive and judicial actors cannot turn on something as ephemeral, and ultimately circular, as a distinction between ‘important subjects’ and

criteria for drawing such a line.<sup>336</sup> He suggests that the important/unimportant dichotomy mirrors the distinction he advances between “exclusive” and “nonexclusive” legislative powers—i.e., Congress has “exclusive” (and nondelegable) authority to decide important policy questions, but can give the executive the “nonexclusive” power to specify unimportant details in a legislative scheme.<sup>337</sup> But Wurman offers no more guidance in distinguishing “exclusive” from “nonexclusive” legislative powers than he does in separating important subjects from unimportant details. And Lawson concedes that his approach—which relies on an analogy to the law of agency—does not “yield a crisp line . . . between what is important and what is of less interest.”<sup>338</sup>

The second problem is historical (and less obvious): as intuitively appealing as the important-subjects theory may be, it does not appear to be one to which members of the Founding generation subscribed. The secondary literature reports no instance of nondelegation discussed in “importance” terms before Justice Marshall’s statement in *Wayman*—which he made more than three decades after Ratification.<sup>339</sup> Wurman asserts that particular Founding-era delegations were “consistent” with an important-subjects theory, but does not point to evidence that anyone at the Founding articulated such a theory.<sup>340</sup> For his part, Lawson argues that an important-subjects theory of nondelegation, grounded in agency law, is part of the

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matters of ‘less interest.’”); Wurman, *supra* note 8, at 1490 (“What are the important policies that must be resolved by Congress [are] sometimes, of course, in the eye of the beholder.”); cf. Sunstein, *supra* note 39, at 326–27 (“The real question is: How much executive discretion is too much to count as ‘executive’? No metric is easily available to answer that question.”).

336 Wurman does suggest that Congress has more latitude in delegating “important” matters involving public rights than private rights. See Wurman, *supra* note 8, at 1502–03. As discussed earlier, that distinction, too, is historically unjustified and conceptually problematic. See *supra* subsection III.B.2. In any event, it offers no guidance for resolving the first-order question of whether the matter delegated to the executive is “important” or not.

337 Wurman, *supra* note 8, at 1534–35, 1538.

338 Lawson, *supra* note 8 (manuscript at 26). In terms of concrete guidance, Lawson advances only the “tentative” suggestion that congressional delegation may be more permissible on questions that do not require national “uniformity,” such that “local knowledge” available only to executive branch officials might be needed in order to fashion policy. *Id.* (manuscript at 27–28).

339 During the post roads debate, one representative who voiced nondelegation objections suggested that the establishment of post roads was “a very important object,” though it is not clear that, in his view, the roads’ importance was what made the delegation unconstitutional. 3 ANNALS OF CONG. 229, 230 (1791) (statement of Rep. Livermore); see Wurman, *supra* note 8, at 1511 (noting Livermore’s statement).

340 Wurman, *supra* note 8, at 1538, 1540.



Constitution's original meaning.<sup>341</sup> But that proposition relies on Lawson's more general—and contestable—belief that the Constitution itself was understood at the Founding to be a sort of fiduciary instrument.<sup>342</sup> Accordingly, while an important subjects theory of nondelegation might be sensible, it does not appear that anyone at the Founding actually articulated it.

In fact, Congress's early legislative record suggests that delegation of important questions to the executive was entirely permissible. The Remission Act itself is a good example. As discussed earlier, there was broad agreement in Congress that the remission power was "important," in two senses: it was crucial for ensuring that innocent lawbreakers were not subject to harsh penalties, and also had to be employed carefully, so as not to undermine revenue collection—itsself a critical matter.<sup>343</sup> As Joseph Story wrote in 1815, the remission power was understood to be "one of the most important and extensive powers" the government possessed.<sup>344</sup> Little wonder that none of the Act's proponents justified it on grounds of unimportance.

Other examples abound. As Christine Chabot has recently shown, in 1790 Congress granted the President broad discretion to borrow up to \$12 million dollars from foreign lenders—a sum that, as a percentage of GDP, would be the equivalent of more than a *trillion* dollars today.<sup>345</sup> In 1794, it authorized the President to impose a complete embargo on foreign trade "whenever, in his opinion, the public safety shall so require."<sup>346</sup> In 1798, it enacted a real estate tax of up to \$2 million that gave executive branch officials broad latitude to decide how the tax burden would be distributed within states.<sup>347</sup> The list goes on.<sup>348</sup>

341 See Lawson, *supra* note 8 (manuscript at 8, 11) ("[T]he real ground for the Constitution's nonsubdelegation principle is the nature of the Constitution as a particular kind of [fiduciary] legal instrument.").

342 See GARY LAWSON & GUY SEIDMAN, "A GREAT POWER OF ATTORNEY": UNDERSTANDING THE FIDUCIARY CONSTITUTION (2017). But see Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL'Y 373, 373 (2019) (reviewing LAWSON & SEIDMAN, *supra*) ("As a historical matter, there is virtually no evidence that the Founders thought of the Constitution on the model of a power of attorney."); Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1484 (2020) ("[T]he historical, philosophical, and legal foundations of fiduciary constitutionalism are weak.").

343 See *supra* Section II.A.

344 *The Margareta*, 16 F. Cas. 719, 720–21 (C.C.D. Mass. 1815) (No. 9072).

345 See Act of Aug. 4, 1790, ch. 34, § 2, 1 Stat. 138, 139; Chabot, *supra* note 8 (manuscript at 26–27) (discussing this legislation).

346 Act of June 4, 1794, ch. 41, § 1, 1 Stat. 372, 372; see Note, *supra* note 20, at 1141–42 (discussing this legislation).

