

# NONDELEGATION, ORIGINAL MEANING, AND EARLY FEDERAL TAXATION: A DIALOGUE WITH MY CRITICS

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## ABSTRACT

*Proponents of toughening the nondelegation doctrine invoke original meaning. Confronted with the many congressional statutes that broadly delegated power in the 1790s, they claim that each of those acts falls into some exceptional category to which the nondelegation doctrine was supposedly inapplicable or weakly applicable, especially non-coercive matters or non-domestic matters. In a recent study in the Yale Law Journal, I brought to light major legislation of 1798 that delegated broadly, yet was coercive and domestic: the “direct tax” on all real estate nationwide, which empowered federal boards to revise the taxable values of land parcels on a mass regional basis “as shall appear to be just and equitable”—a delegation that elicited no constitutional objections. Several scholars have published rebuttals to my study, defending the idea of a tough originalist nondelegation doctrine in the face of my findings.*

*This Article, written for Drake University Law School’s Constitutional Law Symposium, responds to those rebuttals. First, Philip Hamburger and Aaron Gordon each argue that the nondelegation doctrine categorically prohibits administrative rulemaking, but with certain categorical exceptions, including one for fact-finding, into which they say the boards’ “just and equitable” mass revisions of 1798 fall. I respond that a fact-finding exception expansive enough to cover the boards’ indeterminate, contestable, and sweeping exercises of power will be unbounded and not distinguishable in a principled or predictable way from administrative rulemakings in general today. This means Hamburger’s and Gordon’s versions of the doctrine do not have the categorical objectivity they claim to deliver. Second, Ilan Wurman argues for a noncategorical, open-ended version of the nondelegation doctrine that allows Congress to delegate “details” but not “important subjects.” The mass-revision power of 1798, contends Wurman, was a detail. I respond that (a) the power was broader and more consequential than Wurman maintains, and (b) a theory of the nondelegation doctrine premised on the distinction between “important*

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*subjects” and “details” is so malleable as to be non-falsifiable as a historical matter, which means that any judge who invokes the theory to toughen the doctrine today is not following history’s lead but instead is engaging in a creative and political act of constitutional construction. Third, Ann Woolhandler argues for a categorical version of the nondelegation doctrine with an exception for all “public rights,” a category that includes taxation, suggesting Congress could delegate freely regarding taxation but not, say, interstate commerce. I respond that incorporating an exception for public rights (including taxation) into the nondelegation doctrine is not supported by either the discourse or the pattern of legislation in the founding era, nor by the mainstream of case law that first elaborated the doctrine in the mid-nineteenth century.*

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#### I. INTRODUCTION

When Congress enacts a statute, it typically delegates power to one or more administrative agencies to put the statute into effect. If the power delegated is merely executive, there is no constitutional problem, as agencies are part of the executive branch.<sup>1</sup> But, under the U.S. Supreme Court’s longstanding view, if power conferred by congressional statute upon an agency comes with too much discretion, this amounts to a delegation of legislative power, and is therefore unconstitutional because Article I of the Constitution vests all its legislative powers in Congress alone.<sup>2</sup> This stricture is known as the nondelegation doctrine.<sup>3</sup> In case

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

2. *See id.*

3. *See id.* at 2121.

law applying the doctrine for about the last century, a statute passes muster so long as it gives the agency an “intelligible principle” to follow.<sup>4</sup> Practically, the doctrine has proven very permissive toward the statutes that have been challenged.<sup>5</sup> Only two provisions have ever been struck down, both from the National Industrial Recovery Act (NIRA) in 1935.<sup>6</sup>

Many judges, scholars, and advocates think congressional delegations have gone too far, that the nondelegation doctrine is too permissive, and that the judiciary should reform the doctrine to strike down more statutes. I call these people the nondelegation reformers. The reformers made progress at the Supreme Court in 2015, when Justice Clarence Thomas called for toughening the doctrine in a solo concurrence in *Department of Transportation v. Ass’n of American Railroads*, and again in 2019, when Justice Neil Gorsuch did the same in a dissent in *Gundy v. United States*, which Chief Justice John Roberts and Justice Thomas joined, and which Justice Samuel Alito, and later Justice Brett Kavanaugh, praised.<sup>7</sup>

Justices Thomas’ and Gorsuch’s reformist opinions claim the authority of the Constitution’s original meaning, which they interpret to impose a tougher constraint on delegation than the intelligible principle test.<sup>8</sup> There has been much new scholarship in recent years on original meaning as it relates to delegation, some broadly supporting the reformers’ view, and some skeptical.<sup>9</sup>

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4. *See id.* at 2123.

5. Cary Coglianese, *Dimensions of Delegation*, 167 U. PA. L. REV. 1849, 1849 (2019) (noting that “the Court has rejected all other challenges to legislation based on the nondelegation doctrine” except two in 1935).

6. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 551 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 433 (1935); *see also* Coglianese, *supra* note 5, at 1849 n.2 (citing *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936)) (“In one other case [*Carter Coal*], the Court has held unconstitutional the delegation of authority to private parties. But the Court’s underlying reasoning in that case sounded decidedly in due process considerations more than the nondelegation doctrine.”).

7. *Dep’t of Transp. v. Ass’n of Am. R.R.*, 575 U.S. 43, 66–91 (2015) (Thomas, J., concurring); *Gundy*, 139 S. Ct. at 2130–48 (Gorsuch, J., dissenting; Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., respecting the denial of certiorari).

8. *Dep’t of Transp.*, 575 U.S. at 70 (Thomas, J., concurring); *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

9. *See* Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1298 n.40 (2021) [hereinafter *Critical Assessment*] (citing many studies in the nondelegation debate); THE ADMINISTRATIVE STATE BEFORE THE SUPREME

The originalist case for a tougher nondelegation doctrine faces serious difficulties. Originalism begins with the constitutional text, but the text does not expressly prohibit the delegation of legislative power or say how to identify such a thing.<sup>10</sup> Originalism often considers the discourse leading up to ratification in 1788, but Americans in that period made only scattered assertions of legal limits on legislative delegation to the executive.<sup>11</sup> These may suggest there is *some* limit on delegation in the abstract, but they tell us basically nothing about what the limit *is*—nothing to shed light on whether the permissive test we have is sufficient, or if some tougher formulation is required.<sup>12</sup>

Because text and pre-ratification discourse do not tell us what to do, the scholarship has focused substantially on post-ratification practice, especially early congressional statutes.<sup>13</sup> Here, the reformers run into the problem that Congress in

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COURT: PERSPECTIVES ON THE NONDELEGATION DOCTRINE (Peter J. Wallison & John Yoo eds., AEI Press 2022). Additional studies include Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 243 (2021); Aditya Bamzai, *Alexander Hamilton, the Nondelegation Doctrine, and the Creation of the United States*, 45 HARV. J.L. & PUB. POL'Y 795 (2022); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 56 GA. L. REV. 81 (2021); Aaron Gordon, *Nondelegation Misinformation: A Reply to the Skeptics*, 75 BAYLOR L. REV. 152 (2023); Philip Hamburger, *Nondelegation Blues*, 91 GEO. WASH. L. REV. 1083 (2023) [hereinafter Hamburger, *Blues*]; Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. ONLINE 88 (2020) [hereinafter Hamburger, *Delegating*]; Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding: A Response to the Critics*, 122 COLUM. L. REV. 2323 (2022); Ann Woolhandler, *Public Rights and Taxation: A Brief Response to Professor Parrillo*, U. PITT. L. REV. ONLINE, Feb. 2023, at 1, 2, 4–9.

10. NICHOLAS R. PARRILLO, SUPPLEMENTAL PAPER TO: “A CRITICAL ASSESSMENT OF THE ORIGINALIST CASE AGAINST ADMINISTRATIVE REGULATORY POWER” 3–4 (May 14, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3696902](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3696902) [<https://perma.cc/3LDG-UNPR>] [hereinafter PARRILLO, SUPPLEMENTAL PAPER]; see also Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. 1479, 1558 (2022) (finding textual arguments for and against a limit on delegation).

11. PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 5–8, 36–49.

12. *Id.* at 5–8, 36–49 (finding that every such assertion cited in the secondary literature on nondelegation and original meaning has at least one of the following characteristics: (a) the assertion was rejected by a majority of the state political community to which it was addressed; (b) it concerned a delegation more extreme than anything the U.S. Congress has ever attempted; (c) it concerned a delegation whose content is unknown; (d) it concerned only the existence of some limit in principle, without specifics; or (e) it was stated equivocally by the speaker); see also Bamzai, *supra* note 9, at 801 n.25, 825 (finding that New York state legislators in 1787 debated the constitutionality of a delegation to the Continental Congress in a way that implied belief in “some version of a nondelegation doctrine” *within* their state government, but “not claim[ing] that the evidence . . . bears on the question of the scope of the nondelegation doctrine”).

13. See *Critical Assessment*, *supra* note 9, at 1298 n.40 (citing studies).

the 1790s made several broad delegations to the executive—for example: there was a delegation in 1790 to set the overall pay scale for disabled soldiers at any level below a cap, with no criteria for where to set it; later in 1790, to impose any regulations whatever on persons trading with Native Americans, with no criteria for what the regulations should be; in 1792, to lay off half the U.S. army, if “consistent with the public safety”; in 1794, to lay an embargo for up to five months on all ships of the United States, all ships in U.S. ports, or all ships of any foreign nation, if “the public safety shall so require,” imposing “such regulations as the circumstances of the case may require”; and in 1798, to decide criteria for seamen’s eligibility for government medical care, with no guidance as to what the criteria should be.<sup>14</sup>

But reformers deny that these and other delegations of the 1790s disprove a strong nondelegation doctrine.<sup>15</sup> The particulars of the denial vary depending on which of the two groups of nondelegation reformers we are talking about. The first group is the categorical reformers.<sup>16</sup> They claim that the original nondelegation doctrine categorically prohibited Congress from giving administrators any power to make binding domestic rules (except for rulemakings that turned upon fact-finding), and they accordingly recognize categorical exceptions to the nondelegation doctrine for delegations to make rules about privileges, which do not coercively bind anyone, and rules relating to nondomestic matters (foreign and military affairs).<sup>17</sup> The second group is the noncategorical reformers.<sup>18</sup> They emphasize Chief Justice John Marshall’s dictum in *Wayman v. Southard* that Congress cannot delegate “important subjects” but can delegate power to “fill up the details” on matters “of less interest.”<sup>19</sup> The noncategorical reformers think applying this important-versus-detail test will strike down more statutes than the intelligible principle test has, though they recognize the test is less objective than

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14. PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 14–16.

15. *Id.* at 16–20 (citing several reformers).

16. *See infra* Part II.

17. *See* Dep’t. of Transp. v. Ass’n of Am. R.R., 575 U.S. 43, 77–81 (2015) (Thomas, J., concurring); Hamburger, *Blues*, *supra* note 9, at 1102–03, 1109, 1112, 1114–16, 1119–20, 1150 n.354, 1202–04, 1211–13; PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 2–3, 83–110 (Univ. of Chi. Press 2014) [hereinafter HAMBURGER, UNLAWFUL]; Gordon, *supra* note 9, at 160–62; Michael B. Rappaport, *A Two-Tiered and Categorical Approach to the Nondelegation Doctrine*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT*, *supra* note 9, at 195, 197–204, 216–18, 223 n.19.

18. *See infra* Part III.

19. 23 U.S. (10 Wheat.) 1, 43 (1825).

what the categorical reformers aspire to.<sup>20</sup> In applying their test, the noncategorical reformers often say that a delegation in the realm of privileges or foreign-or-military affairs will tend to be less important and more delegable.<sup>21</sup>

Thus, for categorical reformers, the nondelegation doctrine is *inapplicable* to privileges and foreign-or-military affairs, while for noncategorical reformers, the doctrine is *less applicable* to those areas.<sup>22</sup> This allows both groups of reformers to explain away, for example, the several delegations cited above: pay for disabled soldiers is a privilege, as is medical care for seamen; laying off soldiers is military affairs, while laying an embargo is foreign affairs; trading with Native Americans may be foreign affairs, and might also be a privilege; and so on.<sup>23</sup> Furthermore, reformers argue that the *absence* of broad delegations of rulemaking power *outside* the exceptional categories affirmatively shows there to be a constitutional prohibition (or at least a constitutional norm) against such delegations when it comes to binding domestic rules.<sup>24</sup>

In my contributions to this debate, I have made two claims. My first claim has been that, even if delegations were absent in early congressional legislation on binding-and-domestic matters, we would not be able to infer much from that absence. Leaving aside the question of whether the supposed exceptions for foreign-and-military affairs and privileges were recognized in the founding era,<sup>25</sup> I have shown that these two “exceptional” categories actually cover the overwhelming majority of all statutes that Congress enacted in 1789–1799, delegatory or not. The number of early statutes that were coercive and domestic was small, the only clear examples being the Fugitive Slave Act, the master-

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20. *E.g.*, Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 361, 378–82 (2002); Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1502–03 (2021).

21. Lawson, *supra* note 20, at 400–02; Wurman, *supra* note 20, at 1502–03, 1538, 1543, 1548–49, 1556; *see also infra* text accompanying notes 286–87 (noting Lawson’s more recent work); *Gundy v. United States*, 139 S. Ct. 2116, 2133–37 (2019) (Gorsuch, J., dissenting) (incorporating *Wayman* into what otherwise reads as a categorical analysis).

22. *See* sources cited *supra* notes 17, 21.

23. *Critical Assessment*, *supra* note 9, at 1301–02 n.48 (citing several reformers). Noncategorical reformers add further arguments to explain some of these examples. *See, e.g.*, Wurman, *supra* note 20, at 1540–41.

24. *Critical Assessment*, *supra* note 9, at 1302 (citing reformers).

25. For evidence that the exceptions were not recognized in the founding era, see Mortenson & Bagley, *supra* note 9, at 2350–52; Nicholas R. Parrillo, *Foreign Affairs, Nondelegation, and Original Meaning: Congress’s Delegation of Power to Lay Embargoes in 1794*, 172 U. PA. L. REV. (forthcoming 2024) (manuscript on file with author) [hereinafter Parrillo, *Foreign Affairs*]; PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 19–20; Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1140–46 (2021).

seaman contract act, the handful of provisions making gold and silver legal tender, and the minority of taxes that were not import duties.<sup>26</sup> Thus, if there were an absence of coercive-and-domestic delegations, it might result simply from the scarcity of coercive-and-domestic *statutes* of any kind, not from any constitutional prohibition or constitutional tendency against delegations in such statutes.<sup>27</sup>

My second claim has been that, even within the small set of early congressional statutes that were coercive and domestic, there *was* at least one major delegation of rulemaking power to administrators.<sup>28</sup> This occurred in legislation of 1798 imposing a “direct tax” (that is, a property tax) on the nation’s real estate holders and slaveholders.<sup>29</sup> I identify this delegation in my article *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power (Critical Assessment)*.<sup>30</sup> Congress determined to raise \$2 million and, per the Constitution’s requirement for direct taxes, it “apportioned that sum among the states according to each state’s free population plus three-fifths of its slave population[,]” resulting in a dollar-denominated quota for each state.<sup>31</sup> Within a given state, the quota was filled in three steps: (i) by taxing slaveholders at fifty cents for each enslaved person they owned; (ii) by taxing each owner of a house on the house’s value, according to a progressive set of rates; and (iii) by taxing each owner of land on the land’s value, at whatever flat rate was necessary to make up the remainder of the quota.<sup>32</sup> As things turned out, the tax’s burden in most and

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26. PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 24–25.

27. *Id.* at 21–36.

28. *Critical Assessment*, *supra* note 9. The second of my two claims (introduced in this paragraph) was developed in *Critical Assessment*, while the first of my two claims (summarized in the preceding paragraph) was developed in PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10. *Critical Assessment* and the Supplemental Paper were simultaneous publications. Each was first publicly circulated on the Social Science Research Network in late September 2020. *Critical Assessment* was published in the April 2021 issue of the Yale Law Journal, and the Supplemental Paper reached final form on May 14, 2021, as noted on its cover page (with no changes to its basic claims since it was posted the previous September). And the claims of the two papers are complementary, as explained at the outset of PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 3. *See also Critical Assessment*, *supra* note 9, at 1302 n.51 (citing the relevant claims from the Supplemental Paper). I note the simultaneity and complementarity of the two papers because there is a passage in Hamburger, *Blues*, *supra* note 9, at 1214, that may give the inaccurate impression that I wrote the Supplemental Paper after *Critical Assessment* and as a retreat from it.

29. *Critical Assessment*, *supra* note 9.

30. *Id.*

31. *Id.* at 1302–04.

32. *Id.* at 1324.

perhaps all the states fell mostly, and often overwhelmingly, on land and houses.<sup>33</sup> The determinations of all those real estate values proved crucial in distributing the tax burden.

*Critical Assessment* brings to light how these crucial determinations were delegated to administrators. When Congress enacted the tax in 1798, it provided that all the real estate valuations were to be decided under another statute, the Valuation and Enumeration Act (V&E Act), which Congress enacted five days earlier.<sup>34</sup> The V&E Act divided every state into federal tax divisions and provided for a federal tax commissioner resident in each division, to be nominated by the President and confirmed by the Senate.<sup>35</sup> The commissioners of the divisions of each state constituted a federal tax board covering the state.<sup>36</sup> Each federal board was to divide its state into a “suitable and convenient number” of federal tax districts—which varied from about a dozen in a small state to over a hundred in a big one—and appoint one “principal assessor” and several “assistant assessors” for each district.<sup>37</sup> The assistant assessors assigned a taxable value to every piece of real estate in their district at what it was “worth in money,” a term the Act did not define.<sup>38</sup> Owners could appeal their valuations to the district’s principal assessor if they thought the valuations were out of proportion to others in the district.<sup>39</sup> But because the principal and assistant assessors in one district might take a different approach to valuation than their counterparts in other districts, the V&E Act empowered the federal board covering the state “to revise, adjust and vary the valuations of” all pieces of real estate within any district, en masse, by raising or lowering the district’s valuations uniformly by any percentage “as shall appear to be *just and equitable*,” a term the act did not define.<sup>40</sup> Nowhere did the legislation require any definition of value or any method for deciding it, nor was there any background consensus on such definition or methods.<sup>41</sup> By these indeterminate mass revisions, each federal board decided the distribution of taxable real-estate value among the geographic regions of its state.<sup>42</sup> And the boards were often

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33. *Id.* at 1326.

34. Act of July 14, 1798, § 2, 1 Stat. 597, 598 (enacting the tax itself); Act of July 9, 1798, 1 Stat. 580 (Valuation and Enumeration Act).

35. Act of July 9, 1798, 1 Stat. 580, 581–84.

36. *Id.* at 584.

37. *Critical Assessment*, *supra* note 9, at 1328–30.

38. Act of July 9, 1798, 1 Stat. 580, 585; *see also Critical Assessment*, *supra* note 9, at 1366–68.

39. *Critical Assessment*, *supra* note 9, at 1334.

40. Act of July 9, 1798, § 22, 1 Stat. 580, 589 (emphasis added).

41. *Critical Assessment*, *supra* note 9, at 1345–91.

42. *See id.*

aggressive: to give one of the numerous possible examples, the federal board covering Maryland raised the tax value of all houses in Baltimore, the nation's then third-largest city, by 100 percent.<sup>43</sup>

Each federal board's "just and equitable" mass-revision power was a rulemaking power, in that it generically determined many individual legal outcomes (tax liabilities).<sup>44</sup> The power was coercive and domestic—a tax on land. The power seems important, at least intuitively. And considering that the boards were left to define value and choose the methods to decide it, the power did not depend on a finding of fact, if one defines fact-finding as objective, like an import-duty official weighing a shipment of sugar.<sup>45</sup> Moreover, the power elicited no recorded constitutional objections, even though the tax proved to be the federal government's largest non-military endeavor, as measured by the number of federal officials involved, of the Constitution's first two decades.<sup>46</sup>

Several nondelegation reformers—including Philip Hamburger,<sup>47</sup> Aaron Gordon,<sup>48</sup> Ilan Wurman,<sup>49</sup> and Ann Woolhandler<sup>50</sup>—have written thoughtful critiques of *Critical Assessment*, defending the originalist case for a strong nondelegation doctrine in the face of its findings. In making these defenses, some have singled out *Critical Assessment*'s findings as the most serious originalist challenge to the reform effort. Gordon calls *Critical Assessment* the "most formidable" of recent studies questioning the originalist basis for a robust nondelegation doctrine.<sup>51</sup> Wurman writes that the "direct-tax legislation of 1798 is

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43. *Id.* at 1342–43.

44. This definition of rulemaking is intuitive and tracks various authorities. Speaking of the original constitution, Hamburger refers to rules as "generalities directed to the society as a whole," as distinct from "judgments in particular cases or controversies applying such rules to particular persons." Hamburger, *Blues*, *supra* note 9, at 1118. Modern cases on matters like due process (applicable only to adjudications and not rules) have defined rulemaking similarly, including with reference to mass revisions of real estate tax values. *Critical Assessment*, *supra* note 9, at 1304–05.

45. *See Critical Assessment*, *supra* note 9, at 1345–91.

46. *See id.* at 1328–32, 1429–55.