347 See Parrillo, *supra* note 7, at 1318–26 (discussing this legislation).

348 See Mortenson & Bagley, *supra* note 7, at 332–66.

One might argue that these delegations did not contravene an “important subjects” theory, because Congress decided all the *really* important matters. For instance, Wurman suggests that, by capping the 1790 borrowing and tax power, Congress left only minor matters to executive discretion,<sup>349</sup> and he justifies other early delegations on similar grounds.<sup>350</sup> One could say the same about the Remission Act—Congress set the upper limit on penalties, and set forth a (very general) standard for determining who qualified for remission. Perhaps the Treasury Secretary’s discretion to decide what penalty to impose on lawbreakers was simply an unimportant detail that could constitutionally be left to the executive branch.<sup>351</sup>

Such arguments, however, only put us back to square one: How do we distinguish between important matters Congress must decide and unimportant details it can delegate? Maybe proponents of this theory will flesh it out in ways that render it judicially administrable. As an originalist matter, however, the absence of historical evidence in its favor offers no good reason for the Supreme Court to abandon its longstanding “intelligible principle” test in favor of an equally elusive approach to delegation.

#### 4. Necessity

Finally, there is the possibility of necessity: Congress *had* to delegate certain functions—including remission—to the executive, because it could not feasibly perform those tasks itself. Again, the theory is plausible. It would be absurdly self-defeating to prohibit Congress from delegating essential tasks it cannot itself perform, and we know the Constitution is not “a suicide pact.”<sup>352</sup> Indeed, the Court’s historically permissive approach to delegation has been shaped by a recognition that any limit on Congress’s power to delegate must take into account “common sense and the inherent necessities of the governmental co-ordination.”<sup>353</sup> As the Court explained in *Mistretta v. United States*, “in our increasingly complex society . . . Congress simply

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349 See Wurman, *supra* note 8, at 1542–56.

350 See, e.g., *id.* at 1533–34 (pensions); *id.* at 1542–43 (naturalization); *id.* at 1548–49 (patents).

351 But see *Gundy v. United States*, 139 S. Ct. 2116, 2143 (2019) (Gorsuch, J., dissenting) (critiquing SORNA’s similar delegation on the ground that Congress left all the “policy decision[s]” to an executive branch officer).

352 *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting). But see DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 173 (1993) (the supposed necessity of a particular delegation does not excuse a constitutional violation).

353 *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 406 (1928).

cannot do its job absent an ability to delegate power under broad general directives.”<sup>354</sup>

“Necessity” as the touchstone of delegation might make intuitive sense, but as a distinction between permissible and impermissible delegations it suffers from the same problems as an “important subjects” theory. First, there is little evidence members of the Founding generation framed delegation in these terms. It certainly was not present in debates over the Remission Act. While members of Congress generally agreed that the remission power *itself* was essential, no one argued that Congress had to delegate that power *to the executive branch*.<sup>355</sup>

There is similarly little evidence that “necessity” was a core concept in Founding-era views about delegation more generally. Gary Lawson and Christine Chabot both rely on a 1791 comment by James Madison suggesting that departures from nondelegation orthodoxy might be justified on such grounds.<sup>356</sup> But others in the same debate rejected the idea,<sup>357</sup> and it appears that arguments from necessity otherwise did not appear in Founding-era discussions. Ilan Wurman suggests in passing that several early delegations were constitutionally permissible because “[i]t is difficult to imagine what more Congress could have been expected to do.”<sup>358</sup> But Wurman does not embrace “necessity” as a defining characteristic of an original nondelegation principle, let alone offer evidence that it was. As a result, any originalist effort to replace the Court’s longstanding “intelligible principle” test with a more stringent “necessity” argument would seem to fail, at minimum, for lack of proof.<sup>359</sup>

354 488 U.S. 361, 372 (1989); *see also* *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946) (“Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules . . .”).

355 *See supra* Section II.A.

356 *See* 3 ANNALS OF CONG. 238–39 (1791) (statement of Rep. Madison) (“[T]here did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation of the Constitution.”); Chabot, *supra* note 8 (manuscript at 43–45) (extrapolating a “necessity” test for delegation from Madison’s statement); Lawson, *supra* note 8 (manuscript at 35–37) (similar).

357 *See* 3 ANNALS OF CONG. 239 (1791) (statement of Rep. Sedgwick) (“[A] supposed necessity could not justify the infraction of a Constitution which the members were under every obligation of duty, and their oaths, solemnly pledged, to support.”).

358 Wurman, *supra* note 8, at 1542; *see also id.* at 1544, 1545.

359 To be clear, neither Chabot nor Lawson argue that a “necessity” standard would tighten the “intelligible principle” test, let alone replace it. For Chabot, the two principles are entirely consistent, given the Court’s repeated reference to necessity concerns in reaffirming its longstanding test. *See* Chabot, *supra* note 8 (manuscript at 45–46). For Lawson, arguments about necessity—which he believes are consistent with an original fiduciary understanding of the Constitution—simply collapse into first-order disputes over what tasks Congress should undertake in the first place. *See* Lawson, *supra* note 8

Second, a “necessity” standard for delegation raises the same subjectivity problems that flow from an “important subjects” theory. The Remission Act again offers a telling example. Congress certainly had the ability to handle remission petitions itself; it did so both before the Act’s passage and after,<sup>360</sup> and did the same with thousands more petitions on other subjects.<sup>361</sup> Yet as I discuss below, Congress may have delegated the remission power to the Treasury Secretary because doing so would free the legislature to focus on other matters.<sup>362</sup> To determine whether it was “necessary” for Congress to delegate the remission power, therefore, we first have to form a more general opinion about how the early Congress should have spent its limited time.<sup>363</sup> Thus even if a “necessity” exception to nondelegation was historically justified (and it is not), it offers little help in distinguishing permissible from impermissible delegations.

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In the end, none of the various distinctions nondelegationists have proposed can explain a number of early grants of power to the executive branch—including the Remission Act. The most sensible conclusion is that the robust limits on delegation that nondelegationists believe inhered in the Constitution simply did not exist.

#### IV. DELEGATION AND IMPROVISATION AT THE FOUNDING

If the record of early federal legislation points to a permissive view of delegation at the Founding, a question remains: *Why* did Congress repeatedly delegate broad authority to the executive branch? The answer may not matter much for arguments over the original understanding of Congress’s power to delegate. In evidentiary terms, what counts most is the delegations themselves, and what they tell us about what the Founding generation thought about constitutional

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(manuscript at 37–39) (“If Congress’s ‘job’ is indeed to micro-manage the entirety of American society, there is at least a serious argument that massive subdelegation can be justified by even a strict Madisonian understanding of necessity.”); cf. HAMBURGER, *supra* note 9, at 420–22 (in the modern administrative state, alleged “necessity” is a constant condition).

360 See *supra* Part II.

361 See McKinley, *supra* note 153, at 1573–74, 1590.

362 See *infra* Section IV.A.

363 See Lawson, *supra* note 8 (manuscript at 39) (the “necessity” argument the Court makes in *Mistretta* presumes that Congress’s “‘job’ . . . involve[s] . . . a massive overseeing of everybody’s lives, fortunes, and sacred honors” (quoting *Mistretta v. United States*, 488 U.S. 361, 372 (1989))).

limits (or lack thereof) on Congress's ability to give legislative power to the executive.

That said, there is value in stepping back and considering more broadly why Congress structured powers like remission the way it did. Unearthing legislative motivations can help us make sense of the fact that the Founding generation routinely tolerated broad delegations of legislative authority under a Constitution predicated on separation of powers.

The simple—if perhaps inelegant—answer is that granting broad policymaking discretion to the executive branch was often the least-worst way to balance competing legislative priorities. As Part IV.A shows, the Remission Act offers a telling example. After considering and debating a number of different institutional mechanisms through which the federal government could moderate the potentially harsh effects of customs-related penalties, Congress settled on broad discretion vested in the Treasury Secretary. Not because that was obviously the correct choice—or the constitutionally most acceptable one—but because it was the best among imperfect options.

More important, the architects of the early federal government debated the possibilities largely in the language of governmental efficiency, not constitutional limitation. As Part IV.B discusses, this was a pattern repeated across the domains of federal authority, as the early Congress struggled to devise new solutions to the myriad problems of national governance. Indeed, attending to this period's administrative dynamism helps make sense of two additional examples of delegation that figure prominently in the originalist literature. Whatever nondelegation principle members of the Founding generation may have thought inhered in the Constitution, it did not appear to shape their choices about how to design a functional administrative system.

#### A. *Delegating to the Executive*

So why did Congress give its authority to remit customs penalties to the Treasury Secretary? Though the evidence is circumstantial, the historical records reveal several possibilities.

One is that Congress valued the consistency that executive resolution offered. Recall that, under the original House proposal, the Remission Act would have assigned authority to local federal officials, including district judges. But later versions of the bill shifted authority to the executive branch, first to a three-member panel of cabinet officers, and then to the Treasury Secretary alone.<sup>364</sup> This change met objections; several members of Congress were concerned that

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364 See *supra* Section II.B.

centralized decisionmaking would slow the delivery of warranted relief, and disadvantage petitioners located far from the seat of government.<sup>365</sup> Yet Congress apparently concluded that the “strict justice”<sup>366</sup> that a single decision maker would provide would “more effectually . . . secure the revenue.”<sup>367</sup>

Indeed, Fisher Ames, the Act’s chief proponent, doubted whether Congress was equal to the task of ruling on remission petitions consistently. In responding to Edward Livingston’s argument that Congress could not constitutionally delegate the remission power, Ames questioned whether a “popular body” could produce “anything like system” in this area.<sup>368</sup> He may have had good reasons for his doubts. The House’s procedural mechanisms for responding to petitions might have enabled it to rule consistently with past decisions.<sup>369</sup> But any action in favor of a petitioner through private bill was subject to approval by the entire legislature.<sup>370</sup> The Secretary also had an expertise advantage. As one representative argued very early in the debates, the Secretary’s “general superintendence”<sup>371</sup> over the customs system meant that he was best-positioned to “establish a uniform rule” regarding remission.<sup>372</sup> As discussed earlier, it appears that the early Secretaries in fact did exercise their power in predictable and consistent ways.<sup>373</sup>

A second possibility is neutrality. Ames, in particular, worried that legislative politics would have a distorting effect on remission decisions. In his view, it would be impossible for Congress to decide

365 See 2 ANNALS OF CONG. 1475 (1790) (statement of Rep. Goodhue) (petitioners far from the national capital would suffer from delay); Thomas Lloyd, Lloyd’s Notes, 24 March 1790 (Mar. 24, 1790) (shorthand notes) (statement of Rep. Sherman), in 12 DHFFC, *supra* note 148, at 845 (“The amendment made by the Senate will cause some delays.”); *id.* at 846 (statement of Rep. Jackson) (“The people who [are] referred to the Secretary of the Treasury [will be] dragged over to New York to be tried.”); *id.* (statement of Rep. Smith) (“The distant inhabitants will lose all possible relief. This amendment seems calculated for the (merchants) of this city.”); *id.* at 847 (statement of Rep. Boudinot) (saying remission “[o]ught to be determined in the state where [the offense] happens”).