47. Hamburger, *Blues*, *supra* note 9, at 1209–14. While Hamburger argues for an original constitutional constraint on what power Congress may give agencies, he thinks the terminology of delegation and nondelegation does not capture the problem as well as language about "vesting" does. *Id.* at 1169–75. I speak of Hamburger's claims in terms of "nondelegation" for simplicity, since that is the term used by other authors.

48. Gordon, *supra* note 9, at 215–56.

49. Wurman, *supra* note 20, 1549–53.

50. Woolhandler, *supra* note 9.

51. Gordon, *supra* note 9, at 264.

the strongest evidence in favor of a weak nondelegation doctrine.”<sup>52</sup> Also, reformer Ronald Cass, while not giving his own free-standing critique of *Critical Assessment*, says that, of all early legislation, “[t]he tax regulation program discussed by Professor Parrillo comes closest to the sort of delegation that would raise constitutional concerns” for a strong constraint on delegation.<sup>53</sup>

This Article engages the critical responses of Hamburger, Gordon, Wurman, and Woolhandler. It proceeds as follows.

Part II focuses on the categorical reformers, Hamburger and Gordon.<sup>54</sup> The attraction of their approach being categorical is that it promises to resolve the most powerful objection to judicial enforcement of the nondelegation doctrine: that the judiciary cannot apply it in a principled or predictable way.<sup>55</sup> Hamburger and Gordon each claim the federal boards’ mass revisions can be reconciled with a flat prohibition against binding domestic rulemaking because the revisions fall within the exception for fact-finding.<sup>56</sup> I argue that defining the fact-finding exception to include mass real-estate valuation dissolves the hard boundaries of that exception and renders the categorical approach noncategorical, negating its special attraction.<sup>57</sup> Mass real-estate valuation was not an *objective* fact-finding like weighing a shipment of sugar.<sup>58</sup> Instead, such valuation depended on the decisionmaker’s selection among divergent possible definitions of value and methods for determining it (on which Congress in 1798 deliberately gave no direction), was recognized by contemporaries as uncertain and contested, and was the object of intense conflict in several state legislatures who taxed land by value prior to 1798, where politics filled the vacuum of objectivity.<sup>59</sup> Nor was real estate’s value a “fact” in some more abstract sense; it was not (say) a feature of the physical world, nor an event that occurred in the historical past (there being recent sale or rental prices for only a small and unrepresentative fraction of all taxable land).

The key question is whether one can define the category of fact-finding so that it encompasses the federal boards’ “just and equitable” mass revisions of 1798,

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52. Wurman, *supra* note 20, at 1497.

53. Ronald A. Cass, *Fixing Deference: Delegation, Discretion, and Deference Under Separated Powers*, 17 N.Y.U. J.L. & LIBERTY 1, 34 (2023).

54. *See infra* Part II.

55. On the attraction of their approach, see *infra* Part II.A.

56. Hamburger, *Blues*, *supra* note 9, at 1211–13; Gordon, *supra* note 9, at 215–56.

57. *See infra* Part II.

58. *See infra* Part II.B.

59. *See infra* Part II.B.

but still has clear and workable boundaries.<sup>60</sup> In Hamburger's view, what caused a decision to fall into the category of fact-finding was that people expected the decision to be made in a spirit of discernment rather than willfulness (the same was true, he says, for applications of law, which, like fact-findings, could be done by administrators).<sup>61</sup> I do not think this formulation is enough to accomplish the categorical reformers' goal. Insofar as people circa 1798 had expectations that the mass revisions (or other subjective official decisions that Hamburger says were fact-findings) should be made in a spirit of discernment, those expectations were no more than vague aspirations, were not matters of enforceable legal doctrine, and were easily and frequently disregarded.<sup>62</sup> Making the existence of such abstract and amorphous expectations into the test for determining what matters are delegable does not provide us with a categorical nondelegation doctrine.<sup>63</sup> It provides us with a nebulous one.<sup>64</sup> It is not clear what, if any, delegated powers today would fail Hamburger's test for what is delegable, since today's black-letter doctrine and official discourse include (at least) a loose aspiration that agencies should make their decisions by discerning facts and applying law—indeed the ideal of discernment may well be more meaningful today than in the 1700s because the judiciary today does more to enforce it.<sup>65</sup>

Gordon offers a somewhat different view of what causes an official decision to fall within the fact-finding exception.<sup>66</sup> A fact-finding decision, in his view, is a decision that does not depend on the decisionmaker's own policy judgment, but instead upon things like acts of third parties, that is, matters external to the decisionmaker.<sup>67</sup> I do not think this distinction can provide a workably categorical test, at least not if we cast the mass revisions of 1798 as fact-findings. If we cast them as such, then fact-findings do not need to be objective or even close to it; instead, they can allow the decisionmaker broad discretion to define what is to be found and choose the methods for finding it.<sup>68</sup> The question becomes: *how much* does the decision depend upon objective external realities compared to the decisionmaker's own subjective choices of definition and method? This a question

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60. *See infra* Part II.

61. *See* Hamburger, *Blues*, *supra* note 9, at 1211–13; HAMBURGER, UNLAWFUL, *supra* note 17, at 97–100, 107–10.

62. *See infra* Part II.C.

63. *See infra* Part II.C.

64. *See infra* Part II.C.

65. *See infra* Part II.C.

66. Gordon, *supra* note 9, at 160–61 & n.40.

67. *See id.*

68. *See infra* Part II.D.

of degree that necessitates drawing an arbitrary line, assuming one can even figure out an ordinal ranking of decisions according to the relative importance of subjective choice to each one, which will often be impossible. When fact-finding encompasses so much more than what is objective, there is no categorical way to say what agency decisions are *not* factual. To illustrate, consider that the archetypal kind of agency decision is one couched in terms of instrumental rationality: the statute names some desired state of the world (like achieving “safety” or redressing “danger”) and tells the agency to identify the means to shift the world toward that state. Identifying those means in any one instance will be *somewhat* factual, but the question of *how factual* will be in the eye of the beholder (if facts need not be objective). That goes double for the question of which decisions are *sufficiently factual* to be categorized as fact-findings for purposes of nondelegation.<sup>69</sup>

Part III addresses the noncategorical approach, exemplified by Wurman, who says Congress in the 1798 direct-tax legislation decided all the important matters and that the federal boards’ “just and equitable” mass revisions were mere details.<sup>70</sup> I identify several points on which I think the federal boards had wider delegated power than Wurman argues.<sup>71</sup> But even if I am right about all those points, there were still *some* things Congress *did* decide, if only the fixed sum of tax liability that each board had the power to spread around. And one can always say that sum was small enough not to be “important,” because that term is so elastic. What this reveals is that the noncategorical reformers’ theory—that Congress can delegate “details” but not “important” matters—is non-falsifiable, because the terms are so malleable.

Part III then considers what we should make of this theory. Given the thinness of the originalist evidence for a nondelegation doctrine (potentially suggesting *some* limit on delegation but telling us nothing about what the limit is), we can assume *arguendo* the existence of *some* doctrine, unspecified as to content.<sup>72</sup> Getting from that abstract assumption to a formulation that actually

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69. Besides invoking the fact-finding exception, Hamburger, Gordon, and other reformers briefly suggest the direct-tax legislation of 1798 was somehow insignificant in a way that weakens its originalist weight. This point is addressed in Nicholas R. Parrillo, *Nondelegation, Original Meaning, and Early Federal Taxation: A Dialogue with my Critics*, 71 DRAKE L. REV. online app. at 1–6 (2024), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=4830026](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4830026) [hereinafter Appendix].

70. See *infra* Part III; Wurman, *supra* note 20, at 1549–53.

71. See *infra* Part III.B; Wurman, *supra* note 20, at 1549–53.

72. When I said in *Critical Assessment* that originalist evidence might suggest the existence of some limit but nothing about its content, I contrasted my view with what I understood to be the claim of Julian Mortenson and Nicholas Bagley that “the Constitution

decides cases is not something judges can do by *interpreting* evidence of the Constitution's original meaning. Instead, it requires them to engage in open-ended *construction*, that is, to make normative choices of a political and creative nature. Judges could adopt the important-versus-detail test (and give it more specific content) through that kind of creative construction, but if they do, they should be transparent and take responsibility for what they are doing, not claim that their approach is required by original meaning.

Finally, I consider Woolhandler's critique, which is addressed in an Online Appendix,<sup>73</sup> due to the space constraints of this symposium piece, on which the law review editors have already been generous. Recall that the categorical reformers view the nondelegation doctrine as inapplicable to privileges, and the noncategorical reformers view it as less applicable to privileges—a view that each camp uses to explain away many early delegations, though not the 1798 direct tax.<sup>74</sup> Woolhandler suggests a different dividing line for deciding how strong the nondelegation doctrine is.<sup>75</sup> Rather than drawing the line between privileges and rights, she suggests drawing it between “public rights” and “private rights”—the Supreme Court's distinction in the 1856 case *Murray's Lessee v. Hoboken Land & Improvement Co.* for deciding which matters can be adjudicated by executive officers and which must be decided by courts.<sup>76</sup> Essentially, Woolhandler argues that a distinction we have historically applied to distinguish judicial from executive power can also be applied to distinguish legislative from executive power.<sup>77</sup> While the distinction between public rights and private rights in *Murray's Lessee* mostly tracks that between privileges and rights, there is one crucial difference: taxation is counter-intuitively a *public right*, lumped in with privileges and segregated from things like the regulation of interstate commerce.<sup>78</sup> If this distinction informs the original meaning of the nondelegation doctrine, then taxation might be exempt from the doctrine or would at least receive more permissive treatment under it, justifying the delegations to the federal boards of 1798 while preserving nondelegation's strong application to matters like interstate commerce.<sup>79</sup>

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originally imposed *no* limit on delegation.” *Critical Assessment*, *supra* note 9, at 1299 n.43 (emphasis in original). Mortenson and Bagley have since explained that “[i]f our claim is not identical to Parrillo's, it is very close.” Mortenson & Bagley, *supra* note 9, at 2334 n.49.

73. See Appendix, *supra* note 69, at 6–25; Woolhandler, *supra* note 9.

74. See *supra* notes 13–24 and accompanying text.

75. See Woolhandler, *supra* note 9.

76. 59 U.S. 272 (1856); Woolhandler, *supra* note 9.

77. See Woolhandler, *supra* note 9.

78. See Appendix, *supra* note 69, at 6–7; *Murray's Lessee*, 59 U.S. 272.

79. See Appendix, *supra* note 69, at 7.

Woolhandler makes a subtle and in some ways ingenious contribution, but I find it unpersuasive for several reasons.<sup>80</sup> First, Woolhandler cites no primary sources, from the founding era or any other time, which actually say that taxation falls into a category to which the nondelegation doctrine is inapplicable, or less strongly applicable than it is to something else.<sup>81</sup> Second, there is the problem that founding-era speakers expressly and strongly characterized taxation as a “legislative power,” suggesting it should fall within the core of any category of non-delegable matters.<sup>82</sup> Woolhandler posits that the speakers may have meant “legislative” in the sense of *so strongly within the legislature’s control that the legislature is free to delegate*, but this would suggest that the Framers, in using the crucial word “legislative,” were switching between two diametrically opposed definitions of the term without ever expressly saying they were doing so, which would be destabilizing to the text-centrism that most originalists espouse.<sup>83</sup> Third, while Woolhandler argues that we can infer a constitutional principle that broad rulemaking delegations are confined to “public rights” from the pattern of early congressional legislation, the early Congresses passed statutes on “private rights” so rarely that it is dubious to make any inference from the absence of delegations in those acts.<sup>84</sup> Fourth, the nondelegation doctrine’s history in the courts does not confirm Woolhandler’s theory.<sup>85</sup> Federal case law never followed the theory and, in a few cases in the late 1800s, seemed to contradict it.<sup>86</sup> As for state cases interpreting state constitutions (assuming they are even relevant), early ones decided in 1799 and 1830 contradicted the theory, and while some later state cases beginning in the late 1840s may have supported the theory, they did not do so clearly, while many other state cases in the mid-1800s eschewed the theory, such that it never became mainstream.<sup>87</sup>

## II. THE CATEGORICAL REFORMERS: WERE THE MASS REVISIONS FACT-FINDINGS?

### A. *The Categorical Attraction*

This Part addresses the critiques by Hamburger and Gordon. Though formulated independently, their critiques are similar, partly because both are

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80. See Appendix, *supra* note 69, at 6–25.

81. See Appendix, *supra* note 69, at 7–8; Woolhandler, *supra* note 9.

82. See Appendix, *supra* note 69, at 8.

83. See Appendix, *supra* note 69, at 9; Woolhandler, *supra* note 9, at 5–7.

84. See Appendix, *supra* note 69, at 9–12; Woolhandler, *supra* note 9, at 4–8.

85. See Appendix, *supra* note 69, at 12–25.

86. See Appendix, *supra* note 69, at 12.

87. See Appendix, *supra* note 69, at 12–25.

among the categorical reformers.<sup>88</sup> Before introducing their critiques, we need some background on the nature and attraction of the categorical approach to reforming nondelegation.

For a long time, perhaps the most powerful argument against judicial enforcement of the nondelegation doctrine has been that nobody can figure out a principled way to implement it.<sup>89</sup> Justice Antonin Scalia, while believing the doctrine to be “a fundamental element of our constitutional system,” thought it was “not an element readily enforceable by the courts”:

Once it is conceded, as it must be, that no statute can be entirely precise, and that some judgments, even some judgments involving policy considerations, must be left to the officers executing the law and to the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . . Since Congress is no less endowed with common sense than we [(the Court)] are, and better equipped to inform itself of the “necessities” of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we 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.<sup>90</sup>

A major reason why the categorical approach to reforming nondelegation has attracted support is that it promises to resolve Justice Scalia’s concern about unprincipled decisions of degree that are unsuited to courts. A leading articulation of the categorical approach was set forth by Hamburger in his book *Is Administrative Law Unlawful?*, where he argued that the original Constitution prohibited delegation of *all* binding domestic rulemaking power except when the rulemaking simply discerned facts or persons’ statutory duties.<sup>91</sup> Justice Thomas’

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88. Compare Hamburger, *Blues*, *supra* note 9, at 1209–14, with Gordon, *supra* note 9, at 215–56.

89. See *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

90. *Id.*

91. The book clearly articulated a prohibition against rulemaking with exceptions for nonbinding matters (privileges) and for fact-finding (and relatedly, determinations of persons’ legal duties in particular situations). HAMBURGER, *UNLAWFUL*, *supra* note 17, at 2–3, 83–110. The book’s foreign-affairs exception may have been narrower than Hamburger’s more recent articulation of it. See, e.g., *id.* at 104–10. Hamburger has now developed a clear foreign-affairs exception; he speaks in terms of a prohibition against “binding national domestic rulemaking.” Hamburger, *Blues*, *supra* note 9, at 1089. He says possibly the Constitution requires some degree of specificity for delegations regarding nonbinding matters, but surely less than for binding rules. *Id.* at 1116–17.

*American Railroads* concurrence adopted a version of the nondelegation doctrine similar to Hamburger's and cited him repeatedly.<sup>92</sup> The opinion held up the categorical formulation as the answer to Justice Scalia's fear, stating, "[o]ur reluctance to second-guess Congress on the *degree* of policy judgment is understandable; our mistake lies in assuming that *any* degree of policy judgment is permissible when it comes to establishing generally applicable rules governing private conduct."<sup>93</sup>

Hamburger has recently taken this reasoning further, pointing to the categorical approach's determinacy as a key advantage over today's alternative reform approach—the noncategorical one that rests upon *Wayman*'s dictum that Congress cannot delegate "important subjects."<sup>94</sup> Besides arguing that this is actually a misreading of *Wayman*, Hamburger warns "that the importance test is not determinate or predictive. It cannot help judges or anyone else sort out cases."<sup>95</sup> Under it, judges may

pursue an undefined and therefore wavering line between importance and unimportance. They may end up chaotically tacking back and forth in response to popular winds or their personal preferences. Indeed, a judicial inquiry into the idea of importance is apt to be very political. Whether or not something is important will be perceived differently by different persons, depending on their situations.<sup>96</sup>

Hamburger finds this dangerous because judges' roles are "not to make political judgments, let alone about something as open-ended as importance."<sup>97</sup> Altogether, the *Wayman*-inspired approach "invites the judiciary to pursue a highly political doctrinal goose chase."<sup>98</sup> Gordon similarly argues for a "categorical approach" partly on the ground that the *Wayman*-type alternative is too "nebulous."<sup>99</sup> Other categorical scholarship argues the same.<sup>100</sup>

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92. *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 71–74 (2015) (Thomas, J., concurring) (citing HAMBURGER, UNLAWFUL, *supra* note 17, at 33–36, 38–39).

93. *Id.* at 86.

94. Hamburger, *Blues*, *supra* note 9, at 1100–04.

95. *Id.* at 1103.

96. *Id.* at 1104.

97. *Id.*

98. *Id.* at 1147.

99. Aaron Gordon, *Nondelegation*, 12 N.Y.U. J.L. & LIBERTY 718, 780–81 (2019).

100. *See* Rappaport, *supra* note 17, at 195, 205–06.

### B. *The Nature of the Federal Boards' Mass Revisions*

Categorical formulations of the nondelegation doctrine generally recognize a categorical exception allowing delegation of rulemaking that simply turns upon fact-findings.<sup>101</sup> Hamburger's and Gordon's critiques both claim that the federal boards' "just and equitable" mass revisions in 1798 were fact-findings and thus, no threat to the case for a nondelegation doctrine that is categorical and tougher than what we have.<sup>102</sup> But recall what the V&E Act did: it said each federal board was to divide its state into districts and "revise, adjust and vary" all valuations in each district "as shall appear to be just and equitable"—valuations that had been set in the first instance by assistant assessors at what each piece of real estate was "worth in money."<sup>103</sup> The legislation never defined "just and equitable" or "worth in money" nor gave any definition of value or specified any method for deciding it.<sup>104</sup> To nonetheless call the boards' decisions "fact-findings" is to adopt an extremely broad understanding of fact-finding, one that is not categorically distinct from broad delegations of rulemaking power to agencies today, and without any of the determinacy or predictability that the categorical reformers claim their approach will deliver.<sup>105</sup>

To see why, let us consider whether and how real-estate valuation can be understood as fact-finding. I will start from the premise that some things are *objective facts*, that is, features of the world about which reasonable people cannot disagree. These include features of the physical world that we all accept can be discerned through certain technologies, such as the weight of a commodity shipment. They would also include historical facts, that is, events that happened in the past for which we have accepted records, such as the date and price of a land sale in a recorded deed. But the value of a parcel of land is not an objective fact, at least not unless it has recently been sold or rented under some set of market conditions that we could all agree are in the range of "normal." This is not to say that no value of any resource is ever an objective fact. If you have one unit of a commodity that is traded on a public exchange, you can use today's exchange price to figure out the unit's value whether or not the particular unit itself has recently

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101. See *Dep't. of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 77–81 (2015) (Thomas, J., concurring); Hamburger, *Blues*, *supra* note 9, at 1112, 1150 & n.354, 1200, 1204, 1210–11; HAMBURGER, *UNLAWFUL*, *supra* note 17, at 97–102, 107–10; Gordon, *supra* note 9, at 160–62; Rappaport, *supra* note 17, at 195, 216–18.

102. Hamburger, *Blues*, *supra* note 9, at 1211; Gordon, *supra* note 9, at 219–23.

103. Act of July 9, 1798, 1 Stat. 580, 585, 589.

104. See *Critical Assessment*, *supra* note 9, at 1366–69.

105. See *infra* Parts II.C, II.D.

been sold.<sup>106</sup> But real estate is not like that. It is not a commodity traded on a public exchange, but instead, is heterogeneous and illiquid.

Deciding the value of real estate not recently rented or sold in a normal market requires choices of definition and method that are not even close to objective, that is, reasonable people easily disagree about them. This is what a property-tax lawyer would tell you today.<sup>107</sup> And it was just as true in 1798. Among the states that taxed real estate by value at that time and the statutes they had most recently passed on the subject, the subset that specified any definition of value diverged from each other, with some focusing on the predicted price of a future sale of the land and others on the land's income.<sup>108</sup> These two methods could point in different directions (as would occur, for example, amid land speculation—for which there was a “craze” in the United States in the 1790s).<sup>109</sup> When Treasury Secretary Oliver Wolcott made the proposal to establish federal boards of valuation that Congress ultimately adopted, he said, “there appears to be no necessity that the principles of valuation should be uniform in all the [s]tates[,]” meaning that the federal board in each state would choose its own principles.<sup>110</sup> When Congress enacted the actual legislation in 1798, it deliberately chose the emptiest definition of value possible: the House of Representatives initially passed a bill telling assessors to value land at the amount “for which” it “might be sold for immediate payment in money,” but the Senate, by a vote of 14 to 8, resolved to replace this wording with the vaguer phrase “worth in money,” and the House acquiesced.<sup>111</sup> Even the minimal guidance that assessors should imagine a future cash sale was gone.<sup>112</sup>

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106. Even for this, objectivity may depend on agreement that the exchange is not subject to a speculative bubble.