366 2 ANNALS OF CONG. 1474 (1790) (statement of Rep. Sherman); see also 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames) (rejecting option of making customs laws “loosely,” and giving “considerable discretion” to front-line officers in execution). This accords with broader concerns that Hamilton and others had about giving front-line officers discretion in customs collection generally. See RAO, *supra* note 113, at 49–99.

367 2 ANNALS OF CONG. 1474 (1790) (statement of Rep. Sherman).

368 6 ANNALS OF CONG. 2288 (1797) (statement of Rep. Ames).

369 See McKinley, *supra* note 153, at 1561–62 (discussing regularized House procedures for responding to petitions, including standing committees for particular subject areas).

370 *Id.* at 1549 n.34.

371 Thomas Lloyd, 11 January 1790, 3 CONG. REG., Jan. 28, 1790 (statement of Rep. Laurance), as reprinted in 12 DHFFC, *supra* note 148, at 10, 11.

372 *Id.* at 10–11 (statement of Rep. Boudinot).

373 See *supra* subsection III.A.1.

on petitions free of the influence of “local sympathy.”<sup>374</sup> Every representative would feel obliged to advocate on behalf of constituents seeking relief,<sup>375</sup> which would “dirty their fingers”<sup>376</sup> and produce unfortunate “precedent[s]” that subsequent petitioners could invoke to support their suspect claims.<sup>377</sup> In contrast, Ames thought executive branch officers were insulated from political pressure.<sup>378</sup> They owed “responsibility” to Congress—and the nation—as a whole, a fact that would help ensure “proper conduct” in using the remission power.<sup>379</sup> Or as another representative asserted, the Treasury Secretary was “naturally . . . bias[ed]” in favor of augmenting federal revenue, so there was “no danger” to the national interest in placing the remission power in his hands.<sup>380</sup> Not everyone agreed—Edward Livingston thought that a single decisionmaker would be more likely to be improperly influenced by wealthy and powerful merchants seeking to use the system to their advantage.<sup>381</sup> But at minimum it seems that the promise of administrative neutrality may have encouraged Congress to delegate remission to the Treasury Secretary.

There is also a third, more prosaic explanation for why Congress delegated the remission power. It wanted to relieve itself of the burden of responding to petitions. Hamilton suggested as much in his 1790 proposal: vesting remission authority outside Congress would avoid the “inconvenience of a Legislative Decision” on individual applications.<sup>382</sup> At least one member of Congress agreed; if the House did not divert petitions somewhere else, it would be “consumed in local concerns,” unable to focus on “promoting the public good.”<sup>383</sup> The problem remained in 1797; Congress had to expand the Secretary’s power to rid the House of petitions that continued to “engage [its] attention every session.”<sup>384</sup> As one representative bluntly

374 6 ANNALS OF CONG. 2286 (1797) (statement of Rep. Ames).

375 *See id.* at 2288 (statement of Rep. Ames) (“[I]f one of his constituents were to come to him and request relief, he should find himself necessarily interested in his behalf.”)

376 *Id.*

377 *Id.* at 2286 (statement of Rep. Ames).

378 *See id.* (delegating the remission power to “Executive officers” would prevent the influence of “local sympathy” from affecting decisions).

379 *Id.* at 2288 (statement of Rep. Ames).

380 *Id.* at 2285 (statement of Rep. Sitgreaves).

381 *See id.* at 2289 (statement of Rep. Livingston) (“[I]t was certainly more difficult to influence several men than one man.”).

382 *Saddler Report*, *supra* note 99.

383 Lloyd, *supra* note 371, at 10–11 (statement of Rep. Boudinot).

384 6 ANNALS OF CONG. 2285 (1797) (statement of Rep. Livingston); *see also id.* (statement of Rep. Sitgreaves) (noting that the 1797 Act extended the Treasury Secretary’s remission power to violations of statutory requirements regarding vessel licensing and registration was because “the time of the House had been considerably occupied by petitions for remissions of forfeitures”)

warned, if legislators were obliged to dispose of such petitions themselves, “they might sit the whole year round about subjects worse than nothing.”<sup>385</sup>

In the end, the best answer to the question of why Congress delegated such broad authority to the Treasury Secretary might be “all of the above.” That is, there was no single reason for the decision; representatives who supported the Remission Act did so for a variety of reasons. Nor was delegation to the Secretary the obvious choice. Each of the possible configurations of the remission power involved tradeoffs among important values: consistency, expertise, neutrality, capacity. Granting authority to the Treasury Secretary was simply the best—or least-worst—of several imperfect solutions. As one representative put it, the legislature delegated the remission power to the Secretary in 1790 because “[n]o better mode could then be thought of.”<sup>386</sup>

Reflecting this administrative ambivalence, Congress initially made the Act temporary, and did not make it permanent for another decade.<sup>387</sup> It considered other configurations in the meantime.<sup>388</sup> Little wonder that, when critics in 1797 fretted about the danger of concentrating so much power in one person’s hands, one defender responded with a rhetorical shrug: however “extraordinary” the remission power was, the Secretary had been exercising it for years, and “no material inconvenience had arisen.”<sup>389</sup> In other words, what cemented executive-branch remission into the permanent architecture of federal law enforcement was not a grand theory about the relative domains of legislative and executive authority. It was the simple fact that the Act worked well enough.

Critically, members of Congress did not think that the Constitution meaningfully constrained their choice of institutional arrangement. As discussed earlier, opponents of the Remission Act

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385 *Id.* at 1789 (unattributed).

386 *Id.* at 2287 (statement of Rep. Coit).