107. See Christina Berger, *Determining Market Value: Reconciling the Three Approaches to Real Estate Valuation for Ad Valorem Taxes*, J. STATE TAX'N, May-June 2007, at 31, 32 (“[A] property’s value is commonly not identical under any two of the [three most common] methods [of valuation].”); *id.* at 36 (“[T]he question of valuation will always be disputed, and the methods of valuations will continually be debated.”); Carol Kokinis-Graves, *Use of the Cost, Income and Sales-Comparison Approaches in the Valuation of Real Estate*, J. STATE TAX'N, July-Aug. 2006, at 23, 32 (“Experts often disagree on many issues, including the type of approach to use . . .”).

108. *Critical Assessment*, *supra* note 9, at 1350–58.

109. JACOB E. COOKE, TENCH COXE AND THE EARLY REPUBLIC 324 (Univ. of N.C. Press 1978).

110. *Critical Assessment*, *supra* note 9, at 1366 (quoting Oliver Wolcott, Jr., *Direct Taxes* (1796), in 1 AMERICAN STATE PAPERS: FINANCE 414, 441 (Walter Lowrie & Matthew St. Clair Clarke eds., Washington, D.C., Gales & Seaton 1832)).

111. *Critical Assessment*, *supra* note 9, at 1323–24, 1367.

112. *See id.*

And the indeterminacy of basic definitions was only the beginning. If and when officials chose a definition, there were wide-open methodological choices for how to get to actual dollar figures. First off, methods based on land's rental prices—which might have provided some determinacy—were typically a non-starter, as tenancy was unusual in the United States.<sup>113</sup> Any method that looked to parcels' past sale prices or future income faced myriad data-gathering and interpretive questions.<sup>114</sup> Among other things, one had to guess the predictiveness of past and present economic conditions at a time when they were unsteady (there was a recession from 1797 to 1798) and often were changing quite unevenly within a single state, not to mention that the nation's biggest cities were experiencing acute economic disruption on the statutory valuation date (October 1, 1798), as they had been evacuated and cut off from commerce due to yellow fever.<sup>115</sup> Plus, any method looking to lands' past sale prices faced particular difficulties: deeds were sometimes unrecorded, might conceal the true price, and were always scattered across local courthouses, making them costly to consult; past sales were often few, as typical annual turnover seems to have been on the order of one percent by parcel, about a quarter of the rate for rural land in the modern era; and parcels recently sold were not a random or representative sample of all land in their area (whether the land on sale tended to be richer or poorer varied by place and time), leading one economic-history study to conclude that “it was impossible for eighteenth-century contemporaries to produce a meaningful average price per acre.”<sup>116</sup> The extant regulations issued by individual federal boards to their respective assessors reflected much variation in how much reliance each board placed on past prices of land sales, plus variation in how or whether officials should adjust valuations based on changes in the scarcity of money, which could be severe in this era and had great effects on land prices.<sup>117</sup> While records of actual board deliberations on mass revisions are few, it seems the board covering Connecticut did substantial data-gathering on land-sale prices (this data seems to have informed its revisions alongside unknown “X” factors), but that approach was unusual, as the board in South Carolina appears to have done no formal research and relied on the members' sense of differences in soil quality, housing quality, and other factors across the state.<sup>118</sup>

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113. *Id.* at 1347 (citing Wolcott, *supra* note 110, at 439–41).

114. *Id.* at 1358–66.

115. *Id.* at 1359–62.

116. *Id.* at 1362–66 (quoting David B. Ryden & Russell R. Menard, *South Carolina's Colonial Land Market: An Analysis of Rural Property Sales, 1720-1775*, 29 SOC. SCI. HIST. 599, 611 (2005)).

117. *Critical Assessment*, *supra* note 9, at 1372–79.

118. *Id.* at 1378–84.

Americans discussing federal direct taxation around 1798 saw that valuations were uncertain and contestable, as the weight of a shipment of sugar was not. Take some examples. A Supreme Court Justice in 1796 asked whether, in the event of a federal direct tax, “the laws of each state furnish data, from whence to extract a rule [of valuation], whose operation shall be equal and certain in the same state?” and answered it was “doubtful”;<sup>119</sup> former Treasury Secretary Alexander Hamilton, in 1797, said Congress should refrain from taxing real estate by value, to avoid “the very bad business of valuations”;<sup>120</sup> a member of Congress, in 1797, said “it was impossible to lay a land tax with any degree of accuracy”;<sup>121</sup> the chair of the House Ways and Means Committee, in 1798, said “valuations are at best uncertain”;<sup>122</sup> another member of Congress, in 1798, said “there would always be great uncertainty as to the value of property”;<sup>123</sup> a former federal board member, in 1799, said “the judgments of man, individually, respecting the value of landed property, are as various as their principles and practices in the common occurrences of life”;<sup>124</sup> the Ways and Means chair, in 1800, said that in the larger states the federal assessors within *a single district* were so often adopting “different methods of assessment” that Congress should give each federal board power to make mass revisions on an *intra-district* basis;<sup>125</sup> another former federal board member, in 1805, said federal assessors across South Carolina “had proceeded very wide of each other in fixing their valuations of property.”<sup>126</sup>

The indeterminacy of real-estate valuation was especially evident and fraught when it came to the *mass* decisions about value, across the geographic

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119. *Id.* at 1351–52 (quoting *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 179 (1796) (opinion of Paterson, J.)).

120. *Id.* at 1345 (quoting Letter from Alexander Hamilton, Former U.S. Treasury Sec’y, to Oliver Wolcott, Jr., U.S. Treasury Sec’y (June 6, 1797) (available at *Founders Online*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Hamilton/01-21-02-0059> [<https://perma.cc/6346-KBC3>])).

121. *Id.* at 1345–46 (quoting 6 ANNALS OF CONG. 1899 (1797) (statement of Rep. Williams)).

122. *Id.* at 1345 (quoting 8 ANNALS OF CONG. 1839 (1798) (statement of Rep. Harper)).

123. *Id.* at 1346 (quoting 8 ANNALS OF CONG. 1840 (1798) (statement of Rep. Macon)).

124. *Id.* at 1374 (quoting Robert Anderson, *Letter to the Editor*, CITY GAZETTE & DAILY ADVERTISER, Oct. 16, 1799, at 2 (available at *America’s Historical Newspapers*, READEX, <https://www.readex.com/products/americas-historical-newspapers> [<https://perma.cc/UZU8-ALMW>])).

125. *Id.* at 1377 (quoting *Congressional Register*, VERGENNES GAZETTE & VT. & N.Y. ADVERTISER, Jan. 9, 1800, at 2 (available at *America’s Historical Newspapers*, *supra* note 124)).

126. *Id.* at 1378 (Letter from J. Alexander, Comm’r in S.C., to Albert Gallatin, U.S. Treasury Sec’y (Jan. 17, 1805), in CITY GAZETTE, Feb. 7, 1805, at 2 (available at *America’s Historical Newspapers*, *supra* note 124)).

regions of a state, that each federal board had to make. Consider how vast the mass revisions could be: the federal board in Virginia processed over 40 million acres of land (more than 60,000 square miles, an area larger than England), which it divided into 84 districts, and it essentially had to decide the total land value of each district, relative to all the others.<sup>127</sup> The subjectivity of these kinds of decisions is evident from the history of analogous decisions made in the states from the 1780s through the mid-1790s regarding the intra-state distribution of value for *state* property taxes.<sup>128</sup> Notably, each of the nine state legislatures that taxed real estate by value kept jealous control of how to allocate the burden across the state's geographic regions; intra-locality assessments were left to local assessors, but the distribution of taxable values *between* localities was decided by the state legislature itself, in provisions of the tax statute that set a mandatory average per-acre value (or a fixed total tax liability) for each locality.<sup>129</sup> The indeterminacy of these decisions about the relative values of different intra-state regions is apparent in the political conflicts that repeatedly erupted over such matters in the various state legislatures, often pitting a state's wealthy commercial coast against its poor frontier.<sup>130</sup> No comparable conflict occurred over relatively more objective matters such as how to count population.<sup>131</sup> Indeed, although the Articles of Confederation said to allocate fiscal burdens to states according to their respective land values, the Continental Congress found it impossible to reach agreement about how to do nationwide valuation and instead tried to amend the Articles to adopt a relatively more objective and less contestable approach (based on population), which is what the Constitution of 1787 eventually did.<sup>132</sup>

Thus, real-estate valuation—especially on a mass basis across geographic regions—was nothing like an objective fact such as the weight of a shipment of sugar. To be sure, valuations were not entirely divorced from factual objectivity.<sup>133</sup> Despite the indeterminacy of definitions and methods, presumably everyone could agree that, by any plausible definition or method, land in a fertile region with a

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127. Virginia Abstract of Lands, Oliver Wolcott Jr. Papers 1614-1880, Box 60, Conn. Museum of Culture & Hist., Hartford, Conn.

128. See *Critical Assessment*, *supra* note 9, at 1392–401.

129. *Id.* at 1392–93.

130. *Id.* at 1393–401.

131. *Id.* at 1348–50.

132. *Id.*; ROBIN L. EINHORN, *AMERICAN TAXATION: AMERICAN SLAVERY* 124–32, 138–45, 162–71 (Univ. of Chi. Press 2006). Obviously, there were tremendous political compromises on how to assign representation and taxation to the free and enslaved portions of the population, but these did not pertain to the actual counting of persons.

133. See *Critical Assessment*, *supra* note 9, at 1307.

river was worth more on average than land in an infertile region with no river.<sup>134</sup> And everyone might agree that certain objective facts (perhaps recent land sale prices in the area) would be among those relevant to the ultimate determination, however it was done. But objectivity would run out when administrators had to decide *how much higher* the average value of land in the fertile region was compared to the infertile one, what additional objective facts might be relevant, or how to reason from all the inputs to the decide the overall value.

### C. Hamburger's Response

In his article *Nondelegation Blues*, Hamburger claims that the federal boards' "just and equitable" mass revisions under the 1798 legislation are consistent with a categorical prohibition against domestic coercive rulemaking because they fall into the familiar exception for "[d]eterminations of facts."<sup>135</sup> In characterizing the mass revisions this way, Hamburger says that "assessments, were understood at common law to be judicial in nature . . . . Although not actually exercises of judicial power, [assessments] were expected to mimic judicial decisions at least in being exercises of judgment . . . . [S]uch determinations were expected to be done in a judicial rather than a legislative spirit . . . ."<sup>136</sup> Hamburger later adds, with reference to statutes authorizing assessing officials to decide what they thought was just and equitable: "This was discretion in the sense of discernment."<sup>137</sup>

To fully appreciate Hamburger's argument, we need some background. For all the propositions above, Hamburger cites his book *Is Administrative Law Unlawful?*, particularly the section on "Determinations of Legal Duties" by executive officers.<sup>138</sup> Considering his assertion that the mass revisions were determinations of facts, one might expect him to have cited another section of the book that appears a few pages later on "Determinations of Facts" by executive officers.<sup>139</sup> But for Hamburger, the two sections—and the types of determinations they respectively cover—are deeply linked.<sup>140</sup> As he writes in introducing the second section: "Just as executive officers could determine legal duties, so too they could determine legally significant facts. In particular, the legislature could

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134. *Id.*

135. Hamburger, *Blues*, *supra* note 9, at 1211.

136. *Id.*

137. *Id.* at 1212 n.605.

138. *Id.* at 1211 nn.599–600, 1212 n.605 (citing HAMBURGER, UNLAWFUL, *supra* note 17, at 97–100).

139. HAMBURGER, UNLAWFUL, *supra* note 17, at 107–10.

140. *See infra* notes 141–42.

condition a statutory duty on an executive determination of fact.”<sup>141</sup> Furthermore, Hamburger thinks that oft-linked determinations of facts and of legal duties were similar in that both were expected to be done in a judicial spirit of discernment—that officers should confine “themselves to exercising understanding or judgment in discerning the law and the underlying circumstances,” that is, underlying factual circumstances.<sup>142</sup> We might refer to this exercise as law-and-fact discernment.

Hamburger has documented and analyzed law-and-fact discernment in depth in another major book of his, *Law and Judicial Duty*, where he argues the Anglo-American legal world of the seventeenth and eighteenth centuries predominantly shared an ideal that the office of a judge was to discern law (and factual circumstances to which it applied) and not to exercise will, which was the province of the legislature.<sup>143</sup> *Law and Judicial Duty* focuses on discernment as an ideal for the courts, only briefly referencing the notion of discernment by executive officers.<sup>144</sup> *Is Administrative Law Unlawful?* develops the notion somewhat more, claiming that the ideal for the judiciary also served as an ideal for some executive decision-making.<sup>145</sup> Hamburger’s main source for the ideal’s application to executive officers is *Rooke’s Case*, decided by the Court of Common Pleas in 1598.<sup>146</sup> The Commissioners of Sewers—administrators who directed water control projects for which they assessed the nearby landowners who would benefit—imposed the entire cost of one particular flood-protection project on a single landowner even though many others would be protected by it.<sup>147</sup> The landowner brought a common law action for replevin challenging a seizure to enforce the assessment, and the court held the statute required the commissioners to assess *all* benefiting landowners.<sup>148</sup> This holding, as Louis Jaffe says, might have been understood to mean that the officers had acted in violation of the statute and therefore without statutory jurisdiction; but, as Jaffe explains, the case became notable because Edward Coke’s report of it, probably embellishing what the court

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141. HAMBURGER, UNLAWFUL, *supra* note 17, at 107.

142. *Id.* at 97; *see also id.* at 107 (stating that fact-findings were to be done “only by exercising discernment”).

143. *See generally* PHILIP HAMBURGER, LAW AND JUDICIAL DUTY (Harvard Univ. Press 2008).

144. *See, e.g., id.* at 135–36, 545–46.

145. HAMBURGER, UNLAWFUL, *supra* note 17, at 97 n.g.

146. *Id.* at 98–99; *Rooke’s Case* (1598) 77 Eng. Rep. 209, 209–10 (CP).

147. *Rooke’s Case*, 77 Eng. Rep. at 209–10.

148. *Id.*

really said, suggested a “much broader” theory.<sup>149</sup> This broader theory was that discretion afforded to officers under a statute is judicialized and apparently subject to searching judicial review for its proper exercise:

[N]otwithstanding the words of the commission give authority to the commissioners to do according to their discretions, yet their proceedings ought to be limited and bound with the rule of reason and law. For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections . . . .<sup>150</sup>

As Hamburger says, Coke thought “that commissioners were to exercise [statutorily-granted] discretion in the same way as judges—as a sort of understanding or judgment about law rather than lawmaking.”<sup>151</sup>

Drawing upon his discussion of executive discernment in *Is Administrative Law Unlawful?* that centers on *Rooke’s Case*, Hamburger claims in *Nondelegation Blues* that the valuations of 1798 were mere law-and-fact discernment in that they “were expected to be done in a judicial rather than a legislative spirit.”<sup>152</sup> That is, he is relying upon expectations about the spirit in which a decision was to be made.<sup>153</sup>

In my view, these expectations about spirits in 1798 amounted to no more than vague, theoretical aspirations ungrounded in enforceable legal doctrine. Whether people do or do not have such aspirations for a type of decision is a nebulous standard for deciding whether a decision is constitutionally delegable. Such a standard falls short of the determinacy and predictability that categorical reformers claim their approach will deliver. Indeed, modern agency actions are, in general, subject to at least an aspiration that they turn upon law-and-fact discernment, so it is not at all clear which, if any, of today’s delegations would fail the test.

To elaborate my view, I will take up the remainder of Part II.C with four points. First, while Hamburger says the federal boards in 1798 were to act in a spirit of discernment, he does not claim, nor could he, that the thing they were to discern (real-estate’s value) was objective or determinate, like discerning the

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149. LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 625 (Little, Brown & Co. 1965).

150. *Rooke’s Case*, 77 Eng. Rep. at 210.

151. HAMBURGER, *UNLAWFUL*, *supra* note 17, at 98.

152. Hamburger, *Blues*, *supra* note 9, at 1211.

153. *See id.*

weight of a shipment of sugar.<sup>154</sup> Hamburger acknowledges that the “statute [in 1798] did not tell the commissioners how to define the value of real estate or what method to use in evaluating it. . . . But most eighteenth-century valuations by assessors were done without direction about definition or method . . . .”<sup>155</sup> He understands law-and-fact discernment in terms of the spirit in which an official selects an outcome, not whether that official practically has a wide range of permissible outcomes to choose from.<sup>156</sup>

My second point is that any pertinence *Rooke’s Case* had for executive decisions, like the mass revisions in the 1790s, was at most a matter of articulating unenforceable ideals, not hard doctrine. *Rooke’s Case’s* actual holding in 1598 was about the availability of judicial review, at common law, of an exercise of administrative discretion, and that holding was pared back by the English courts long before the U.S. founding.<sup>157</sup> In Jaffe’s account, a case before Chief Baron Hale in 1668 and another before Chief Justice Holt in 1700 “affirmed the power of judicial review” of administrative acts but with “a limitation of the broader power asserted by Coke in . . . *Rooke’s Case*.”<sup>158</sup> These later cases said a court could review whether officers exceeded their jurisdiction (that is, violated the statute) but not review actions they took within their jurisdiction.<sup>159</sup> This is consistent with how the Marshall Court in the early United States conducted judicial review of administrative acts at common law, following a “legality model” that reviewed officers’ violations of statutes but not their exercises of discretion given by

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154. *Id.* at 1211 n.602.

155. *Id.*

156. *See id.*

157. *See infra* notes 158–59.

158. JAFFE, *supra* note 149, at 626–28. Note that Jaffe mistakenly gives the date of 1680 for *Terry v. Huntington* (1668) 145 Eng. Rep. 557 (Ex.).

159. JAFFE, *supra* note 149, at 626–28. On the question of how much *Rooke’s Case’s* influence continued into the founding era, Hamburger cites a leading justice of the peace manual that closely paraphrased the key passage from *Rooke’s Case* as applying to justices of the peace. HAMBURGER, UNLAWFUL, *supra* note 17, at 100, 538 n.36 (citing MICHAEL DALTON, THE COUNTRY JUSTICE: CONTAINING THE PRACTICE OF THE JUSTICES OF THE PEACE 20 (London: Printed for the Societie of Stationers 1622)). But Michael Dalton’s manual was superseded and had its last edition in 1746, which was 42 years before ratification. *See* John A. Conley, *Doing It by the Book: Justice of the Peace Manuals and English Law in Eighteenth Century America*, 6 J. LEGAL HIST. 257, 268 (1985). Also, Hamburger cites J.H. Baker for the observation that “Coke’s attitude toward discretion persisted in the eighteenth century.” HAMBURGER, UNLAWFUL, *supra* note 17, at 538 n.30. For my response on this point, see Appendix, *supra* note 69, at 25.

statute.<sup>160</sup> Congress could write the statute to create or limit discretion. When Congress said in 1808 that a decision about enforcing an embargo was to depend simply on the officer's "opinion," the Marshall Court in 1814 held such an opinion unreviewable, even for whether it rested on reasonable suspicion.<sup>161</sup> (Some English cases of the late 1700s, on matters other than the land tax, contemplated some judicial review of official discretion but suggested more respect for it than did *Rooke's Case*, as well as a higher bar for questioning its exercise: that it be arbitrary, capricious, biased, partial, malicious, corrupt, or tyrannical.<sup>162</sup>)

The courts, as of 1798, treated the tax valuation of real estate as an exercise of discretion that was within officers' jurisdiction and thus unreviewable. *Critical Assessment* shows—and Hamburger does not deny—that determinations of such values (individual or en masse) were not subject to judicial review by any mechanism at equity or common law, whether it be writ of error, certiorari, mandamus, civil actions against enforcing officials (such as trespass), or litigation

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160. Ann Woolhandler, *Patterns of Official Immunity and Accountability*, 37 CASE W. RESV. L. REV. 396, 414–22 (1987).

161. *Id.* at 421 & n.123.

162. *Rex v. Young* (1758) 97 Eng. Rep. 447, 450 (KB) (Mansfield, C.J.) (“[T]his Court had no power or claim, to review the reasons of justices of peace, upon which they form their judgments in granting [innkeeper] licenses; by way of appeal from their judgments or overruling the discretion intrusted to them.’ But if it clearly appears that the justices have been partially, maliciously, or corruptly influenced in the exercise of this discretion, and have (consequently) abused the trust reposed in them, they are liable to prosecution by indictment or information; or even, possibly, by action, if the malice be very gross and injurious.”); *Rex v. Askew* (1768) 98 Eng. Rep. 139, 141 (KB) (Mansfield, C.J.) (“[T]he judgment and discretion of determining [upon the qualifications of doctors] is trusted to the College of Physicians: and this Court will not take it from them . . . . But their conduct in the exercise of this trust thus committed to them ought to be fair, candid, and unprejudiced; not arbitrary, capricious, or biassed; much less, warped by resentment, or personal dislike.”); *see Leader v. Moxon* [sic] (1773) 96 Eng. Rep. 546, 546 (CP) (granting review when commissioners for paving a street “had grossly exceeded their powers, which must have a reasonable construction. Their discretion is not arbitrary, but must be limited by reason and law”), *reported sub nom. Leader v. Moxton* [sic] (1773) 95 Eng. Rep. 1157, 1160 (CP) (“[T]he commissioners have acted arbitrarily and tyrannically . . . .”). Later cases were divided about whether *Leader* rested on officers exceeding their jurisdiction or instead reviewed the officers’ exercise of discretion, but even if the latter, the bar for such review required “wanton” misuse of discretion or some such. *Governor v. Meredith* (1792) 100 Eng. Rep. 1306, 1307 (KB) (Kenyon, C.J.) (stating *Leader* “must have depended on the question, whether or not the commissioners exceeded their jurisdiction”); *Sutton v. Clarke* (1815) 128 Eng. Rep. 943, 948 (CP) (reading *Leader* to mean that if “commissioners, acting within their jurisdiction, act wantonly and oppressively,” they are liable); *Boulton v. Crowther* (1824) 107 Eng. Rep. 544, 546 (KB) (reading *Leader* to rest “upon the ground, that the commissioners had exceeded their authority”).

about land seizures or titles.<sup>163</sup> This was true for the federal direct tax of 1798 and the analogous English land tax of the 1700s.<sup>164</sup> Some common law mechanisms allowed judicial review of whether the officer was violating the statute and thus acting outside statutory authority or jurisdiction (e.g., if taxing property that was not taxable at all), but not review of questions that were within the officer's discretion, like the amount of an assessment.<sup>165</sup> I have seen no evidence that *Rooke's Case*, with its view of official discretion as judicialized and suited to judicial scrutiny,<sup>166</sup> was ever applied to the English land tax or the U.S. federal direct tax.

Indeed, we find a view of official discretion quite different from *Rooke's Case* in a case arising from the federal direct tax of 1798 that came before Justice James Kent.<sup>167</sup> The dispute occurred because the tax imposed a different rate on houses than on all other real estate.<sup>168</sup> Assistant assessors mistakenly thought a certain theater was a house and assigned it the house rate, which was higher.<sup>169</sup> While assessor determinations of valuations were obviously unreviewable, the reviewability of an assessor's selection of the wrong tax rate was a borderline question.<sup>170</sup> When the theater's owner brought a trespass action in New York state's Supreme Court against the collector for enforcing the tax based on the wrong rate, the court held, by vote of three to two, that selecting among rates was an act within the administrators' jurisdiction, so there was no review.<sup>171</sup> Justice Kent, in the majority, said that the principal assessor, besides his valuation-review powers, would have had power to change the applicable rate if the theater's owner had appealed to him (which the owner had failed to do).<sup>172</sup> For a court to review the selection of the rate, said Justice Kent, would be to invade the principal assessor's discretion.<sup>173</sup> “[T]he determination of the principal assessor upon appeal was intended by the act [of Congress] to be of *plenary discretion*, and final authority[,]” said Justice Kent, even though the Act said nothing express about

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163. *Critical Assessment*, *supra* note 9, at 1417–29.

164. *See id.*

165. *Id.* at 1422–27.

166. *See Rooke's Case* (1598) 77 Eng. Rep. 209, 209–10 (CP).

167. *Henderson v. Brown*, 1 Cai. R. 92, 95–104 (N.Y. Sup. Ct. 1803).

168. *Id.* at 92–93.

169. *Id.* at 93.

170. *See Critical Assessment*, *supra* note 9, at 1425.

171. *Henderson*, 1 Cai. R. at 95–104.

172. *Id.* at 102.

173. *Id.*

judicial review or its limits.<sup>174</sup> “The multifarious and minute detail of the proceedings of the assessors [that is, the procedure provided by the congressional legislation] seems to *render such a discretion absolutely necessary* to the due execution of the law . . . .”<sup>175</sup> Justice Kent was comfortable with Congress granting officers “plenary discretion” and saw that such grants might be “absolutely necessary.”<sup>176</sup>

My third point is that Hamburger’s own descriptions of executive officers in the 1600s and 1700s repeatedly acknowledge that such officers often did not follow, or might not be following, any ideal of law-and-fact discernment, leading the reader to wonder if such an ideal was anything more than an ungrounded, theoretical aspiration.<sup>177</sup> Discussing Anglo-American administration generally, Hamburger says “assessments and other determinations of fact have often been misused to exercise a disguised legislative power”<sup>178</sup> and that executive officers’ determinations of individuals’ legal duties “could easily stray into the legislative realm.”<sup>179</sup> Regarding the Commissioners of Sewers, he says “[i]t is possible that, in reality, commissioners of sewers frequently used their determinations to exercise will and thus, in effect, to legislate,” though “they were expected to come as close as possible to the ideal of merely discerning legal duties and giving the affected persons notice of what the law already required,” and particularly their rulemakings “were to be made in the spirit of determinations of legal duties.”<sup>180</sup>

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174. *Id.* (emphasis added).

175. *Id.* (emphasis added). The opinion of Justice Jacob Radcliff, in the minority, shared Justice Kent’s premise that officers were liable if they “exceed their authority,” while disagreeing with Justice Kent on whether an officer’s selection of the wrong tax rate was in excess of authority. *Id.* at 98–99. Justice Radcliff added that he thought the court *could* review a discretionary decision of the principal assessor, as it was “the discretion of a ministerial officer only.” *Id.* at 99 (apparently using *ministerial* in the sense of *subordinate*, since the term’s other meaning—lacking discretion—would make nonsense of the phrase “discretion of a ministerial officer”). However, Justice Radcliff said such review would be unavailable if “such discretion is declared to be definitive” by the statute, indicating his view that Congress could create zones of unreviewable discretion. *Id.* He also said the officer’s discretion would be definitive if “the nature of the subject requires it to be so considered,” which presumably would be the case regarding a matter like valuation that was less borderline than selection of tax rates. *Id.*

176. *Id.* at 102.

177. *See infra* notes 178–84 and accompanying text.

178. Hamburger, *Blues*, *supra* note 9, at 1211.

179. HAMBURGER, UNLAWFUL, *supra* note 17, at 97.

180. *Id.* at 99. William Holdsworth said “the commissioners [of sewers] were left very free to execute their commissions as they pleased” and “had a large discretion as to the machinery they employed.” 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 205 (Sweet & Maxwell Ltd. 1938).

As to the early United States, federal executive officers and state and local justices of the peace “could come close to legislative power by making determinations of legal duties, but in making their determinations, they were expected to act with an attitude of discernment rather than will,” that is, “to act as much as possible in a spirit of discernment or judgment.”<sup>181</sup> Another description along these lines appears in Hamburger’s discussion of executive adjudications, which he finds were prone to a similar “problem” of straying outside the proper administrative role if “the law did not clearly dictate the outcomes, but left room for officers to exercise some will or subjective discretion,” leading to executive trespasses “into legislative and judicial power.”<sup>182</sup> In this area, he notes valuations as the “clearest instance of how early federal tax determinations could stray into binding adjudications . . . . Both in England and America this was particularly a problem under a land tax.”<sup>183</sup> “Theoretically, the decisions of assessors were mere determinations [(i.e., discernments)], but to the extent loose evaluations rather than the law bound taxpayers, the assessments were really binding adjudications.”<sup>184</sup>

It is no surprise that executive officers in areas such as tax valuation might easily not follow an ideal of law-and-fact discernment. As noted earlier, the decisions they had to make were often subjective and indeterminate, and any ideal of discernment was not enforceable against them by courts.<sup>185</sup> Furthermore, while Hamburger argues in *Law and Judicial Duty* that the ideal of discernment predominated as applied to actual judges, he does not claim that—even as applied to them—it was some kind of pervasive cultural assumption that everybody accepted and automatically knew how to apply.<sup>186</sup> On the contrary, he shows that contemporaries found the ideal to be in tension with their own beliefs about human nature, that even its greatest exponent (Coke) “often failed” to meet it, that the ideal was “derided” as impossible by some of Coke’s contemporaries,<sup>187</sup> that it was contested or subverted in various ways during the late 1700s by Lord Mansfield and by several of the most illustrious U.S. founders, and that it was in serious tension with the emergence of U.S. democracy.<sup>188</sup> It is hard to believe that an ideal

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181. HAMBURGER, *UNLAWFUL*, *supra* note 17, at 100, 102.

182. *Id.* at 204 n.j.

183. *Id.* at 209.

184. *Id.* at 210.

185. *See supra* Part II.B; *supra* notes 157–76 and accompanying text.

186. *See infra* notes 187–188 and accompanying text.

187. HAMBURGER, *supra* note 143, at 137–40, 160–61.

188. *See, e.g., id.* at 144–46 (stating Chief Justice Mansfield’s self-conscious reform of commercial law went “beyond the law and his duty”); *id.* at 354–55 (stating that equitable

so fraught as applied to judges would be generally accepted, in any but the most vague manner, for executive officers—officers who lacked judges’ acculturation and institutional trappings and who faced missions and pressures vastly more diverse than judges did.

All this goes double for the members of the federal boards in 1798, whose mass revisions were profoundly different from the work of courts.<sup>189</sup> Dividing up a geographic area as large as 60,000 square miles into districts and deciding the relative average values of land among all those districts was vastly more complex than anything that happened in litigation.<sup>190</sup> Instead, it was like what the state legislatures did when enacting state property taxes in the years leading up to 1798.<sup>191</sup> There is a tension, to say the least, between (a) Hamburger’s claim that the mass revisions were by nature judicial rather than legislative and (b) the historical fact that such determinations of relative taxable value among a state’s geographic regions had never been done by judges and always done by legislatures.<sup>192</sup>

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interpretation of statutes was advocated by Hamilton, James Iredell, and Edmund Randolph); *id.* at 508–12 (stating that James Madison, James Wilson, and George Mason advocated the addition of federal judges to a council of revision empowered to strike down statutes for inconsistency with the public good); *id.* at 520 (discussing the tension with democracy).

189. See Act of July 9, 1798, 1 Stat. 580, 589.

190. See *e.g.*, Virginia Abstract of Lands, *supra* note 127.

191. See *Critical Assessment*, *supra* note 9, at 1392–93.

192. Hamburger says that the 1798 legislation’s use of the phrase “as shall appear to be just and equitable” is evidence of the “judicial nature” of the mass revisions:

Although the phrase *just and equitable* was widely familiar in many contexts as a generic measure of justice, the authorization to officers to act *as shall appear to be just and equitable*—the statute’s phrase—was a familiar measure of the conduct of government officials making judicial or judicial-like determinations, including assessments.

Hamburger, *Blues*, *supra* note 9, at 1212. To support this, Hamburger cites An Act in Addition to an Act Intituled “An Act for Regulating of Fences, Cattle & c.,” 1758–1759 Mass. Province Laws, ch. 33 (1759) (empowering proprietors of land in a common enclosure to make rules for the land’s improvement); An Act for Preventing an Illicit Trade and Intercourse Between the Subjects of This State and the Enemy, ch. 317 (1782), in ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 287, 297 (Peter Wilson ed., 1784) (empowering a justice of the peace to set a reward for recapturing property taken by the enemy); An Act for Dividing, Allotting, Inclosing, Draining, and Improving the Commons and Waste Grounds, 35 Geo. 3 c. 107, at 17–18 (Gr. Brit. 1795) (empowering commissioners to improve common lands and impose assessments and charges on persons with rights to the lands). Given that Hamburger is claiming that “as shall appear to be just and equitable” is a term of art with a more specific

My fourth and final point is that holding statutory delegations unconstitutional based on loose “expectations” about the “spirit” in which the officers are to exercise their delegated discretion—decoupled from any hard, enforceable doctrine pertaining to such discretion—is an abstract and nebulous standard, one that negates the determinacy and predictability that categorical reformers claim they will deliver. The standard would be especially difficult to apply coherently or predictably today because modern agency actions are, in

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meaning than “just and equitable,” the first thing I should note is that none of the three statutes he cites use the phrase “as shall appear to be just and equitable.” Instead, the Massachusetts statute says, “as they shall think just and equitable.” An Act for Regulating of Fences, Cattle & c., 1758–1759 Mass. Province Laws, ch. 33 (1759). The New Jersey statute says “as the [justice of the peace] shall in his discretion think just and equitable.” An Act for Preventing an Illicit Trade and Intercourse Between the Subjects of This State and the Enemy, ch. 317 (1782), *in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 287, 297 (Peter Wilson ed., 1784). And the British statute says “as the said [officers] shall think most just and equitable.” An Act for Dividing, Allotting, Inclosing, Draining, and Improving the Commons and Waste Grounds, 35 Geo. 3 c. 107, at 17–18 (Gr. Brit. 1795). Even if the phrase were the same, I see nothing in the statutes to indicate that the phrase *exclusively* connoted discretion that was distinctly judge-like. It is true that the New Jersey statute said that any party to the proceeding could demand that the reward be set by a jury instead of the justice of the peace; perhaps the jury option indicates the proceeding was judicial in some sense. *See* An Act for Preventing an Illicit Trade and Intercourse Between the Subjects of This State and the Enemy, ch. 317 (1782), *in* ACTS OF THE GENERAL ASSEMBLY OF THE STATE OF NEW-JERSEY 287, 297 (Peter Wilson ed., 1784). But the jury was optional with the parties even in the New Jersey statute, and the statutes of Massachusetts and Britain did not provide a jury option, nor did the 1798 direct-tax legislation. *See id.*

Hamburger also claims, Hamburger, *Blues*, *supra* note 9, at 1212–13, that the phrase “as shall appear to be just and equitable” must imply judicial discernment when it pertains to the federal boards’ mass revisions because a very similar phrase appeared in the provision of the V&E Act empowering the principal assessor in each district to hear individual taxpayer appeals of their respective valuations: “in all cases to which reference may be made in any appeal, . . . the principal assessor shall have power to re-examine and equalize the valuations as shall appear just and equitable.” Act of July 9, 1798, § 20, 1 Stat. 588. Hamburger’s view seems to be that the principal assessor’s adjudication of individual appeals was obviously judicial in nature and that any other power governed by similar language must also have been judicial. *See* Hamburger, *Blues*, *supra* note 9, at 1212–13. But the phrase “as shall appear to be just and equitable” could connote subjective and indeterminate decision-making about value as applied to individual appeals for the principal assessors *and* as applied to mass revisions for the federal boards. Even if this sameness of the phrase implies an expectation of a judicial spirit of discernment for the federal boards, any such expectation—as I argue throughout Part II.C—would be a mere theoretical aspiration: it would do nothing to narrow the practical subjectivity of their task, would be judicially unenforceable, might easily fail of realization, and would be no closer to the ideal of discernment than broad agency rulemaking powers generally are today.

general, subject to at least some loose aspiration that they turn upon discernments of law and fact, making it hard to say when (if ever) today's delegations are different from the supposed founding-era ideal. A standard expectation today is that agency actions result from an instrumentally-rational process of discerning the ends set by the enabling statute, discerning the factual state of the world, and discerning the means for bringing the world more into line with the statute's ends.<sup>193</sup> A leading study by Kathryn Watts found that "[a]gencies today generally . . . [are] couching their decisions in technocratic, statutory, or scientific language, either failing to disclose or affirmatively hiding political factors that enter into the mix."<sup>194</sup> In other words, agencies today officially present their decisions as products of the discernment of law ("statutory" factors) and of facts ("technocratic" and "scientific" factors), not products of will ("political" factors).<sup>195</sup> Of course we may think, as Watts does, that the official story of discernment that agencies routinely tell is aspirational and that reality is more complicated because agencies do respond to political factors without officially saying so—indeed the U.S. Supreme Court has recently recognized this duality between stated and unstated reasons and unanimously held it legitimate.<sup>196</sup> This duality may suggest that the ideal of law-and-fact discernment today is aspirational and loose, but as explained above, any such ideal in the founding era was also aspirational and loose as applied to executive officers—their decisions could be highly subjective, and expectations of a discerning spirit were judicially-unenforceable and could easily and frequently fail of realization.<sup>197</sup>

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193. See, e.g., Jerry L. Mashaw, *Agency-Centered or Court-Centered Administrative Law? A Dialogue with Richard Pierce on Agency Statutory Interpretation*, 59 ADMIN. L. REV. 889, 898 (2007).

194. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 6 (2009).

195. See *id.*

196. *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2573–74 (2019) (striking down agency action for which the *only* stated rationale was proven to be insincere and cautioning against viewing unstated reasons as problematic per se: "a court may not reject an agency's stated reasons for acting simply because the agency might also have had other unstated reasons. . . . Relatedly, a court may not set aside an agency's policymaking decision solely because it might have been influenced by political considerations or prompted by an Administration's priorities. . . . Such decisions are routinely informed by unstated considerations of politics, the legislative process, public relations, interest group relations, foreign relations, and national security concerns (among others)"); see also *id.* at 2579–80 (Thomas, J., dissenting in part) (dissenting with three other Justices from this aspect of the opinion but suggesting the Court should have gone even farther in tolerating unstated political reasons for agency exercises of discretion).

197. See *supra* notes 154–92 and accompanying text.

What is more, the aspiration toward law-and-fact discernment that pertains generally to agency actions today is, in one sense, *more* meaningful than any such ideal generally could have been during the founding era because today's aspiration is subject to more judicial enforcement. Beginning around the turn of the twentieth century, federal courts began systematically understanding delegatory legislation to require that agency exercises of discretion not be arbitrary or capricious, and the courts enforced this understanding.<sup>198</sup> Congress expressly articulated the understanding in the Administrative Procedure Act (APA) of 1946, which tells courts to set aside an agency action that is arbitrary, capricious, or an abuse of discretion.<sup>199</sup> The judiciary takes this to mean agencies must be reasonable in finding and evaluating facts and in reasoning from those facts to a decision about how to implement the enabling statute.<sup>200</sup>

Today's stronger enforceability of the ideal of discernment renders even more unpromising and unworkable any attempt to invoke (non-doctrinal) eighteenth-century expectations about the spirit of discretion's exercise as the test to strike down statutes today. By this formulation, the fact-finding exception to the categorical approach's ban on binding domestic rulemaking has no workable boundary, and the categorical approach is no longer categorical.

#### D. Gordon's Response

Like Hamburger, Gordon makes an originalist argument for a categorical version of the nondelegation doctrine, one that prohibits all delegation of authority to make coercive domestic rules if "the content or effectiveness of those rules [is] dependent upon the agent's policy judgment, rather than upon a factual contingency."<sup>201</sup> In recognizing a categorical exception to the prohibition for rules

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198. See Alexander Mechanick, *The Interpretive Foundations of Arbitrary or Capricious Review*, 111 KY. L.J. 477, 495–503 (2022–2023).

199. *Id.* at 517–22.

200. See, e.g., *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 48, 55 (1983) ("Given the effectiveness ascribed to airbag technology by the agency, the mandate of the Safety Act to achieve traffic safety would suggest that the logical response to the faults of detachable seatbelts would be to require the installation of airbags. At the very least this alternative way of achieving the objectives of the Act should have been addressed and adequate reasons given for its abandonment." "When the agency reexamines its findings as to the likely increase in seatbelt usage, it must also reconsider its judgment of the reasonableness of the monetary and other costs associated with the Standard. In reaching its judgment, NHTSA should bear in mind that Congress intended safety to be the preeminent factor under the Motor Vehicle Safety Act[.]").

201. Gordon, *supra* note 9, at 160–62. Gordon also recognizes categorical exceptions for internal government administration and for D.C. and the territories. *Id.*

whose content and effectiveness depend on the agency fact-findings, as distinct from policy judgments, Gordon's formulation is quite similar to that in Justice Thomas's *American Railroads* concurrence,<sup>202</sup> and also similar to Justice Gorsuch's *Gundy* dissent, which expressly recognized a categorical exception for "factual findings" as distinct from "policy judgments" (though the *Gundy* dissent's additional exception for "details" as distinct from "important subjects" seems to put Justice Gorsuch more in the noncategorical camp).<sup>203</sup>

Note that the fact-policy distinction is not to be confused with the familiar fact-law distinction. The latter distinction is not relevant in this context, as it refers to finding and applying law, and everyone agrees agencies can both (a) find facts and (b) find and apply law with regard to those facts. What is key is the introduction of a third and supposedly illegitimate activity, policymaking, which is neither fact-finding nor law-finding (but rather law-making).<sup>204</sup>

Using this framework, Gordon contends that the federal boards' "just and equitable" mass revisions in 1798 fall within the exception for factual findings and thus do not puncture the originalist case for a categorical nondelegation doctrine.<sup>205</sup>

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202. *Dep't of Transp. v. Ass'n of Am. R.R.*, 575 U.S. 43, 78–82 (2015) (Thomas, J., concurring).

203. *Gundy v. United States*, 139 S. Ct. 2116, 2136–41 (2019) (Gorsuch, J., dissenting).