387 *See supra* Section II.C.

388 For example, an early version of a 1791 Act regulating distilled spirits provided for remission of penalties by the district court judge, with an appeal to the Supreme Court available in cases worth \$500 or more. *Enclosure: [An Act Repealing Duties Laid Upon Distilled Spirits Imported]*, [9 January 1790], NAT’L ARCHIVES: FOUNDERS ONLINE (Alexander Hamilton) (Jan. 9, 1790), <https://founders.archives.gov/documents/Hamilton/01-06-02-0076-0002-0013> [<https://perma.cc/5FXC-KYAP>]. The final version of the Act gave remission authority to the Treasury Secretary. Act of Mar. 3, 1791, ch. 15, § 43, 1 Stat. 199, 209. And in the 1797 debates over the Remission Act’s reauthorization, several members revived the proposal from 1790 for vesting the power in a multi-member board. *See* 6 ANNALS OF CONG. 2287 (1797) (statement of Rep. Swanwick); *id.* (statement of Rep. Coit); *id.* (statement of Rep. Livingston).

389 6 ANNALS OF CONG. 2291 (1797) (statement of Rep. Coit).



made only a handful of half-hearted arguments that it was unconstitutional, and just one based on nondelegation principles.<sup>390</sup> Congress apparently felt free to propose and debate delegations to different actors in nonconstitutional terms. It adopted an approach modeled on British practice. This, despite the fact that, according to nondelegationists, the Founding generation's alleged distrust of delegation was a reaction against the British constitution's tradition of parliamentary supremacy over the constitution.<sup>391</sup>

Remission's improvisational foundations become even more evident when viewed within the broader framework of the customs laws more generally. Much of the legislation Congress wrote in this area was highly detailed, specifying everything from the precise duties on rum, steel, and salt<sup>392</sup> to the size of the containers in which beer and wine could be imported into the United States.<sup>393</sup> According to Jennifer Mascott, members of the First Congress believed that, at least with respect to duties on goods, legislative specificity helped ensure that the customs laws balanced conflicting state and regional economic concerns through the mechanism of representative politics.<sup>394</sup>

At the same time, Congress left critical aspects of this regulatory regime largely to executive discretion<sup>395</sup>—including the Remission Act's authority to effectively rewrite the statutory penalties for customs violations. In other words, legislative specificity and executive discretion were not constitutionally irreconcilable modes of governance. They were simply different tools the early Congress reached for in order to meet the immediate challenges at hand.

### B. *Improvising Administration*

Congress's early willingness to experiment with administrative regimes becomes even more evident when we look across the domains of federal authority. Consider the episode that nondelegationists cite as powerful evidence of a demanding Founding-era doctrine: the 1792

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390 See *supra* Sections II.B–C.

391 See, e.g., Wurman, *supra* note 8, at 1527–31.

392 See Mascott, *supra* note 63, at 1415–27.

393 See, e.g., Act of May 2, 1792, ch. 27, § 12, 1 Stat. 259, 262 (prohibiting importation of beer, ale, or porter in casks smaller than forty gallons or in packages of fewer than six dozen bottles); see also MASHAW, *supra* note 85, at 44 (observing the 1791 Spirits Act specified “everything from the brand of hydrometer to be used in testing proof to the exact lettering to be used on casks that have been inspected”).

394 See Mascott, *supra* note 63, at 1395.

395 See Mortenson & Bagley, *supra* note 7, at 346 (describing how Congress passed statutes governing customs enforcement without “any meaningful guidance about the circumstances in which ships ought to be searched or the type of evidence that ought to make collectors think that fraud or smuggling was afoot”).

statute establishing the national postal system.<sup>396</sup> During debate over the legislation, Theodore Sedgwick proposed giving the President complete discretion to designate the roads on which the mail would travel.<sup>397</sup> Echoing themes that had arisen in the Remission Act debates two years earlier, Sedgwick asserted that the President had better information about the mails than Congress, and his decisions would not be “biassed [sic] by local interests.”<sup>398</sup> The proposal’s opponents doubted both propositions: collectively, Congress knew more about local conditions,<sup>399</sup> and granting authority to the President would give him a “dangerous power” he could use to his personal advantage.<sup>400</sup>

Several opponents also asserted that such a delegation would be unconstitutional,<sup>401</sup> and Congress rejected Sedgwick’s proposal.<sup>402</sup> In the statute’s final version, Congress specified the post roads in excruciating detail.<sup>403</sup> Accordingly, a number of nondelegationists cite this episode as powerful evidence of a robust Founding-era doctrine.<sup>404</sup> Yet as scholars have pointed out,<sup>405</sup> in the very same statute Congress gave the executive branch discretion to *extend* the post roads and to decide where post *offices* would be located.<sup>406</sup>

The mystery is why Congress rejected a grant of executive discretion as to one part of the postal system but embraced as to other parts. The Constitution gives Congress the power to establish “Post Offices” *and* “post Roads,”<sup>407</sup> so a partial limitation on delegation is textually unjustifiable.<sup>408</sup> A better explanation is that apportioning

396 See POSTELL, *supra* note 320, at 75–77; Gordon, *supra* note 8, at 744–47; Lawson, *supra* note 14, at 402–03; Wurman, *supra* note 8, at 1506–12.

397 See 3 ANNALS OF CONG. 229 (1791) (statement of Rep. Sedgwick) (proposing post roads would be determined “by such route as the President of the United States shall, from time to time, cause to be established”).

398 *Id.*

399 See *id.* at 233 (statement of Rep. White) (“No individual could possess an equal share of information with th[e] House on the subject of the geography of the United States.”).