204. This is stated with particular clarity in Rappaport, *supra* note 17, at 203.

205. Gordon, *supra* note 9, at 219–20. One early and relatively brief part of Gordon's argument cites and closely tracks Hamburger's ideas on judge-like discernment. *Id.* at 220–22. Here I will address case law that Gordon offers in this vein that is not cited by Hamburger. In particular, Gordon invokes five cases on administrative assessments to argue that the category of official discretion that encompassed tax assessment was understood as judicial, suggesting a spirit of discernment. *Id.* at 220 nn.338, 340 (citing *Henderson v. Brown*, 1 Cai. R. 92 (N.Y. Sup. Ct. 1803); *Dillingham v. Snow*, 5 Mass. (5 Tyng) 547 (1809); *Le Roy v. Mayor of New York*, 20 Johns. 430 (N.Y. Sup. Ct. 1823); *Bouton v. President of Brooklyn*, 2 Wend. 395 (N.Y. Sup. Ct. 1829); *Easton v. Calendar*, 11 Wend. 90 (N.Y. Sup. Ct. 1833)). But none of these five cases are about nondelegation; instead, they all consider whether judicial review of assessment is available at common law, and they all say that, if an officer's act is within jurisdiction, it is discretionary and cannot be reviewed, thereby confirming that any spirit of discernment in deciding the quantum of assessment was unenforceable. See *Henderson*, 1 Cai. R. at 100–02; *Dillingham*, 5 Mass. at 559; *Le Roy*, 20 Johns. at 438–41; *Bouton*, 2 Wend. at 398; *Easton*, 11 Wend. at 95. Further, none of the five cases clearly or strongly characterize assessment officials as judicial. One case says apportioning a school district tax is "to a certain extent, in the nature of a judicial act," or "quasi judicial." *Easton*, 11 Wend. at 93, 95 (emphasis added). The other four cases never use the words *judicial* or *judge* to describe the officer or act; the closest any comes is to say the officers "exercise . . . judgment," *Henderson*, 1 Cai. R. at 102 or that they should be *treated like* "inferior judicial officers," *Dillingham*, 5 Mass. at 559. Nor do the five cases suggest the assessment officials' task was objective. On the contrary, one says "[t]he

What Gordon most emphasizes is that contemporaries often spoke of the mass revisions under the 1798 legislation (or of similar administrative acts) as efforts to *equalize* the valuations across the state (or whatever geographic area was covered).<sup>206</sup> Gordon shows that the word *equalize* and its variants (such as *equalization*)—although not appearing in the text of the 1798 legislation with reference to the federal boards’ mass revisions<sup>207</sup>—were used to describe those mass revisions by two successive Treasury Secretaries, by one member of Congress, by the members of several federal boards, and by Congress itself, in a cleanup statute pertaining to one straggler federal board in 1805.<sup>208</sup> *Equalize* and its variants were also used by state statutes during the period that empowered officials to conduct mass revisions on an intra-*county* basis.<sup>209</sup> The term was also used by Congress in a major statute of 1815 that imposed another direct tax and adopted a system of federal boards and mass revisions very similar to that of 1798.<sup>210</sup> In Gordon’s view, the prominence of the term *equalize* indicates that the federal boards’ discretion was narrower than it might otherwise seem.<sup>211</sup> Their mass-revision power, he says, was generally viewed as a call “for the commissioners to engage in the fact-finding necessary to equalize valuations in different parts of a state, so as to achieve greater accuracy in the assessment process.”<sup>212</sup>

In response to this, let me start with a brief side point: I do not think someone who has read *Critical Assessment* would be surprised by the prominence of *equalize* and its variants in how people talked about the mass revisions. The word

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business of these officers is often perplexed and embarrassing, and . . . should be viewed with indulgence.” *Easton*, 11 Wend. at 93. Besides these cases, all other sources in this part of Gordon’s argument are from 1830 or later, or are not about administrative assessments. Gordon, *supra* note 9, at 220–22.

206. Gordon, *supra* note 9, at 215–50.

207. Act of July 9, 1798, § 20, 1 Stat. 580, 588 (using *equalize* only with reference to a principal assessor’s power to decide individual appeals within a district).

208. Gordon, *supra* note 9, at 228–35, 246.

209. *Id.* at 224, 227, 240–41; *see also id.* at 241 n.447 (noting the Ohio legislature in 1834 provided for a state agency to equalize on a *state-wide* basis); *see also Critical Assessment*, *supra* note 9, at 1391 n.454 (describing how state legislatures first began delegating power to state agencies to conduct mass revisions statewide (rather than just intra-county) in the 1820s).

210. Gordon, *supra* note 9, at 247–48.

211. *See id.* at 218–19.

212. *Id.* at 218.

and its variants appear 20 times in *Critical Assessment* with regard to statewide mass revisions under the federal legislation of 1798 and later federal direct taxes.<sup>213</sup>

What I mainly wish to say, in response to Gordon, is that his claim—that the federal boards were meant “to engage in the fact-finding necessary to equalize valuations in different parts of a state, so as to achieve greater accuracy in the assessment process”—runs into two major difficulties.<sup>214</sup> First, the “accuracy” of equalization could be no more than a vague aspiration—given the indeterminate and contestable nature of real-estate value—for which no definition or methods were provided by the V&E Act or by any background consensus.<sup>215</sup> Second, this indeterminacy and contestability mean that calling the boards’ task “fact-finding” implies a broad and unbounded definition of that term that cannot be categorically distinguished from policy judgment in the way Gordon seeks to do.<sup>216</sup> When today’s statutes task agencies with identifying “danger” or ensuring “safety” or the like, they likewise reflect an aspiration, albeit vague and indeterminate, to accurately identify or ensure these things.

In stating the first difficulty, that accuracy in equalization under the V&E Act was no more than a vague aspiration because the task was so indeterminate and contested, I am reiterating the claim on which *Critical Assessment* expends the bulk of its evidence and argument.<sup>217</sup> It is true the article does not state with certainty that the V&E Act meant for each federal board to equalize values across the districts (the text of the act does not say it, and Gordon himself does “not assert” that this reading “is the *only* reasonable construction of the statutory language, or even necessarily the most reasonable one”).<sup>218</sup> But *Critical Assessment* makes its case for broad delegation almost entirely on the assumption that this *is* what the V&E Act meant.<sup>219</sup> At the beginning of its Part II, the article says the federal boards’ mass revisions would be indeterminate “[e]ven if we assume . . . that the federal board was to discern the average value of real estate per acre in each district and adjust the valuations of each district so that their average matched that

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213. See *Critical Assessment*, *supra* note 9, at 1343 n.255, 1345 n.263, 1346 n.267, 1369 n.376, 1372, 1378–80, 1384, 1391 n.454, 1446, 1451 & n.755, 1453–54.

214. See Gordon, *supra* note 9, at 218.

215. This looseness may explain why Gordon, while using the word “accurate,” quotes no primary sources that use the word with reference to statewide revisions. See *id.* at 226 (citing the Treasury Secretary’s use of the word “accurate,” but with reference to intra-county revisions).

216. See *Critical Assessment*, *supra* note 9, at 1345–91.

217. See *id.* at 1339–1417.

218. Gordon, *supra* note 9, at 219.

219. *Critical Assessment*, *supra* note 9, at 1339–1417.

value.”<sup>220</sup> Part II of the article is devoted to showing that real-estate valuation was indeterminate,<sup>221</sup> while Part III is devoted to showing that it was politically contested,<sup>222</sup> all of which demonstrates that trying to discern the average value of real estate per acre in each district for the purpose of equalization would be indeterminate and contested. Indeed, *Critical Assessment* says virtually nothing about how the federal boards might have exercised their power if doing something *other than* aspiring to make uniform real-estate valuations across the districts. The article focuses on how open-ended, divergent, fractious, and susceptible to politics all the officials’ decision-making would be when they each *tried to do* such equalizing valuations, not unlike the experience of many officials implementing broadly-delegatory statutes today.<sup>223</sup>

Some of the uses of *equalize* that Gordon quotes illustrate this very divergence and contestation. For one, a member of the federal board in Connecticut wrote that “[t]he course pursued by” his board in “*equalizing* the Assessments” “was different from those in the neighboring States.”<sup>224</sup> That is, his board ran up eyebrow-raising expenses by traveling around the state to do extensive empirical research on historical sale prices, something other federal boards nearby did not do.<sup>225</sup> Meanwhile, a member of the federal board in South Carolina resigned in protest and got into a newspaper debate with a current member of the same board. Gordon emphasizes that both men spoke of the board’s task as equalizing valuations.<sup>226</sup> But the larger takeaway is that the two disagreed vehemently about how to do equalization—and not just on little choices at the margins but on first principles. The board member who resigned did so because he thought the board should have imitated the regional land values that the South Carolina state legislature had adopted for the purpose of state property taxes (an approach hard-

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220. *Id.* at 1346. The same point also appears at the start of a two-page-long footnote in the Introduction about whether the mass revisions can be understood as fact-findings. *Id.* at 1314 n.102. My descriptions and quotations regarding the federal boards in Connecticut and South Carolina make clear that this is what they were doing. *Id.* at 1378–84.

221. *Id.* at 1345–91.

222. *Id.* at 1391–417.

223. *See id.* at 1339–417.

224. Gordon, *supra* note 9, at 231–32 (alteration in original) (quoting Letter from William Heron to Andrew Kingsbury (Sept. 23, 1799), as quoted in *Critical Assessment*, *supra* note 9, at 1380–81).

225. *Critical Assessment*, *supra* note 9, at 1380–81.

226. Gordon, *supra* note 9, at 232–34.

won by poor inland farmers in whose region he lived), whereas the rest of the board members opted to go off on their own and not imitate the state legislature.<sup>227</sup>

Thus, while agreeing with Gordon that equalization is what the federal boards officially aspired to do in many or all cases, I differ with him in how he characterizes equalization. He implies that the official aspiration of equalization meant the boards' task was narrow or straightforward, referring to it as "a mere equalization power," "simply an equalization power," "a simple 'equalization' power," or the like.<sup>228</sup> In making these statements, Gordon may be (a) reading *Critical Assessment* to make the extreme claim that the V&E Act told boards to make "just and equitable" revisions based on their freestanding views of justice and equity, without any reference to real estate or trying to think about something called "value," and (b) contrasting his view of the V&E Act with that extreme claim.<sup>229</sup> But I do not think *Critical Assessment* made such an extreme claim.<sup>230</sup>

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227. *Critical Assessment*, *supra* note 9, at 1408–13.

228. Gordon, *supra* note 9, at 231–32, 236.

229. *See id.*

230. There are a few points when this issue comes up:

(1) Gordon says an equalization power "is considerably different in degree (if not also in kind) from the open-ended policymaking powers commissioners would have enjoyed under Parrillo's reading of [the Act]." *Id.* at 228. I do think the boards had "open-ended policymaking powers" in that they could decide the definition of value and the methods for finding it, and I do not think a vague aspiration toward equalization changes that. But if Gordon is reading *Critical Assessment* to argue the boards could distribute the tax burden without even trying to think in terms of real-estate values, then I do not think that is what the article argues.

(2) Gordon says the equalization power was not a power to "make an all-things-considered judgment not bound by clear rules." *Id.* at 218, 227. *Critical Assessment* does find that legal actors circa 1798 used the phrase "just and equitable" with regard to many different subjects and that "some prominent uses of the phrase in cases suggest it meant a decisionmaker was to make an all-things-considered judgment not bound by clear rules." *Critical Assessment*, *supra* note 9, at 1369–70. What I meant is that the phrase suggested an all-things-considered judgment, unbound by clear rules, *about whatever subject the user of the phrase was talking about*. *See id.* Given that this passage appears in the middle of a long section on real-estate valuation's indeterminacy, I think the clear implication was that, in the V&E Act, "just and equitable" connoted an all-things-considered judgment *about real-estate valuations*, unbound by clear rules *about real-estate value's definition or the methods for deciding such value*. *See id.* None of this is inconsistent with a vague aspiration toward equalization.

(3) Gordon says I claim that the mass revisions were "a sweeping domestic grant of legislative power." Gordon, *supra* note 9, at 215. *Critical Assessment* never says the mass-revision power was legislative. *See generally Critical Assessment*, *supra* note 9. Its claim is that the mass revisions show *executive* power was understood to encompass grants of domestic coercive rulemaking authority that were highly discretionary and that, if placed within the fact-finding exception, render that exception extremely broad. *See generally id.*

Alternatively, Gordon's references to a "simple" equalization power and the like might suggest he thinks real-estate valuation was understood to be more objective and determinate than *Critical Assessment* finds it was—closer to weighing a shipment of sugar.<sup>231</sup> But, for the most part, I do not think Gordon seeks to argue such a view. He does not engage or attempt to counter the large majority of the sources offered to show valuation's indeterminacy in Part II of *Critical Assessment* or its political contestability in Part III (nor the large valuation disagreements among officials documented at the end of Part I).<sup>232</sup> Further, he says that "Parrillo's claims about the difficulties that came with the process of valuation in the early Republic may well be right,"<sup>233</sup> and later adds that equalization was "undoubtedly leaving important decisions to administrative discretion."<sup>234</sup>

That said, Gordon does make a few points related to the valuations' objectivity that I ought to engage. For one, he cites the remarks of Representative Albert Gallatin during debate on the House bill that led to the V&E Act, in which he spoke of the task of each federal board as "to adjust and equalize the tax upon the whole State[,] "to regulate any variations" among assessors in different parts of the state, and "to rectify any inequality which may take place" in assessors' valuations.<sup>235</sup> Indeed it does seem Congress thought valuation was better done by giving final authority to a board covering the whole state than by accepting as final the decentralized values set by assistant assessors and adjusted on appeal by principal assessors.<sup>236</sup> But to say a federal board could conduct valuation better than did assistant and principal assessors is not to say valuation was even remotely objective, because leaving everything to the assistant and principal assessors was a very low bar—indeed an invitation to chaos—as a state could have over 100 districts, each with a principal assessor and many assistant assessors, with no means of coordination between districts besides the federal board.<sup>237</sup> That the federal boards had a better vantage point than their decentralized underlings is not to deny that the boards faced uncertainty and conflict, as did the state legislatures who decided intrastate regional values under state property taxes in the years

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231. Gordon, *supra* note 9, at 231–32, 236.

232. See *Critical Assessment*, *supra* note 9, at 1339–1417.

233. Gordon, *supra* note 9, at 219. He adds that "some at the time considered a touch of administrative discretion inevitable in any system of property taxation." *Id.* This is an extreme understatement.

234. *Id.* at 228.

235. *Id.* at 227–28.

236. See *Critical Assessment*, *supra* note 9, at 1304.

237. *Id.* at 1328–32.

before 1798.<sup>238</sup> (Also, I disagree with Gordon’s claim that establishing the boards was “a means of *curbing* administrative discretion in assessment” relative to simply accepting the valuations of the assistant and principal assessors.<sup>239</sup> The amount of administrative discretion was the same so long as Congress did not set values, definitions, or methods—establishing the boards only *concentrated* administrative discretion, replacing numerous petty administrators with a few powerful administrators.)

Gordon also speaks to the objectivity question when he says the Supreme Court in *Faw v. Marsteller* read the phrase “just and equitable” with regard to real estate to mean “market value,” which, if correct, might suggest the phrase injected at least some definitional or methodological content into the equalization process.<sup>240</sup> But I disagree with that reading of the case. *Faw* concerned a Virginia state statute of 1781 that took paper money out of circulation and imposed a “scale of depreciation” for deciding the value of debts that had been incurred while paper money was in circulation, but the statute said that, if a court faced a situation in which applying the scale was “unjust,” it should not follow the scale but instead “award such judgment as to [the court] shall appear just and equitable.”<sup>241</sup> The case was about an unusual land sale that occurred while paper money was in circulation but in which the parties, believing the eventual contract payments would be made in specie, agreed to a low price—a price that application of the scale would have rendered miniscule compared with the land sold.<sup>242</sup> The Court held the scale inapplicable and said the “just and equitable” award should be the value of the property when it was sold, which the Court referred to variously as its “real value,” “actual annual value,” what it was “actually worth,” or “fairly worth” at that time.<sup>243</sup> The opinion said: “In inquiring . . . what ‘judgment will be just and equitable,’ the court can perceive no other guide, by which its opinion ought, in this case, to be regulated, but the real value of the property at the time it was

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238. *Id.* at 1392–401. Gordon quotes some words of Representative Gallatin indicating that each state government, administering its land tax, had used a statewide board of commissioners to equalize land values. Gordon, *supra* note 9, at 228. Representative Gallatin was wrong about this. No state ever created a statewide administrative process with power to equalize values statewide until the 1820s; each legislature decided the intra-state allocation of the tax burden among localities itself. *Critical Assessment*, *supra* note 9, at 1391–93. A few states provided administrative processes for *intra-locality* equalizations. *Id.* at 1392–93. What Congress did in 1798 by giving an administrative body statewide equalization power was new.

239. Gordon, *supra* note 9, at 228.

240. *Id.* at 240 (citing *Faw v. Marsteller*, 6 U.S. (2 Cranch) 10, 31 (1804)).

241. *Faw*, 6 U.S. at 11–12.

242. *Id.* at 13.

243. *Id.* at 31–33. The word “annual” referred to the fact that the transaction was for a perpetual annual “ground rent,” not a one-time lump sum. *Id.*

sold.”<sup>244</sup> Gordon reads this language to mean “just and equitable” *must* mean market value.<sup>245</sup> But the Court’s opinion never uses the term “market value” or even the word “market,” and its phrases *real value*, *actual value*, *actually worth*, and *fairly worth* are more general.<sup>246</sup> It is true that, in looking for evidence of value, the opinion cited a few historical sale prices of possibly-comparable properties from about five years before and after the sale at issue, but it concluded that “[t]he record,” despite containing these sale prices, “does not furnish satisfactory evidence of [the land’s] value” and therefore the value “ought to be found by a jury,” with the issue “to be tried at the bar” of the lower court, presumably with the chance to offer more evidence at trial, though the Court did not say what the further evidence might be.<sup>247</sup> Overall, the language about there being “no other guide” only means the award must depend on a valuation of the land, as of the date of the contract.<sup>248</sup> It does not suggest that a particular valuation method is necessary; the Court did refer to some historical sale prices of possibly-comparable lands but found them insufficient evidence and sent the question back to be tried before a jury.<sup>249</sup>

Indeed, *Faw* highlights one especially contestable point about real-estate valuation: knowing that changes in the money supply could greatly affect land values, and anticipating that the jury might recall the extraordinary dearth of specie at the time of the sale (that is, 1779, amid the Revolutionary War), the Court said that “the jury ought not to be governed by the particular difficulty of obtaining gold and silver coin at the time, but their conduct ought to be regulated by the real value of the property, if a solid equivalent for specie had been made receivable in lieu thereof.”<sup>250</sup> That is, the jury was to imagine a counter-factual past that was like 1779 but with a more plentiful money supply that the Court considered normal.<sup>251</sup>

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244. *Id.* at 31.

245. *See* Gordon, *supra* note 9, at 240.

246. *See Faw*, 6 U.S. at 31–33. The term “market price” appears in the argument of counsel, but with regard to wheat, not land. *Id.* at 17.

247. *Id.* at 31–33.

248. *See id.* at 31.

249. *See id.* at 31–33.

250. *Id.* at 32.

251. *See id.*

This just underscores how many methodological choices had to be made in valuation.<sup>252</sup>

All this brings me to the second difficulty with Gordon's claim that the mass revisions were fact-finders in the service of equalization.<sup>253</sup> Given how subjective and contestable the mass revisions were, putting them into the fact-finding exception to a prohibition against rulemaking makes that exception unbounded—there is not a principled way to draw the boundary between it and the realm of policy judgment that is supposed to be its foil.

If the fact-finding exception were confined to objective facts, like the weight of a commodity shipment, then it might be distinguished as a bounded category.<sup>254</sup> But mass real-estate valuation is in a different ballpark. It is not remotely close to objective fact-finding. Even if you focus on a single parcel, real-estate value is not a fact about the physical world (like a commodity shipment's weight), nor a

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252. Gordon cites a few other cases calling for valuation based on market value, but they are all state cases from the 1820s or later. Gordon, *supra* note 9, at 240 n.441, 242. I note two additional points on objectivity:

(1) A few quotations that Gordon gives might be taken to imply objectivity in real estate valuations, in that they speak of valuations being *correct* or of *correcting* them. *Id.* at 225, 230–31, 234, 241 n.447. But while the word *correct* (as adjective or verb) implies objective certainty in today's English, the word in the 1700s had broader usage that could pertain to contested and political claims. *See, e.g.*, THE FEDERALIST NO. 40 (James Madison) (referring to the Constitution as “so singular and solemn an experiment for correcting the errors of a system [i.e., the Articles of Confederation] by which this crisis had been produced”); THE FEDERALIST NO. 47 (James Madison) (referring to the need “to form correct ideas on this important subject” of whether the Constitution has a dangerous tendency to consolidate powers); THE FEDERALIST NO. 85 (Alexander Hamilton) (arguing in favor of allowing the Constitution to operate for a while before deciding on whether and how to amend it, because “the feeling of inconveniences must correct the mistakes which [those who govern] INEVITABLY fall into in their first trials and experiments”).

(2) Gordon cites economic historian Frank Garmon as finding the valuations of 1798 to be reasonably accurate based on their correlation with population density. Gordon, *supra* note 9, at 237–38 (citing Frank W. Garmon, Jr., *Population Density and the Accuracy of the Land Valuations in the 1798 Federal Direct Tax*, 53 HIST. METHODS: J. QUANTITATIVE & INTERDISC. HIST. 1, 1, 6–7 (2019)). *Critical Assessment* extensively discusses why Garmon's study does not show the process to have been objective in ways taxpayers would have cared about, including new analysis of Garmon's data that he generously shared with me. *Critical Assessment*, *supra* note 9, at 1384–91. Gordon also cites economic historian Lee Soltow on the relation of valuations to sale prices in Connecticut. Gordon, *supra* note 9, at 238. I address this in Appendix, *supra* note 69, at 26.