400 *Id.* at 235 (statement of Rep. Vining).

401 See Wurman, *supra* note 8, at 1507–08 (citing statements).

402 3 ANNALS OF CONG. 241 (1791).

403 See Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, 232–33.

404 See sources cited *supra* note 396.

405 See Chabot, *supra* note 8 (manuscript at 43–44 & n.380); Mortenson & Bagley, *supra* note 7, at 353–54.

406 See Act of Feb. 20, 1792, ch. 7, § 2, 1 Stat. 232, 233 (saying Postmaster General can enter into contracts “for extending the line of posts”); *id.* § 3 (saying Postmaster General has authority to appoint deputy postmasters “at all places where such shall be found necessary”).

407 U.S. CONST. art. I, § 8, cl. 7.

408 Indeed, one opponent of Sedgwick’s proposal argued that, in light of Article I, section 8, Congress had a “duty” to “designate the roads” *and* “to establish the offices.” 3 ANNALS OF CONG. 229 (1791) (statement of Rep. Livermore). Wurman explains the

decision-making authority in this manner was simply the best way to satisfy competing interests and concerns. Communities near designated post roads reaped significant economic advantages, so representatives in the House may have been eager to specify by statute that the roads would run in their districts.<sup>409</sup> But members of Congress likely had less enthusiasm for making adjustments to the routes going forward, a task that—like addressing remission petitions—would require constant legislative attention.<sup>410</sup> Congress therefore left it to the executive branch to “extend[]” the system as it saw fit.<sup>411</sup> In the end, as with the customs regime, a mix of legislative specification and executive discretion may have best accommodated the various interests at play.

Or take another example: the Patent Acts of 1790 and 1793. Within weeks of convening, the First Congress received petitions from inventors seeking private legislation confirming their intellectual property rights—something state legislatures had traditionally done.<sup>412</sup> Concerned about the volume of work involved, Congress immediately sought to allocate responsibility elsewhere.<sup>413</sup> It considered a number of different arrangements, including juries and private referees.<sup>414</sup> As commentators have noted, Congress ultimately gave authority to a panel of executive branch officers to grant patents to any invention they deemed “sufficiently useful [or] important.”<sup>415</sup> Even

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discrepancy by arguing that the delegations of authority to extend the post roads and site post offices were “less significant,” because “[t]he important question of the day” was the designation of the initial roads. Wurman, *supra* note 8, at 1510–11. But Wurman’s argument is premised primarily on his *own* view of the relative importance of each component of the statutory scheme. *See id.* (“[T]he President’s discretion was greatly cabined once Congress had established the locations of the post roads.”).

409 *See* 3 ANNALS OF CONG. 241 (1791) (statement of Rep. Sedgwick) (noting that opponents of executive discretion “had a very important interest in establishing the directions of the post”); CURRIE, *supra* note 306, at 149 (“[O]ne is tempted to attribute the House’s zest for detail more to a taste for pork than to a principled concern for the virtues of representative government.”).

410 *See* MASHAW, *supra* note 85, at 46 (describing how Congress was concerned that it would be inundated with “demands for the expansion of the postal service”); Chabot, *supra* note 8 (manuscript at 45) (“Delegation to the executive was necessary to incorporate these important adjustments to existing post routes.”).

411 *See* Act of Feb. 20, 1792 § 2.

412 *See* McKinley, *supra* note 153, at 1563–65.

413 *See id.* at 1565.

414 *See* Chabot, *supra* note 8 (manuscript at 36–37).

415 Act of Apr. 10, 1790, ch. 7, § 1, 1 Stat. 109, 110 (saying patent will issue on the vote of two of the Secretary of State, Secretary of War, and Attorney General); *see* Chabot, *supra* note 8 (manuscript at 36–39); Posner & Vermeule, *supra* note 13, at 1735.

nondelegationists admit that this was a broad grant of discretion in an area of significant economic importance.<sup>416</sup>

Congress revised the Patent Act in 1793. Among other changes, executive officers no longer had the discretion to approve or deny a patent on “useful or important” grounds. Instead, the Secretary of State and Attorney General had *no* discretion; they were to grant a patent in response to any application that met the statute’s technical requirements.<sup>417</sup> Rival inventors could then challenge issued patents in court on various grounds.<sup>418</sup> This change left the judiciary, rather than the executive, as the institution ultimately responsible for determining which inventions would receive protection.

Congress did not make this change out of concern that the 1790 Act unconstitutionally delegated legislative authority to the executive branch, as Aaron Gordon suggests.<sup>419</sup> As recalled twenty years later by Thomas Jefferson (the 1793 Act’s prime mover<sup>420</sup>), the institutional rearrangement was a matter of efficiency. Under the 1790 Act, the executive board developed a few general rules in determining whether to grant patents, but an “abundance of cases” fell outside the scope of those rules.<sup>421</sup> Deciding fact-specific cases took time—more time than cabinet officers could “spare from higher duties.”<sup>422</sup> So the 1793 Act turned responsibility “over to the judiciary,” to allow the patent-granting process “to be matured into a system” that would enable inventors to know their rights.<sup>423</sup>

Importantly, Jefferson did not think (at least in hindsight) that this was actually the best way to award patents. Judges’ educations left them ill-prepared to decide questions of scientific merit, and inventors would therefore find little guidance in “the lubberly volumes of the

416 See Wurman, *supra* note 8, at 1548 (acknowledging the Patent Act “leaves a lot of discretion” to the executive branch).

417 See Act of Feb. 21, 1793, ch. 11, § 1, 1 Stat. 318, 318–21; *The Patent Act of 1793*, 18 J. PAT. OFF. SOC’Y (CENTENNIAL NUMBER ISSUE) 77, 81 (1936) (claiming the 1793 Act “made the grant of a patent purely a clerical matter”).