253. Gordon, *supra* note 9, at 218–19.

254. *See supra* Part II.B. This sentence and the next five summarize the discussion in *supra* Part II.B.

historical fact. Land is not sold on a public exchange and thus does not have a knowable market price, unless the parcel happens to have been recently sold or rented (which very little real estate in the 1790s United States had been), and even then, only if we think the sale or rental occurred in normal market conditions. There is no way for a decisionmaker to get to a value without making affirmative *choices* about how to define value and what methods to adopt. Now imagine you have the same challenge except that, instead of valuing one parcel, you must divide a state as large as Virginia (over 60,000 square miles, larger than England) into districts and decide the average per-acre value of each district.<sup>255</sup> Perhaps people who do this could act in a spirit of “trying to get it right,” but that is no answer to the fact that people widely and frequently disagreed about what was “right” with a fundamentally higher level of intensity than when weighing sugar shipments or even counting the population in a census.<sup>256</sup> There was not an objective common referent external to the decisionmakers (like features of the physical world, known historical events, or a commodity exchange price) that made for a meeting of minds. In discussing the distinction between fact-finding and policy judgment, Gordon speaks of how a fact-finding should not depend on “the exercise of [the agency’s] will,” but he says the finding can be “a collateral consequence of a third party’s unrelated action.”<sup>257</sup> That is, facts are determined by sources outside the decisionmaker, while policy comes from inside the decisionmaker. But when deciding something as subjective as statewide mass real-estate values, the decision-maker cannot be simply a neutral receiver of what comes from outside. Wurman, a nondelegation reformer (albeit a noncategorical one), rightly recognizes this when he lists various policy questions under the direct tax and adds, “[t]he question of how best to determine value is also a question of policy . . . .”<sup>258</sup>

To be sure, there might be consensus at the extremes, say, that rich riverside land was more valuable per-acre than infertile remote land.<sup>259</sup> And there might be consensus that certain objective facts were among those relevant to the decision, such as prices of recent sales in the area. But objectivity and agreement would run out when deciding *how much more* one type of land was worth than another, or how to reason from the objective inputs (or decide what additional inputs to gather) to reach an actual conclusion. And, crucially, this modest level of objectivity is also present in delegations that we today think of as broad. Take the power of the

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255. See Virginia Abstract of Lands, *supra* note 127.

256. See *supra* note 132 and accompanying text.

257. Gordon, *supra* note 9, at 161 n.40.

258. Wurman, *supra* note 20, at 1552 (emphasis removed). That said, I differ with Wurman about whether the V&E answered this question. See *infra* Part III.B.

259. *Critical Assessment*, *supra* note 9, at 1307.

Occupational Safety and Health Administration (OSHA) to impose an emergency temporary standard when “necessary” to protect workers against a “grave danger” from harmful substances.<sup>260</sup> This standard has an objective factual aspect in the sense that we could all agree on certain extremes—that some substances do or do not pose a grave danger, or at least are more of a grave danger than others.<sup>261</sup> And there may be consensus that certain objective facts are among the relevant inputs (like hospitalization numbers). But objectivity runs out when OSHA must decide just how harmful a substance must be to pose a “grave danger,” or what additional inputs to include, or how to incorporate all the inputs into the decision.<sup>262</sup>

Any effort to distinguish the mass revisions of 1798 from delegations like OSHA’s “grave danger” decision will turn upon questions like, how important are the agreed-upon external realities compared to the decisionmaker’s own subjective choices of definition and method?<sup>263</sup> These are questions of degree, not categorical questions. Gary Lawson (yet another nondelegation reformer, but a noncategorical one) acknowledges this problem when he asks: “are there . . . ‘facts’ that are so open-ended or policy laden that committing their determination to executive or judicial agents effectively makes those actors legislators?”<sup>264</sup> Recognizing that categorical reformers wish “to avoid how-much-is-too-much kinds of questions,” Lawson cautions that a fact-finding exception to the prohibition against delegation “may not lend itself to categorical judgments. No formulation of a test can eliminate the need for judgment, at some point in the process, about whether ascertainment of a contingent ‘fact’ amounts to making the law.”<sup>265</sup> I would note one thing further. Questions of degree can be bad or worse. They are bad if we must draw an arbitrary line on a spectrum on which we know the ordinal ranking of all cases on the spectrum (e.g., if I tell you to draw a binary distinction between time periods that qualify as “a long time” and time periods that do not, at least you can tell whether any one period is longer than any other). But questions about the ratio of external reality to decisionmaker choice are worse, because very often they are not amenable to consensus on the ordinal ranking of the cases. One might, sometimes, be able to rank delegations of decisions involving the same subject matter (e.g., deciding the value of farms in Virginia involves a lower ratio of

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260. 29 U.S.C. § 655(c)(1); *Nat’l Fed’n of Indep. Bus. v. Dep’t of Lab.*, 595 U.S. 109, 123–26 (2022) (Gorsuch, J., concurring) (suggesting that this power would violate the nondelegation doctrine unless pared back by the major questions doctrine).

261. *See* 29 U.S.C. § 655(c)(1).

262. *See id.*

263. *Compare id.*, with *Critical Assessment*, *supra* note 9, at 1345–91.

264. Gary Lawson, *A Private-Law Framework for Subdelegation*, in *THE ADMINISTRATIVE STATE BEFORE THE SUPREME COURT*, *supra* note 9, at 123, 146.

265. *Id.*

external reality to decisionmaker choice than deciding the acreage of those farms). But the nondelegation doctrine is supposed to cover, and provide predictable outcomes for, *all* domestic coercive legislation.<sup>266</sup> How does one tell if devising the definitions and methods to value all the land within the largest U.S. state involves a lower or higher reality–choice ratio than deciding how to identify what measures are necessary to protect against workplace substances posing grave dangers? Or than each of the decisions delegated in the regulation of securities, health insurance, air pollution, car safety, telecom, etc.?

The indeterminate boundaries of the fact-finding exception pose a very general problem for the categorical reformers, because once you concede that the fact-finding category ranges so far beyond objectivity as to encompass things like methodless mass real-estate valuation, it becomes difficult to determine, in a principled way, whether any delegations are *not* fact-findings. As noted earlier, it is standard to think of an agency’s exercise of delegated power as instrumentally rational: the statute gives an end to be sought, the agency finds that certain action is a means toward that end, and so the agency takes that action.<sup>267</sup> Such reasoning from end to means can generally be characterized as factual, in that the agency is asking whether doing something to the world will cause the world to shift toward some desired state.<sup>268</sup> To illustrate, consider the many circumstances where end-

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266. See *Critical Assessment*, *supra* note 9, at 1293–96.

267. See *supra* note 193 and accompanying text.

268. Mid-nineteenth-century state court cases cited by Gordon in his discussion of the difference between factual findings and policy judgments concerned state laws that were to go into effect only if voted-for by a majority of voters, either statewide or in a locality. Gordon, *supra* note 9, at 161 n.40. Cases like these held those statutes unconstitutional because the delegee (the electorate) was given the power to make a “decision . . . upon the expediency of the [provision] itself.” *Id.* (quoting *Bradley v. Baxter*, 15 Barb. 122, 124 (N.Y. Gen. Term 1853) (alteration in original)). In these cases, the legislatures were not telling the delegee to decide whether the act was a good means toward some stated end (this is no surprise, as the delegee was a popular electorate). *Bradley*, 15 Barb. at 125. Instead, the delegee (electorate) was to make a pure political choice as to whether it wanted the act or not. *Id.* This is why one case said the delegee (electorate) was deciding “the identical question which the constitution makes it the duty of the legislature itself to decide”—whether something shall become a law. Gordon, *supra* note 9, at 161 n.40 (quoting *Barto v. Himrod*, 8 N.Y. 483, 491 (1853)). Indeed, the statute in that case said, “[t]he electors shall determine . . . whether this act shall or shall not become a law.” *Barto*, 8 N.Y. at 486 (emphasis removed). Such delegation of a pure political choice is different from the power Congress delegates to an agency to take action the agency finds to be expedient toward some end that Congress states. See *id.* An action’s expediency toward a stated end is itself (at least partly) a factual matter on which Congress decides the

to-means reasoning is *objectively* factual. Say the statutory end is to prevent unreasonable risk of car fatalities but at reasonable cost. It is an objective fact that installing seatbelts in all cars is a better means toward achieving this end than installing back-up cameras in all cars, because seatbelts save many more lives and are less costly. But if the categorical reformers concede that fact-finding need not be anything near objective (as they must if they are to cast the 1798 delegation as fact-finding), they open the door to delegations of end-to-means determinations that are more subjective as to (1) how to discern what the accomplishment of the end would look like and (2) what means will tend toward that accomplishment. How subjective is too subjective? A categorical line is elusive. Some might say we should require the legislature to be objective in defining what accomplishment of the end looks like, but the 1798 legislation cuts against that: how would a person test objectively whether the goal of valuing all of Virginia's land at its "worth in money" on the statutory valuation date (October 1, 1798) had been achieved?<sup>269</sup>

As evidence of the general intractability of this line-drawing, consider the Supreme Court's attempt at doing it in nondelegation cases during the period from the 1800s through the 1930s when Justice Gorsuch thinks the Court was following sound tradition (before, in his telling, going astray in the 1940s by

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agency's choice should turn. *Expedient*, OXFORD ENG. DICTIONARY, [https://www.oed.com/dictionary/expedient\\_adj?tab=meaning\\_and\\_use#5049394](https://www.oed.com/dictionary/expedient_adj?tab=meaning_and_use#5049394) [<https://perma.cc/YQD7-HLU6>] (Sept. 2023) (defining *expedient* as "conducive to advantage," either "in general, or to a definite purpose").

269. If (say) you tried testing the V&E Act's achievement of accuracy by comparing the post-revision valuations of parcels that were actually sold after October 1, 1798, to the prices of those sales, you would encounter indeterminacies analogous to those catalogued in *supra* Part II.B; see *supra* notes 106–18 and accompanying text. First, in order to adopt such a test, you would need to exercise discretion to choose among different definitions of value, that is, to define value in terms of prices of parcels, rather than other options like basing it on land's income (a consequential choice if there were, say, a speculative bubble). Second, actually finding sale prices statewide would be costly, perhaps prohibitively so. Third, such a test would require waiting for long enough after October 1, 1798, to accumulate a substantial number of sales. But you might have to wait for quite a while, given low rates of turnover. And the longer you waited, the stronger would be the argument that changes in such factors as economic conditions, the money supply, or yellow fever disruptions (all of which could vary greatly between a state's localities) had diminished or negated the probitiveness of subsequent sales' prices for gauging the value that the parcels theoretically held on October 1, 1798. Fourth, parcels sold would not be a representative sample of all land. For categories of land that were sold relatively less, data would be especially sparse, rendering the entire test less reliable, considering that the V&E Act aspired to do equity between different types of land. Fifth, except in the improbable event that sale prices perfectly matched valuations, you would have to decide: how close is close enough?

overemphasizing the “intelligible principle” formula).<sup>270</sup> The fact-finding category devised by the Court between the 1800s and 1930s was indistinguishable from policy judgment. In 1892, in *Marshall Field & Co. v. Clark*, the Court upheld as fact-finding a delegated power of the President to impose retaliatory duties on a stated range of goods of a foreign country “for such time as he shall deem just” if that country imposed duties on U.S. products that the President “may deem to be reciprocally unequal and unreasonable.”<sup>271</sup> In 1907, in *Union Bridge Co. v. United States*, the Court upheld as fact-finding a power delegated to the Secretary of War to order any bridge owner “to alter the [bridge] as to render navigation through or under it reasonably free, easy, and unobstructed,” including a power to specify the exact alterations.<sup>272</sup> The question of how a bridge needed to be constructed to leave navigation “reasonably free” entailed a subjective balancing of the rival economic interests of bridge users (who would be harmed by drawbridges and steep grades); bridge owners (who bore the cost of modifications); and waterway carriers and shippers (who could enjoy the advantage of larger vessels if bridges were higher).<sup>273</sup> The *Union Bridge* case was part of a 20-year political brawl pitting the owners and users of several bridges in Pittsburgh (then the nation’s eighth-largest city) against carriers and shippers who wanted the bridges redone, resulting in repeated adversarial proceedings before successive Secretaries of War, who disagreed with each other on what was “reasonably free.”<sup>274</sup> Later, in 1915, in *Mutual Film Corp. v. Industrial Commission of Ohio*, the Court—in a decision it clearly considered part of its *federal* nondelegation jurisprudence—upheld as fact-finding a delegated power of a state agency to ban all movies not “of a moral, educational, or amusing and harmless character.”<sup>275</sup> When categorical reformers argue for a principled fact-policy distinction, they are seeking something the Court has failed in all its attempts to devise, even throughout the period before Justice Gorsuch thinks the Court lost its way.

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270. *Gundy v. United States*, 139 S. Ct. 2116, 2137–40 (2019) (Gorsuch, J., dissenting).

271. 143 U.S. 649, 680, 692–94 (1892).

272. 204 U.S. 364, 366, 385–89 (1907).

273. See Gary Link, *The Battle for the Bridges*, W. PA. HIST., Summer 2004, at 30, 30–39; THOMAS W. SYMONS & FREDERICK LAW OLMSTEAD, *THE CITY AND THE ALLEGHENY RIVER BRIDGES* 8–9 (Pittsburgh Civic Comm’n 1910).

274. Link, *supra* note 273, at 30–39; SYMONS & OLMSTEAD, *supra* note 273.

275. 236 U.S. 230, 240, 245–46 (1915). Though the case was about a state agency (and the basis for federal jurisdiction over the question was unstated), the Court couched the question as “delegation of legislative power” and cited one of its own cases on delegation to a federal agency. *Id.* at 245–46 (citing *Buttfield v. Stranahan*, 192 U.S. 470 (1904)). The Court later cited *Mutual Film* as precedent in a nondelegation challenge to a federal agency. *Avent v. United States*, 266 U.S. 127, 131 (1924) (citing *Mut. Film*, 236 U.S. at 246).

Indeed, it will be difficult to categorically distinguish as nonfactual even delegations to act in the “public interest.” One might think the phrase “public interest” specifies no end whatsoever, leaving the agency to define what is to be accomplished, such that all the agency does is policy choice, with no instrumental rationality. But actually, statutory mandates to do rulemaking in the “public interest” are generally “not determinative of what rule is ultimately adopted because [those mandates] are typically embedded in statutory authorizations that include more specific and concrete standards that drive rulemaking outcomes.”<sup>276</sup> In the subset of “public interest” delegations where the agency’s reading of that term really does drive the outcomes, one study (focusing on merger approval adjudications at three federal regulators) found that agencies do not think or act like they enjoy unbounded policy choice; they instead focus on achieving economic efficiency and rarely consider values that are not more specifically set forth in the relevant legislation.<sup>277</sup> Relatedly, the judiciary historically has read “public interest” mandates to have more specific meanings: not determinate ones, but enough to give some more specific sense of a desired state of the world.<sup>278</sup> For example, the Supreme Court in a unanimous opinion by Chief Justice Charles Evans Hughes in 1932 held the “public interest” standard for authorizing mergers under the Transportation Act of 1920 to mean the agency must “assure adequacy in transportation service.”<sup>279</sup> In another unanimous case authored by Chief Justice Hughes in 1933, the Federal Radio Commission was exercising its power to decide license applications “as public convenience, interest or necessity requires” and an also vague power “to make a ‘fair and equitable allocation’” of licenses geographically.<sup>280</sup> The “public interest” requirement, said the Court,

is not to be interpreted as setting up a standard so indefinite as to confer an unlimited power. The requirement is to be interpreted by its context, by the nature of radio transmission and reception, by the scope, character, and quality of services, and, where an equitable adjustment between states is in view, by the relative advantages in service which will be enjoyed by the public through the distribution of facilities. In making such an adjustment the equities of existing stations undoubtedly demand consideration. . . . But *the weight of the evidence as to these equities and all other pertinent facts is for the*

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276. Jodi L. Short, *In Search of the Public Interest*, 40 YALE J. ON REGUL. 759, 781 (2023).

277. *Id.* at 790–95, 800–03, 806–11. The agency that most commonly addressed values not more specifically set forth in statute was the Federal Communications Commission; these were most commonly national security or emergency response. *Id.* at 801–02.

278. *Id.* at 769–70.

279. *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12, 24 (1932).

280. *Fed. Radio Comm’n v. Nelson Bros. Bond & Mortg. Co.*, 289 U.S. 266, 285 (1933).

*determination of the commission* in exercising its authority to make a ‘fair and equitable allocation.’<sup>281</sup>

In the last-quoted sentence, we see the unanimous *Lochner*-era Court using a fact-finding lens to modestly curb but also legitimize a broad “public interest” standard: “equities” were grouped as “facts,” and the whole decision on “fair and equitable allocation” under the “public interest” standard was cast as a “determination” upon “the weight of the evidence.”<sup>282</sup> Cases like this underscore the absence of a predictable and categorical distinction between policy judgment and fact-finding once we give up on requiring fact-finding to be objective—and once we recognize the fact-finding aspect inherent to instrumentally-rational action generally.

### III. THE NONCATEGORICAL REFORMERS: WERE THE MASS REVISIONS UNIMPORTANT DETAILS?

#### A. *The Noncategorical Alternative*

In contrast to the categorical reformers’ argument for a prohibition against coercive domestic rulemaking (other than fact-finding), the noncategorical reformers argue that the original meaning of nondelegation is well-summarized in Chief Justice Marshall’s dicta in *Wayman*:

The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.<sup>283</sup>

In classic work drawing from *Wayman*, Lawson wrote, “Congress must make whatever decisions are important enough to the statutory scheme in question so that Congress must make them.”<sup>284</sup> While admitting the test to be “absurdly self-

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281. *Id.* (emphasis added) (internal citation omitted). Although this case did not expressly decide a nondelegation challenge, it was cited as authority in later nondelegation cases. *See* *Panama Refin. Co. v. Ryan*, 293 U.S. 388, 428 (1935); *see also* *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 226 (1943).

282. *See* *Fed. Radio Comm’n*, 289 U.S. at 285.

283. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

284. Lawson, *supra* note 20, at 361 (citing *Wayman*, 23 U.S. at 43). There is disagreement over whether *Wayman* means to set up a test and if so what kind. *See, e.g.*, Mortenson & Bagley, *supra* note 9, at 2362 (quoting *Wayman*, 23 U.S. at 43) (“Undeveloped, ambiguous dicta in a case about federalism [rather than separation of powers] delivered almost four decades after the

referential” and recognizing that it understandably repelled formalists like Justice Scalia, Lawson believed the Court had to go forward with applying it “in the context of each particular statutory scheme”—and that doing so, while involving hard judgment calls, would result in striking down at least some major provisions that had previously been upheld, such as those that failed to make any “meaningful normative commitment.”<sup>285</sup> Since then, Lawson has developed an extensive argument for interpreting the Constitution according to principles of eighteenth-century private fiduciary law.<sup>286</sup> But while that framework adds some content to the nondelegation inquiry, the fact patterns of such private fiduciary cases and nondelegation cases are practically quite different. Within this framework, Lawson continues to think *Wayman*’s broad distinction is central and confronts the judiciary with context-specific judgments.<sup>287</sup> Justice Gorsuch’s *Gundy* dissent, while speaking in categorical terms about coercive regulation of private conduct being legislative, and positing categorical exceptions for fact-finding and foreign affairs, also invokes the more obviously open-ended distinction in *Wayman* between “important subjects” and “fill[ing] up the details.”<sup>288</sup>

Another leading noncategorical reformer who invokes *Wayman* is Wurman. Like Lawson, Wurman says the original Constitution means Congress cannot delegate “important subjects” but can delegate the power to “fill up the details” on matters of “less interest.”<sup>289</sup> Under this open-ended distinction, Wurman eschews

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Founding does not provide a strong foundation for originalist claims about the nondelegation doctrine.”); Rappaport, *supra* note 17, at 207 (citing *Wayman*, 23 U.S. at 43) (“Advocates of the important subjects approach read this to mean that important subjects must be legislated but less important subjects or details can be left to the executive. But despite my very high opinion of Chief Justice Marshall and the advocates of the important subjects approach, there are reasons for questioning the correctness of this view.”); Hamburger, *Blues*, *supra* note 9, at 1100–02 (citing *Wayman*, 23 U.S. at 44–45, 48–49) (“Even if *Wayman* could be relied upon, Marshall’s opinion did not actually propose that importance should be used as a standard for distinguishing exclusive and nonexclusive powers. On the contrary, the Chief Justice merely observed the importance of powers that were exclusively legislative.”).

285. Lawson, *supra* note 20, at 361, 376, 378–91.

286. See GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY”: UNDERSTANDING THE FIDUCIARY CONSTITUTION (Univ. Press of Kan. 2017). *But see* Richard Primus, *The Elephant Problem*, 17 GEO. J.L. & PUB. POL’Y 373 (2019) (questioning the originalist grounds for this general approach).

287. Lawson reads the fiduciary law to permit delegations that are ministerial, which he thinks track the subjects of “less interest” in *Wayman* and may often be tasks that require local knowledge available to the agent but not the principal. LAWSON & SEIDMAN, *supra* note 286, at 118, 123–24; Lawson, *supra* note 264, at 137–42.

288. *Gundy v. United States*, 139 S. Ct. 2116, 2133–37 (2019) (Gorsuch, J., dissenting) (quoting *Wayman*, 23 U.S. at 31, 43).

289. Wurman, *supra* note 20, at 1502.

the categorical view that rulemaking on domestic private conduct was entirely forbidden.<sup>290</sup> Instead he says that, when private rights were at stake, constraints on delegating discretion tended to be stronger because the regulation of private conduct tends to be more important than other matters.<sup>291</sup> Additionally, he says “perhaps” Congress may have more latitude to delegate in foreign affairs, but again, this seems not to be categorical.<sup>292</sup>

Beyond these non-dispositive tendencies, Wurman treats the master distinction between important subjects and details as open-ended.<sup>293</sup> He does note that “discretion over *purpose* is surely more legislative than discretion over how to effectuate that purpose,”<sup>294</sup> that is, discretion over the selection of “means.”<sup>295</sup> But I do not think a purpose-versus-means distinction adds much content to an important-versus-details distinction, as both of these suggest drawing a line at some undefined point on the continuous spectrum between policymaking and implementation; Wurman himself says the “lines can be difficult to draw.”<sup>296</sup> Finally, he briefly adds that “[t]here is probably a difference . . . between so-called jurisdictional questions and nonjurisdictional questions. The question *whether* something should be regulated appears qualitatively different than a decision over *how* something is to be regulated after Congress has already declared that it should be regulated.”<sup>297</sup> But this distinction, too, does not make Wurman’s approach categorical. For one thing, he says it is only “probably” true.<sup>298</sup> Further, the difference is blurry between an agency’s *jurisdiction* and simply its *powers*.<sup>299</sup> If jurisdiction just means power, then it seems to add nothing to the important-versus-detail distinction, since we are just asking: how much power did Congress give the agency, and is it too much? The distinction could be clarified by defining jurisdiction in terms of (say) the parties regulated, as distinct from what conduct or resources of theirs are regulated—or any number of other distinctions. But

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290. *Id.* at 1554–56.

291. *Id.* at 1502–03, 1538–39, 1556.

292. *Id.* at 1549 n.322; *see also id.* at 1543 (explaining a broad delegation on the ground that it was “in the context of the President’s Treaty and Commander-in-Chief Powers”).

293. *See infra* notes 294–304 and accompanying text.

294. Ilan Wurman, *As-Applied Nondelegation*, 96 TEX. L. REV. 975, 1009 (2018).

295. Wurman, *supra* note 20, at 1555 (“means” as distinct from “purpose”); *see also id.* at 1502–03, 1549 n.322.

296. *See* Wurman, *supra* note 294, at 1010.

297. *Id.* at 1009; *see also* Wurman, *supra* note 20, at 1549 n.322 (stating the jurisdictional status of the question “might factor into” the nondelegation analysis).

298. *See* Wurman, *supra* note 294, at 1009.

299. *City of Arlington v. Fed. Comm’n Comm’n*, 569 U.S. 290, 297–98 (2013).

Wurman does little to make such clarifications. He argues that early congressional statutes delegated only details and not important subjects, but in doing so, he does not apply the distinction between jurisdictional and nonjurisdictional matters in an express or systematic way.<sup>300</sup> Wurman casts the matters that Congress decided in those statutes as important—and those that Congress delegated as unimportant—while barely mentioning “jurisdiction”; the concept does not seem to control how he sorts matters.<sup>301</sup> Further, he ignores a statute of 1794, cited in prior literature, that gave the President broad discretion to decide whether to impose a temporary embargo on ships leaving ports and to choose the groups of ships it would apply to, which seem to be jurisdictional questions, and other statutes seemingly delegating jurisdiction in 1798 and 1799.<sup>302</sup>

Rather, Wurman applies the *Wayman* distinction in a more open-ended way, specific to each statutory context, similar to what Lawson advocated in his classic work.<sup>303</sup> And like Lawson, Wurman expects that his approach, though not rigidly defined, will result in striking down more statutes: “Under this account, I suspect that some, but hardly all, of the modern administrative state is unconstitutional.”<sup>304</sup>

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300. The one express application is when he passingly says Congress “appears to have resolved” all jurisdictional questions in the early pension statutes. Wurman, *supra* note 20, at 1549 n.322.

301. In Wurman’s analysis of the direct tax of 1798, he notes at the outset that the tax was confined to slaveholders and landowners, but mostly he focuses on matters that do not appear to be jurisdictional: the different rates for different types of real estate, the \$2 million sum of the tax overall, the quota for each state, the degree of discretion enjoyed by the federal boards in valuation as compared to state administrators or hypothetical alternatives, and the role of the boards in constraining lower-level officials’ discretion. *Id.* at 1549–53. In his discussions of other early statutes, Wurman likewise says several matters were important that seem not to be jurisdictional, e.g., rates of tariffs, market-price restrictions on Sinking-Fund purchases, and a first-to-file rule for patents. *Id.* at 1542, 1547, 1549. That said, regarding these other statutes, Wurman does invoke seemingly jurisdictional points by noting that Congress did not delegate what items to subject to tariffs, or whether to have naturalization at all, or whether to have patents or pensions at all. *Id.* at 1542, 1548.

302. Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 356 (2021) (citing Act of June 4, 1794, ch. 41, §1, 1 Stat. 372); *see also* PARRILLO, SUPPLEMENTAL PAPER, *supra* note 10, at 15–16 (describing statutes of 1798 and 1799 regarding the benefits eligibility of sick and disabled seamen, and prohibitions against U.S. ships sailing to French ports).

303. *See* Wurman, *supra* note 20, at 1538–55 (referencing *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825)); Lawson, *supra* note 20, at 361.

304. Wurman, *supra* note 20, at 1503.

### B. *Wurman's Response*

Wurman contends that, although the 1798 legislation empowering the federal boards to make “just and equitable” mass revisions “may suggest that Congress could delegate at least some significant discretion over private rights,” it is ultimately consistent with a principle that Congress can delegate only the power to “fill up the details” on matters of “less interest” and cannot delegate “important subjects.”<sup>305</sup>

In responding to Wurman, I want to begin by explaining certain differences I have with him regarding “what happened” as a historical matter—that is, differences between us over what Congress’ options were in designing the direct tax; what matters Congress did and did not decide, and how controversial those matters were; and just what the responsibilities and powers of the federal boards were in making “just and equitable” mass revisions. After describing these differences over the history, I will shift to the larger question of whether the history is inconsistent with the hypothesis that original meaning entails a nondelegation doctrine resting on an important-versus-details distinction. But for now, here are my four differences with Wurman on the more prosaic question of “what happened.”<sup>306</sup>

First, Wurman says: “Certainly, Congress could not have conducted the valuations itself.”<sup>307</sup> Although Congress could not have done *individual* valuations itself, the task that it delegated to each federal board—dividing its state into districts and determining the share of the state quota to be borne by each district based on some sense of the value of that district’s land—is something Congress could have done itself. We know because Congress actually did it in the direct tax of 1813 (before shifting back to using federal-board mass revisions in the direct tax of 1815).<sup>308</sup> Alternatively, Congress in 1798 could have passed the V&E Act, but not the subsequent statute imposing the actual tax, waited for the valuations to be completed, and *then* enacted a tax on the basis of valuations that it could see and adopt, instead of delegating power to the federal boards to make valuation decisions with automatic and direct coercive effects. To be sure, Congress in 1798 was in a hurry to get revenue to prepare for hostilities with France. But I do not understand the reformers to admit that the nondelegation doctrine yields to necessity.

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305. *Id.* at 1538–39.

306. *See infra* notes 307–29 and accompanying text.

307. Wurman, *supra* note 20, at 1554.

308. *Critical Assessment*, *supra* note 9, at 1444, 1450–51. Congress in 1813 did give each state legislature an option to vary its intra-state apportionment. *Id.* at 1444.

Second, Wurman says that “Congress resolved all the controversial political questions,” and under that heading, he says that,

perhaps most significantly, Congress resolved for itself the most politically controversial issue: whether houses should be taxed separately from land, to ensure that most of the tax burden would fall upon wealthy city dwellers with large houses, as opposed to rural farmers with large tracts of land but more modest accommodations.<sup>309</sup>

Thus, in Wurman’s view, the house-versus-land issue nationwide (decided by Congress) was more controversial than the intra-state geographic distribution of taxable value within each state (which Congress delegated).<sup>310</sup> I do not see the basis for saying this. Although Wurman is probably correct that the house-versus-land issue was the most controversial issue *that Congress debated*, the delegation of intra-state valuation to the federal boards was not debated, and we do not know how controversial that issue would have been if Congress had debated it—say, if someone had proposed inserting county-level quotas into the bill.<sup>311</sup> When the direct tax bill of 1813 was written to include such county-level quotas, those quotas sparked extended deliberations in the House, with several divided votes, including infighting among the representatives of at least one big state (Virginia).<sup>312</sup> These debates of 1813 are very spottily recorded, so we do not have many details of the controversy, but it was major.<sup>313</sup> This is consistent with the history of intra-state land-tax distribution by the state legislatures, which also saw intense intra-state political conflict.<sup>314</sup> It is quite plausible that members of Congress in 1798 delegated to avoid having a debate that would open this can of worms.

Related to this second difference, I should note that while Congress may have formally resolved the tax’s respective treatment of houses and lands, it practically delegated that issue to the federal boards. Although the statute subjected houses to a progressive set of rates while subjecting non-house land to whatever flat rate was necessary to fill the remainder of the state’s quota, each federal board practically controlled the distribution of the tax burden between houses and lands because Congress, in empowering each board to revise values in each district, authorized the board to revise a district’s houses separately from that same

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309. Wurman, *supra* note 20, at 1497, 1550.

310. *See id.*

311. *See Critical Assessment, supra* note 9, at 1403–04, 1446–48.

312. *See id.* at 1446–48, 1446 n.727; *see also* 26 ANNALS OF CONG. 312, 405 (1813).

313. *See Critical Assessment, supra* note 9, at 1446–48, 1446 n.727; *see also* 26 ANNALS OF CONG. 312, 405 (1813).

314. *See Critical Assessment, supra* note 9, at 1392–401.

district's non-house lands.<sup>315</sup> That is, each board was free to shift the distribution of taxable value between houses and lands.<sup>316</sup> As it happened, the federal boards in the aggregate assigned value to houses and non-house lands in such a way that non-house lands bore the majority of the state quota in 11 of the 12 states for which records are extant.<sup>317</sup> This does not suggest Congress actually achieved the result that Wurman says it voted “to ensure,” i.e., “that most of the tax burden would fall upon wealthy city dwellers with large houses.”<sup>318</sup> Instead, the power that Congress delegated proved decisive.

Third, Wurman claims that “[t]he motivating concern [that led to the establishment of the federal boards] was that some local assessors [(i.e., assistant assessors, all of whom were residents of their respective districts)] might systematically favor their local area by reducing the overall valuation to lower the resulting tax burden”—opportunistic reductions that the federal board would then redress.<sup>319</sup> Thus, says Wurman, “the inclusion of this power [of the federal board to conduct mass revisions] was actually intended to *reduce* discretion overall.”<sup>320</sup> I have two responses to this. First, the inclusion of the boards’ mass-revision power did not reduce administrative discretion. The sum of administrative discretion remained constant as long as Congress did not set values, definitions, or methods; creating the boards only *concentrated* administrative discretion, replacing many small administrators with fewer, more powerful administrators. Second, although Wurman is correct that the possibility of systematic lowballing by “hometown” assistant assessors was a concern and a reason to empower the federal boards, it was hardly the sole reason to empower them.<sup>321</sup> The federal boards were not mere fraud-prevention squads, preventing dishonest officials from concealing some knowable true value. Real-estate valuation was genuinely uncertain and could be done many different ways.<sup>322</sup> Leaving numerous decentralized assistant assessors to their own devices could therefore produce all sorts of inconsistency in definitions or approaches, regardless of those officers’ incentives or honesty.<sup>323</sup> Leading observers in 1798 spoke of how they expected or found dramatic divergences of approaches among assistant assessors within a single state, without

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315. Several boards made different revisions for houses than for lands. *See id.* at 1339–45.

316. *See id.*

317. *Id.* at 1326.

318. Wurman, *supra* note 20, at 1550.

319. *Id.* at 1552.

320. *Id.*

321. *See infra* notes 322–24 and accompanying text.

322. *Critical Assessment*, *supra* note 9, at 1345–91.

323. *See id.*

alleging opportunistic lowballing.<sup>324</sup> Note these divergences were expected and observed even though the very existence of the federal boards' revision power would have diminished whatever incentives the assistant assessors had to lowball. And, more subtly, but just as importantly, a major reason that lowballing was a concern *was* the uncertain and discretionary nature of valuation to begin with. Fraud and opportunism were easier and more tempting in valuing real estate than in weighing shipments of sugar because it could be so difficult to conclude objectively that an official had reached false results.

Fourth, Wurman states that the

question of *how best to determine* value is also a question of policy, and Congress appears to have answered that [question], too—by letting assessors use any standards and metrics at their disposal to make as good an estimate of the true value of the property “in money” in their particular geography and circumstances. Such standards and metrics would vary from place to place, and it was therefore not thought wise or necessary to fix the same standards.<sup>325</sup>

Related to this, Wurman notes that leaving the choice among various “standards” to the boards had many advantages: the boards had more expert information about their states, were suited to tailor their decisions to the circumstances, and could devise standards that were less crude and less prone to being gamed.<sup>326</sup> These are all classic arguments in favor of broad delegation. At first glance, Wurman’s line of reasoning here seems like a concession that the V&E Act’s delegation was important—and justifiably so. For this reasoning *not* to be a concession (and Wurman does not mean it be), it must rest on a background premise that the boards, in choosing their own standards, were constrained by some kind of underlying objectivity in what the best methods were for achieving accuracy under the circumstances of a given state. This seems to be what Wurman is referencing when he says the purpose of the delegation was “so that all states’ valuations could be conducted in a manner that would most nearly approximate the true value ‘in money’ of every property.”<sup>327</sup> Yet Wurman does not mount an affirmative argument that real-estate valuation was objective,<sup>328</sup> nor does he attempt to counter

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324. *See, e.g., id.* at 1372 (Treasury Secretary); *id.* at 1377 (Ways and Means Committee chair); *id.* at 1378 (commissioner in South Carolina).

325. Wurman, *supra* note 20, at 1552.

326. *Id.* at 1551–52.

327. *Id.* at 1551.

328. Instead, he seems to recognize the discretion that valuation called for. *Id.* at 1538–39 (“The [V&E Act] . . . may suggest that Congress could delegate at least some significant discretion over private rights.”); *id.* at 1553 (“Implementing this mandate still required discretion, but perhaps not so much as to defeat a private-rights theory nondelegation.”).

the evidence in *Critical Assessment* that it was far from being so—and particularly that contemporaries disagreed and fought about real-estate valuations even within the *same* state (or within the same area that was even smaller than a state).<sup>329</sup>

The preceding four points suggest that the direct-tax legislation of 1798 decided less and delegated more than Wurman argues it did, as a historical matter. But there is still the ultimate question of whether, as a legal matter, the legislation left enough questions unanswered, and delegated enough power to administrators, to falsify the important-versus-detail theory of nondelegation's original meaning.

I must admit the direct-tax legislation does not falsify the theory, but the reason is that the theory is non-falsifiable, which keeps us from evaluating its truth. For any real-world statute there will be some things Congress decides and others that it delegates, and one can always classify the former as important and the latter as details if the distinction is malleable enough. And the important-versus-detail distinction is very malleable. This is evident when Justice Gorsuch speaks approvingly of letting agencies decide “highly consequential details.”<sup>330</sup> Wurman, while contending that early members of Congress never denied the important-versus-detail distinction in principle, concedes they disagreed on its “contours” and “application.”<sup>331</sup> And his analysis of early statutes does little to elaborate the distinction in ways other than by applying it to each act in a way that seems specific to the act, making it difficult, on the basis of any one application, to predict objectively how any other application will come out.<sup>332</sup> He gestures at potential elaborations that could render the distinction more hard-edged and falsifiable—such as the idea that questions of agency jurisdiction (defined in some identifiable way) are nondelegable or less delegable—but does not develop them or answer

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329. For references to uncertainty, divergence, and contestation that pertain to real estate within a single state (or smaller area), see, for example, *Critical Assessment*, *supra* note 9, at 1349, 1351, 1353 n.295, 1354, 1357–58, 1365–66, 1372, 1377, 1378, 1392–1401, 1404–05, 1408–17. The methodological uncertainties discussed in *id.* at 1358–66 would generally not be resolved by confining valuation to the circumstances of one state.

330. *Gundy v. United States*, 139 S. Ct. 2116, 2143 (2019) (Gorsuch, J., dissenting).

331. Wurman, *supra* note 20, at 1514; *cf.* Chabot, *supra* note 9, at 112–47 (arguing that the First Congress delegated matters that were “important” according to the familiar meaning of that term (including as used by contemporaries)).

332. *See* Wurman, *supra* note 20, at 1538–55.

counterevidence to them.<sup>333</sup> Importance, he says, is just “sometimes . . . in the eye of the beholder.”<sup>334</sup>

Even if the boards’ just-and-equitable revision powers were “important” by any meaningful definition to the value-based allocation of the real-estate tax burden, one can still conclude they were unimportant in the *Wayman* sense by (a) defining the scope of the important-versus-detail inquiry to encompass not only the boards’ power over the allocation of liability but also how much liability each board had to spread around, and (b) drawing the subjective line between *important* and *detail* at a place that leaves that allocation of liability on the *detail* side.<sup>335</sup> As Wurman rightly points out, Congress did make a hard-edged decision on at least one controversial issue, the amount of tax to raise (\$2 million), and the Constitution then required that sum to be divided into quotas for each state according to the population-based formula.<sup>336</sup> Thus, even if the board in Virginia aggressively concentrated tax liability in one part of the state, the liability it could allocate was limited by the state’s quota of \$345,488.<sup>337</sup> Was that sum large enough for its allocation to be “important?” It all depends on that undefined term. We might compare the \$2 million nationwide total with average annual federal tax revenue

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333. See *supra* notes 289–304 and accompanying text. Besides jurisdiction, Wurman says, with regard to an act on import duties, that Congress did not delegate the setting of rates. Wurman, *supra* note 20, at 1542. Perhaps this suggests rate-setting was generally nondelegable for taxes. But in the direct tax of 1798, each state’s rate on non-house land floated depending on the state’s enslaved population and the total value of its houses, the latter of which was determined by the federal board through its “just and equitable” revision power. See *supra* notes 315–18 and accompanying text.

334. Wurman, *supra* note 20, at 1490. Wurman does briefly posit hypothetical statutes—delegating with no guidance Congress’ entire naturalization power, its entire patent power, or *all* its powers—that he says could falsify the claim that *any* nondelegation doctrine existed. *Id.* at 1556. But he does not articulate what feature distinguishes these hypothetical statutes from actual early statutes. *Id.* Presumably the distinguishing feature is not the absence of meaningful guidance, as there was no meaningful guidance in several actual early statutes. See *supra* note 14 and accompanying text. I suppose what distinguishes the hypotheticals may be the sheer scope of the delegation, covering an entire enumerated power of Congress (or more than one). But in that case, the absence of early statutes comparable to Wurman’s hypotheticals would not support an originalist nondelegation doctrine any different from the doctrine we have today because there are no cases upholding the delegation of an entire enumerated power; the only case evaluating a statute that came near to delegating an entire enumerated power (the NIRA) invalidated the statute and has never been overturned. *Infra* notes 358–79 and accompanying text.

335. For the dichotomy between important subjects and details, see *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825).

336. Wurman, *supra* note 20, at 1550.

337. *Critical Assessment*, *supra* note 9, at 1303.

in the years 1796 to 1800, which consisted mostly of import duties and was about \$8 million.<sup>338</sup> Does that mean \$2 million was “important?” Again, it all depends on the undefined term. Additionally, we might think the boards’ mass revisions carried importance out of proportion to the tax’s mere revenue because so much was riding on the administrative success and public acceptance of Congress’ first-ever direct tax; lenders might consider it a test of whether the United States was capable of taxing the great bulk of its economy (land) and not just its imports, and the nation’s internal legitimacy was at stake in that direct taxes involved more widespread coercion of U.S. citizens than any federal activity before the Civil War.<sup>339</sup> But are these the kind of things that would make the mass revisions “important?” Yet again, it all depends on the undefined term.

### C. Construction, Political Creativity, and Judicial Candor

The direct-tax legislation of 1798 does not falsify the important-versus-detail formulation of an original nondelegation doctrine, but applying that formulation to the legislation reveals the formulation to be non-falsifiable, which keeps us from evaluating it for truth. What are we to make of the noncategorical approach, then? I think we can usefully draw upon the distinction between constitutional interpretation and constitutional construction that has been adopted by many originalist scholars (albeit not all).