418 See *Thomas Jefferson to Isaac McPherson, 13 August 1813*, NAT’L ARCHIVES: FOUNDERS ONLINE (Thomas Jefferson) (Aug. 13, 1813), <https://founders.archives.gov/documents/Jefferson/03-06-02-0322> [<https://perma.cc/8C2V-NKTP>] (“[I]nstead of refusing a patent in the first instance, as the [executive] board was authorised to do, the patent now issues of course, subject to be declared void on such principles as should be established by the courts of law.”).

419 See Gordon, *supra* note 8, at 796–97.

420 See Chabot, *supra* note 8 (manuscript at 40); *A Bill to Promote the Progress of the Useful Arts, [1 December 1791]*, NAT’L ARCHIVES: FOUNDERS ONLINE (Thomas Jefferson) (Dec. 1, 1791), <https://founders.archives.gov/documents/Jefferson/01-22-02-0322> [<https://perma.cc/TX3H-YMHZ>].

421 *Thomas Jefferson, supra* note 418.

422 *Id.*

423 *Id.*

law.”<sup>424</sup> Jefferson would have preferred leaving the matter to a board of “Academical professors” instead.<sup>425</sup> But a proposal to create a separate department to handle patents was roundly opposed in Congress in 1793.<sup>426</sup> And because England had adopted the judicial model, “the usual predominancy of her examples,” according to Jefferson, led to a similar arrangement in the United States.<sup>427</sup>

The parallels between the Patent and Remission Acts are revealing. In both, Congress sought to divest itself of legislative authority to decide important questions impacting the rights of private individuals.<sup>428</sup> It considered delegating its power to several different configurations of judicial and executive branch officials. It ultimately settled on an arrangement that offered administrative advantages, but was not inherently the right choice. Indeed, it may have largely been a reflexive retreat to familiar models derived from British practice. And all the while, few constitutional objections (if any) emerged.

These are just a few of many examples of Congress’s early experimentation in arranging institutional decisionmaking, many of which involved broad delegations of discretionary authority.<sup>429</sup> It did the same with military pensions,<sup>430</sup> the governance of federal territories,<sup>431</sup> and management of the national debt.<sup>432</sup> Indeed, as historians have recently demonstrated, this kind of administrative creativity extended across the many domains of federal governance, in

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424 *Id.*

425 *Id.*

426 See 3 ANNALS OF CONG. 855 (1793) (statement of Rep. Baldwin) (objecting to any proposal “which should provide for the institution of a new department”); *id.* (statement of Rep. Williamson) (“He was decidedly opposed to creating a new Department . . .”).

427 *Thomas Jefferson*, *supra* note 418; see also 3 ANNALS OF CONG. 855 (1793) (statement of Rep. Williamson) (asserting that the 1793 Act “was an imitation of the Patent System of Great Britain”).

428 On patents as private rights, see *supra* note 330.

429 See MASHAW, *supra* note 85, at 34–50.

430 See McKinley, *supra* note 153, at 1586–89 (describing early congressional efforts to enlist the executive and judiciary branches in resolving pension claims).

431 See Mortenson & Bagley, *supra* note 7, at 334–38 (describing discretion granted to executive branch officials in administering the Northwest Territory and the District of Columbia).

432 See Chabot, *supra* note 8 (manuscript at 31–33) (detailing discretion given to the Sinking Fund Commission, composed of executive and judicial officers).

areas as diverse as revenue collection,<sup>433</sup> military development,<sup>434</sup> disaster relief,<sup>435</sup> land sales,<sup>436</sup> and public subsidies<sup>437</sup> (among others).

This improvisation—and uncertainty—extended not just to the allocation of powers, but also to the assignment of personnel. The early federal government was deeply understaffed,<sup>438</sup> and the early Congress routinely sought to enlist various federal and state officers to fulfill multiple government functions<sup>439</sup> (as did the executive branch<sup>440</sup>). At times these efforts prompted constitutional objections, but not on delegation grounds. Famously, in *Hayburn's Case* the Justices of the Supreme Court raised constitutional doubts about their role in deciding who was eligible for Revolutionary War pensions, because the statutory scheme effectively allowed Congress and the Secretary of War to overrule their decisions.<sup>441</sup> In response, Congress created a new scheme in which judges only took evidence and transmitted it to the Secretary<sup>442</sup>—a role remarkably similar to the one Congress had earlier assigned to federal judges under the Remission Act.<sup>443</sup> Even though assignment of these considerable administrative duties apparently rankled some judges, no constitutional complaints arose again.<sup>444</sup>

To be sure, the possibility that there was *some* original constitutional limit on Congress's ability to delegate its powers is not preposterous. As this Article (and others) have demonstrated,

433 See RAO, *supra* note 113.

434 See MAX M. EDLING, *A REVOLUTION IN FAVOR OF GOVERNMENT: ORIGINS OF THE U.S. CONSTITUTION AND THE MAKING OF THE AMERICAN STATE* (2003); MAX M. EDLING, *A HERCULES IN THE CRADLE: WAR, MONEY, AND THE AMERICAN STATE, 1783–1867* (2014).

435 See DAUBER, *supra* note 153.

436 See GREGORY ABLAVSKY, *FEDERAL GROUND: GOVERNING PROPERTY AND VIOLENCE IN THE FIRST U.S. TERRITORIES* (2021); PAUL FRYMER, *BUILDING AN AMERICAN EMPIRE: THE ERA OF TERRITORIAL AND POLITICAL EXPANSION* (2017).

437 See BALOGH, *supra* note 313; RICHARD R. JOHN, *SPREADING THE NEWS: THE AMERICAN POSTAL SYSTEM FROM FRANKLIN TO MORSE* (1995).

438 See RAO, *supra* note 113, at 69.

439 See Wesley J. Campbell, *Commandeering and Constitutional Change*, 122 *YALE L.J.* 1104, 1161–65 (2013) (describing early federal statutes imposing “administrative burdens” on state officials).

440 See Kevin Arlyck, *The Courts and Foreign Affairs at the Founding*, 2017 *BYU L. REV.* 1, 35 (describing Washington Administration efforts to enlist federal and state officers in preventing French maritime attacks on British vessels).

441 See Maeva Marcus & Robert Teir, *Hayburn's Case: A Misinterpretation of Precedent*, 1988 *WIS. L. REV.* 527, 530.

442 Act of Feb. 28, 1793, ch. 17, §§ 1–2, 1 Stat. 324, 324–25.

443 See Act of May 26, 1790, ch. 12, § 1, 1 Stat. 122, 122–23.

444 See James E. Pfander, *Judicial Compensation and the Definition of Judicial Power in the Early Republic*, 107 *MICH. L. REV.* 1, 26 (2008) (quoting 1800 statement from district court judge that remission petitions “add much to the increase of business to the judges, in matters too, not strictly within the line of their Judicial functions”).

nondelegation arguments popped up occasionally in early legislative debates, and it seems unlikely that sophisticated skeptics of executive power (like James Madison) would bother with arguments that could not pass the laugh test. But whatever constitutional principle Madison and others had in mind, it clearly did not have much purchase. Across the federal government, Congress made decisions about where it should locate decision-making authority not by reference to immovable principles of constitutional law, but through the rough and tumble of legislative politics.

Indeed, according to Hamilton, that was the way it should be. When he first proposed that Congress vest its remission authority “somewhere,” Hamilton indicated that the legislature could “safe[l]y” delegate that power to another entity, but he did not specify to whom.<sup>445</sup> A question of such “delicacy and importance,” according to Hamilton, would best be answered after “mature deliberation” by Congress.<sup>446</sup> In the end, the choice of whether—and where—to delegate legislative authority was left to the legislature itself.

#### CONCLUSION

On its own, the Remission Act may not defeat originalist arguments in favor of a restrictive version of the nondelegation doctrine. The Act is just one instance of early federal legislation granting the executive branch broad discretion to fashion rules governing private conduct. And it is an odd one, at that. The Treasury Secretary did not formally make prospective rules; he altered or dispensed with Congress’s statutory directives as he saw fit, even if he did so consistently and predictably. The Secretary exercised discretion that was greater than—but akin to—law-enforcement authority we conventionally understand executive branch officials to enjoy. As the Remission Act’s chief congressional defender, Fisher Ames, suggested, perhaps remission as a form of constitutional authority was neither fish

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445 *Saddler Report*, *supra* note 99.

446 *Id.* Wurman suggests Hamilton’s reference to the “delicacy and importance” of the question of where to locate the remission power is support for an “important subjects” theory of nondelegation. See Wurman, *supra* note 8, at 1553 n.348 (quoting *Saddler Report*, *supra* note 99). But nondelegation would be a “craven watchdog indeed” if the only “important subject” the Constitution requires Congress to decide is *which* administrative agency should exercise legislative power. *Cf. Morrison v. Nat’l Austl. Bank Ltd.*, 561 U.S. 247, 266 (2010) (“[T]he presumption against extraterritorial application would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case.”).

nor fowl.<sup>447</sup> And perhaps remission's defiance of easy categorization is what made its delegation constitutionally palatable.

Remission's peculiarity may be a plausible explanation for the Act's passage and persistence, but it is not the best one. Even if couched in unusual form, the power Congress granted to the Treasury Secretary in 1790 was unmistakably broad and fundamentally legislative. That is likely why no one in Congress bothered to defend the Act's constitutionality on the ground of exceptionality. Nor was the Act the only such delegation the early Congress made. As this Article shows, it is similarly difficult to explain away other examples through distinctions no one at the Founding made, and likely would have rejected. If there was a Founding-era consensus that the Constitution incorporated a nondelegation principle, apparently it did not meaningfully limit Congress's ability to give away its power.

The difficulty of pigeonholing the Remission Act highlights a broader point, as well. In this and many other areas, the early Congresses often showed little interest in articulating a careful taxonomy of offices and powers. When it came to designing an efficient and responsive system of federal governance, the Founding generation did not traffic much in constitutional absolutes. That, of course, is a challenge for judges and scholars who seek to ground definitive statements of constitutional principle in historical evidence.<sup>448</sup> If nothing else, it suggests that the search for a "useable past"<sup>449</sup> by those who advocate for a more stringent version of the nondelegation doctrine may be unproductive.

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447 6 ANNALS OF CONG. 2288 (1797) (statement of Rep. Ames) (remission was "neither Judicial nor Legislative" power).

448 Compare Mortenson & Bagley, *supra* note 7, at 367 ("There was no nondelegation doctrine at the Founding, and the question isn't close."), with *Gundy v. United States*, 139 S. Ct. 2116, 2139 (2019) (Gorsuch, J., dissenting) (finding the Court's current "intelligible principle" test "has no basis in the original meaning of the Constitution [or] in history"), and Wurman, *supra* note 8, at 1494 ("[T]here is significant evidence that the Founding generation adhered to a nondelegation doctrine . . .").

449 Cass R. Sunstein, *The Idea of a Useable Past*, 95 COLUM. L. REV. 601 *passim* (1995).