As Lawrence Solum explains, interpretation is “the activity of discovering the linguistic meaning or communicative content of the constitutional text,” including by using historical context, while construction is “the activity of determining the legal effect given to the text.”<sup>340</sup> While construction nominally occurs in every case where a constitutional provision is applied, there are some cases where the provision’s meaning is clear, such that interpretation does all the practical work, and construction is “mechanical” and hardly noticed.<sup>341</sup> But “[c]onstruction becomes the focus of explicit attention when the meaning of the

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338. Calculations based on *Annual Receipts for Seventeen Years (1809)*, in 2 AM. STATE PAPERS: FINANCE 318, 319 (Walter Lowrie & Matthew St. Clair Clarke eds., Gales & Seaton 1832).

339. See BRIAN BALOGH, *A GOVERNMENT OUT OF SIGHT: THE MYSTERY OF NATIONAL AUTHORITY IN NINETEENTH-CENTURY AMERICA* 53–150 (Cambridge Univ. Press 2009) (detailing the absence of widespread federal coercion of citizens).

340. Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 *FORDHAM L. REV.* 453, 468 (2013). On the relevance of history to discovering communicative content, see *id.* at 481.

341. Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Debate*, 113 *NW. U. L. REV.* 1243, 1278 (2019).

constitutional text is unclear, or the implications of that meaning are contested,” including when the text is vague, that is, lacking a “bright line.”<sup>342</sup> Whereas interpretation simply follows from communicative content that is “determined by facts” about words and context, “construction is essentially driven by normative concerns,” and different approaches to construction raise different normative possibilities—such as deferring to the political branches, following one’s own political morality, adopting a presumption of liberty, etc.<sup>343</sup> When text-in-context is unclear and “underdetermines legal effect, it creates a construction zone—a set of possible circumstances where the full communicative content of the constitutional text is consistent with more than one course of action.”<sup>344</sup> For some provisions and some cases, the construction zone is large, that is, the meaning is unclear enough that there are widely divergent available constructions.<sup>345</sup>

Keith Whittington similarly finds that “[c]onstitutional meaning must be ‘constructed’ in the absence of a determinate meaning that we can reasonably discover,” and he explains that while construction may use the Constitution’s “text and the values enshrined in the text [as a] starting point,” the “founders’ Constitution . . . may not be able to carry us all the way to the end point of those deliberations.”<sup>346</sup> He says further that

constitutional constructions, as distinct from constitutional interpretations, must be and are made by political actors in and around the elected branches of government. Perhaps they should also be made on occasion by judges, but in doing so, *judges are engaging in a political and creative enterprise and cannot simply rely on the authority of interpreting the founders’ Constitution.*<sup>347</sup>

The ratio of construction to interpretation will be especially high when it comes to nondelegation because the originalist interpretive evidence is thin. The constitutional text does not say whether there is a limit on delegation.<sup>348</sup> Rare scattered comments made in pre-ratification discourse may evidence *some* limit in the abstract, but they tell us nothing useful about what the limit *is*—about the actual content or stringency of any test.<sup>349</sup> While the few references to such a limit in the

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342. Solum, *supra* note 340, at 469–70.

343. *See id.* at 472–73.

344. *Id.* at 499.

345. *See id.* at 523.

346. Keith E. Whittington, *The New Originalism*, 2 GEO. J.L. & PUB. POL’Y 599, 611–12 (2004).

347. *Id.* at 612 (emphasis added).

348. *See supra* note 10 and accompanying text.

349. *See supra* notes 11–12 and accompanying text.

early U.S. Congress were sometimes more specific about the limit's application when each is taken in isolation, they were articulated by so few lawmakers and were so marginal within the larger debates on the bills to which they pertained (relative to other constitutional arguments and policy arguments) that it is unknown whether any of the specifics were widely accepted, even in the subset of instances where a bill's terms shifted in favor of those articulating nondelegation concerns.<sup>350</sup> Early congressional statutes contain strikingly broad delegations, as already noted, though one can devise nondelegation tests that are vague enough, or have enough exceptions, not to clash with any of the statutes.<sup>351</sup>

Let us assume *arguendo*, as *Critical Assessment* does, that there was originally *some* (unspecified) limit on delegation.<sup>352</sup> Imagine a judge who wishes to apply such a limit to decide cases. Because any limit is so unspecified, the judge will have to construct it, doing so in a large zone with many normative choices. One possible construction is to adopt the important-versus-detail test, but the test is so vague that it will not get the judge much farther in deciding cases than the original unspecified limit did. For the distinction to invalidate any of today's statutes, it will require further construction, through cases that either (1) devise more-specific construction in a way that is transparent and general or (2) implicitly do construction through ad-hoc treatment of the one case ("I know it when I see it"). Either type of construction will, again, occur in a large zone with many normative choices.

To be sure, the zone in which judges construct the original limit or the *Wayman* distinction will have limits, in that some constructions are refuted by interpretive evidence of original meaning.<sup>353</sup> For example, I think the direct-tax legislation of 1798—coupled with the strong evidence that it was accepted as constitutional—forecloses construing the Constitution to impose a categorical prohibition against binding, domestic rulemaking with an exception only for *objective* fact-finding (as opposed to an exception for *non-objective* fact-finding, which is unbounded and causes the categorical approach to morph into something noncategorical like the *Wayman* test).<sup>354</sup> The 1798 tax is also strong counterevidence against certain other constructions, e.g., a supposed prohibition

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350. Compare Wurman, *supra* note 20, at 1503–18, with Mortenson & Bagley, *supra* note 302, at 349–66.

351. See *supra* notes 13–24, 330–39 and accompanying text.

352. *Critical Assessment*, *supra* note 9, at 1299.

353. See *infra* notes 354–55 and accompanying text.

354. *Critical Assessment*, *supra* note 9, at 1345–91 (giving evidence that the delegated power was not objective fact-finding); *id.* at 1429–55 (giving evidence that the legislation was accepted as constitutional).

against delegations to make wide-open methodological choices, or to make decisions that have predictable winners and losers in mass distributive and political controversies.<sup>355</sup>

All that said, the construction zone will still be large. In a zone that so greatly empowers them, judges should be explicit about the choices they make and should take responsibility for the political and creative work they are doing in making them—rather than pretending their decisions are determined by original meaning. As Solum says, making a conscious distinction between interpretation and construction helps prevent “conceptual confusion and motivated reasoning” and promotes “increased transparency.”<sup>356</sup> Originalist jurists should take seriously the critiques leveled at them for exaggerating the determinacy of what they are doing.<sup>357</sup>

Non-categorical reformers may respond that, however much political creativity will be needed to settle on a new approach, it is *not* a politically creative act to discard our present approach (upholding every statute since 1935) and replace it with *something tougher* because the present approach is no limit at all on delegation, thus violating even the unspecified original limit assumed above *arguendo*. That is, if we assume *some* nondelegation doctrine (as I have), the current approach is outside the construction zone.

But I think the current approach is within the construction zone, such that any departure from it will be a political and creative choice. To show why, let me point out one construction that is consistent with the originalist evidence and imposes an actual limit on delegation while supporting almost all outcomes the Court has reached up until now (though not all the reasoning for those outcomes).

The construction appears in an article by Cary Coglianese.<sup>358</sup> He asks why the Court in *A.L.A. Schechter Poultry Corp. v. United States*, in 1935, struck down the keystone provision of the National Industrial Recovery Act (NIRA)—which authorized the President to promulgate “codes of fair competition” for all industries—but has upheld every statute since.<sup>359</sup> Nondelegation opinions usually focus on the enabling statute’s criteria for exercising the delegated power, yet the

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355. *See id.* at 1345–417 (giving evidence of open methodological choices and political and distributive controversies surrounding mass real-estate valuation).

356. *See Solum, supra* note 340, at 479, 483.

357. *See, e.g.,* Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 772–76 (2011) (critiquing “new originalism” for exaggerating determinacy); Mortenson & Bagley, *supra* note 9, at 2365 (regarding nondelegation particularly).

358. *See generally* Coglianese, *supra* note 5.

359. *Id.* at 1857–60 (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 521–23, 551 (1935)).

criteria in the NIRA's key provision were no more vague than the criteria in several statutes that were upheld more recently.<sup>360</sup> This seeming shift is often taken to reflect the Court's unacknowledged abandonment of the nondelegation doctrine, but Coglianese offers an alternative view.<sup>361</sup> He shows that the pattern of outcomes in the cases (albeit not all their reasoning) is coherent if we consider not only the *criteria* for a power's exercise but also the *extent* of the power if it *is* exercised—measured by the range of possible regulated parties and the range of possible regulated activities.<sup>362</sup> The codes that the President could promulgate for all industries under the NIRA could regulate all firms' output, prices, mergers and acquisitions, employment practices, working conditions, use of natural resources, and more.<sup>363</sup> Thus, the NIRA's delegation to promulgate codes of fair competition was genuinely more extreme than all the statutes upheld since—not simply because the criteria for whether the President could promulgate a code were so vague, but because the extremely vague criteria were coupled with such vast ranges of potentially-regulated parties (all businesses in all industries) and of potentially-regulated activities.<sup>364</sup> Other broad statutes upheld by the Court can be distinguished on this basis, e.g., the Communications Act only allowed regulation of broadcasters and the Clean Air Act only allowed regulation of air pollution.<sup>365</sup> And while the opinions mostly have not focused on the extent-of-power factor, it was discussed in two of the most prominent cases, *Schechter Poultry* and *Whitman v. American Trucking Ass'ns*.<sup>366</sup> The intuition is that, as the extent of power lessens, the need for specification of criteria lessens with it (non-categorical reformers themselves appear to assign weight to the extent of power delegated.)<sup>367</sup>

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360. *See id.*

361. *Id.* at 1849–51.

362. *Id.* at 1864–68. Besides the extent of power and criteria for its exercise, Coglianese also notes other dimensions of delegated power (severity of sanctions and strictness of procedure) but does not put as much weight on them. *Id.* at 1866–68.

363. *Id.* at 1866.

364. *Id.* at 1865–66, 1873–74.

365. *Id.* at 1873–74.

366. *Id.* at 1871–72 (first citing *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 475 (2001); and then citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 538–39 (1935)). The one case that Coglianese's approach fails to explain is *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), which struck down another provision of the NIRA that seemed to have no criteria but was narrow in extent, on transportation of certain oil products. Coglianese, *supra* note 5, at 1877–78.

367. *Gundy v. United States*, 139 S. Ct. 2116, 2131–32, 2143 (2019) (Gorsuch, J., dissenting); Wurman, *supra* note 20, at 1542–43, 1548.

There is then the question of how much weight the nondelegation inquiry should assign to the extent of the delegated power—and how to decide when the extent is too much. Coglianesse, besides showing that the NIRA sits at the apex of an ordinal ranking of litigated delegations once the extent of power is considered, also offers a rationale for drawing the line of constitutionality between the NIRA’s delegation and all others.<sup>368</sup> Resonating with Justice Benjamin Cardozo’s concurrence in *Schechter Poultry*, Coglianesse says delegations of rulemaking authority are unconstitutional if they “approximate one of Congress’s enumerated powers” in the extent of power conferred, coupled with criteria vague enough to approximate Congress’ own discretion in making law.<sup>369</sup> What distinguished the NIRA in *Schechter Poultry* was not that it gave the President more authority than other statutes did, or “too much” authority in some intuitive sense, but authority that approximated Congress’s *entire* power under the Interstate Commerce Clause.<sup>370</sup> In pointing to the relevant enumerated power of Congress as the yardstick for any challenged delegation, Coglianesse’s approach proves more specific and determinate than the unadorned important-versus-detail distinction.<sup>371</sup> To be sure, while Coglianesse’s test is *less* vague, it is still *somewhat* vague. What “approximates” an enumerated power? But the test has the virtue of lowering the stakes of that line-drawing challenge because its standard is permissive enough that, in the actual history of litigated matters, Congress has apparently only violated it once (in the NIRA).<sup>372</sup>

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368. Coglianesse, *supra* note 5, at 1877.

369. *Id.* at 1851, 1872 (citing *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 553 (Cardozo, J., concurring)); *see also id.* at 1879–85 (elaborating the test).

370. *Id.* at 1877.

371. *Id.* at 1879–80.

372. Although the price-control statutes of World War II and the Korean War might have come near to approximating the interstate commerce power, the cases upholding those statutes against nondelegation challenges never mentioned the commerce power and suggested instead that they were passed under the war power, which their delegations did not come near to approximating. *Yakus v. United States*, 321 U.S. 414, 422–23 (1944) (“war emergency measure”); *United States v. Excel Packing Co.*, 210 F.2d 596, 598 (10th Cir. 1954) (“to promote the national defense”). The price-control statute of 1970, enacted when U.S. involvement in Vietnam was phasing out, was not passed under the war power. Willard Z. Carr et al., *A Short Historical Perspective of Economic Controls in the United States*, 33 *BUS. LAW.* 3, 15, 19 (1977). So perhaps it was unconstitutional under Coglianesse’s approach. But note it had tighter criteria than its predecessors. *Id.* at 26; *cf. Amalgamated Meat Cutters & Butcher Workmen of N. Am. v. Connally*, 337 F. Supp. 737, 746 (D.D.C. 1971) (upholding the Act under the intelligible principle test). Possibly, Federal Reserve control of the money supply approximates one or more enumerated powers, but this “operates either through uncontested uses of regulatory authority over banks or through voluntary buyer-seller transactions with impact that

I think Coglianese’s test is an available construction of the abstract original limit on delegation that we assumed at the outset (though he himself does not analyze it in originalist terms). As noted earlier, text, pre-ratification discourse, and early congressional discourse do not tell us what the content of any such limit was, so for those sources, Coglianese’s approach is as permissible as any. As to early statutes, it seems none delegated power that approximated the entirety of an enumerated power of Congress.<sup>373</sup>

Let me underscore, Coglianese’s construction is an actual limit. It does not render the nondelegation doctrine a nullity, as some scholars argue *Wickard v. Filburn* did to the Interstate Commerce Clause.<sup>374</sup> Far from it. Coglianese’s test confirms that *Schechter Poultry* remains good law.<sup>375</sup> The NIRA was probably the most sweeping law in U.S. history, at least in peacetime.<sup>376</sup> A doctrine that strikes down such a law is no nullity; it is momentous. The test also addresses the parade of horrors that reformers posit, including Lawson’s hypothetical statute “forbidding ‘all transactions in interstate commerce that fail to promote goodness

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is profound, but also generalized and indirect—meaning nobody has standing to sue.” Peter Conti-Brown et al., *Towards an Administrative Law of Central Banking*, 38 YALE J. ON REGUL. 1, 5 (2021); see also *infra* note 379 (discussing possible violation of the test by the Federal Trade Commission Act).

373. A few looked to me as if they might have, but not on further investigation.

(1) The Indian Trade and Intercourse Act of 1790 made a delegation that may have approximated the entire Indian Commerce Clause as to commerce in goods but *not* as to commerce in land. Act of July 22, 1790, §§ 1, 4, 1 Stat. 137, 137–38. Robert Pushaw says, with specific reference to this statute, that “commerce” included “the sale of any property,” including land. Robert J. Pushaw, Jr., *The Original “Market” Understanding of the Commerce Clause: Insights from Early Federal Government Practice and Precedent*, 48 BYU L. REV. 535, 615 (2022). Land was the “most obvious” object of transactions between Natives and U.S. citizens at the time. Gregory Ablavsky, *Beyond the Indian Commerce Clause*, 124 YALE L.J. 1012, 1031 (2015).

(2) A delegation of power to lay embargoes, Act of June 4, 1794, 1 Stat. 372, was potentially very consequential for maritime trade and the U.S. economy overall, given how limited overland transport was. Parrillo, *Foreign Affairs*, *supra* note 25, at Part II.B. But likely an “embargo” meant a prohibition only against ships leaving ports, not entering ports, suggesting it fell short of approximating the entire regulation of foreign commerce. *Id.* at Part III.A.

374. Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 36–37, 44–45 (2018) (citing *Wickard v. Filburn*, 317 U.S. 111 (1942)).

375. Coglianese, *supra* note 5, at 1877.

376. See *id.* at 1874.

and niceness,”<sup>377</sup> plus Hamburger’s hypothetical about delegating “the taxing power.”<sup>378</sup> Coglianesse adds that his test “[a]rguably” invalidates the 1975 statute giving the Federal Trade Commission rulemaking power over “unfair or deceptive acts or practices” in interstate commerce.<sup>379</sup> To be sure, the test would not invalidate many, if any, statutes that are currently in force. But I do not think a constitutional principle must be frequently violated by Congress in order to be meaningful.

While this test is not the only option within the construction zone for our assumed nondelegation doctrine, its availability is enough to show that judges who reject the status quo in favor of some tougher approach must do so by a political and creative choice for which they ought to take responsibility, instead of claiming that originalist sources compel them to reject the status quo. Once judges acknowledge that choice and take political responsibility for it, there are any number of normative values on which they could rely. One is the idea of constitutional liquidation,<sup>380</sup> which I think would point strongly in favor of Coglianesse’s construction, given its consistency with the long-run history.<sup>381</sup> Alternatively, judges might invoke general structural arguments that they think weigh in favor of a tougher limit on delegation, such as the idea that, as a matter of democratic legitimacy, Congress should be forced to make more specific choices; but that argument could run up against other, opposing, general structural arguments, which would call for judges to engage in discretionary balancing of competing structural arguments against each other.

Consider, for one thing, that congressionally granted agency discretion has its own sources of democratic legitimacy. First, every instance of such discretion was enacted through bicameralism and presentment and exists only so long as those opposing the delegation fail to muster a democratic coalition sufficient to repeal it through bicameralism and presentment. Second, agency discretion is exercised by agency leaders who are appointed by the President and often (perhaps always) removable by the President—who is the government’s “most democratic

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377. Lawson, *supra* note 20, at 340.

378. Hamburger, *Blues*, *supra* note 9, at 1147 n.336.

379. Coglianesse, *supra* note 5, at 1885–86.

380. See William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1, 6 (2019).

381. Justice Gorsuch thinks the Supreme Court’s nondelegation doctrine was restrictive from the 1800s to the 1940s, at which point it became far more permissive. See *Gundy v. United States*, 139 S. Ct. 2116, 2135–40 (2019) (Gorsuch, J., dissenting). I take a different view. See *infra* note 387 and accompanying text.

and politically accountable official.”<sup>382</sup> The President may be “elected on a . . . platform” to shape agency action and may legitimately induce executive agencies to follow the “preferred policies” of the White House.<sup>383</sup> Third, agencies’ administrative expenses are, with very few exceptions, funded year-to-year, in which case agencies exercise discretion only if Congress keeps voting to fund them.

Besides all this, another general structural argument is that Congress must be able to exercise its enumerated powers, and to do so, must use the executive branch’s capacities. *How* Congress should use executive capacities to exercise its powers is a vastly complex question unsuited to disposition by lawsuit, which counsels against an aggressive judicial approach—as both Chief Justice Marshall and Justice Scalia expressly said.<sup>384</sup> Their view is understandable. Absent a construction that is sustainably categorical and permitted by original meaning (which nobody has succeeded in devising), the nondelegation doctrine will consist of formulations like the important-versus-detail distinction that are extraordinarily susceptible to capricious, “I-know-it-when-I-see-it” judging, not only because there is no determinate place to draw a dividing line on a spectrum of cases, but often no clear way to order cases on a spectrum to begin with.<sup>385</sup> And the doctrine’s vast and heterogeneous subject matter does not provide the kind of repeated or similar fact patterns that allow judges to build up clarity through precedent over time. For a doctrine that is supposed to serve democracy, this one seems to place a large amount of unreasoned power in the Constitution’s least democratic branch.<sup>386</sup> Given how policing congressional delegation strains the judicial role, it is no surprise that the Supreme Court, in more than 230 years, has never devised an

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382. *Seila Law LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2203 (2020); *id.* at 2212 (Thomas, J., concurring) (arguing that agency heads must always be removable at will by the President).

383. *Id.* at 2204 (majority opinion).

384. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 46 (1825) (“[T]he precise boundary of this power is a subject of delicate and difficult inquiry, into which a Court will not enter unnecessarily.”); *see Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting); *see also supra* Part II.A.

385. Witness the experience of state judiciaries who try to enforce the nondelegation doctrine or claim to do so. Roderick M. Hills, Jr., *Hunting for Nondelegation Doctrine’s Snark*, 75 VAND. L. REV. EN BANC 215 (2022) (critically reviewing recent work on the states).

386. Further, the consequence of an unwise ruling against the government (invalidation of statutory authority) is more severe than in other open-ended doctrines of administrative law, such as standing (where the result is merely that the court reaches the merits), procedural due process (adding more procedures), or arbitrary-or-capricious review (mere invalidation of one agency action, allowing a do-over). *See* 5 U.S.C. § 706.

aggressive construction of a nondelegation doctrine, even in phases of the Court's history when the Justices have been relatively vigilant against regulatory power, as throughout the generation before the New Deal, when the Court uniformly upheld tremendous delegations, with near unanimity.<sup>387</sup>

If you think the originalist evidence supports *some* unspecified nondelegation doctrine (which is the most it can possibly support), then none of what I have said means a construction toughening the doctrine compared to the status quo is necessarily wrong. All I claim is that such toughening will depend on construction—on a judge's answers to normative questions like whether to acknowledge liquidation or how to balance the competing general structural arguments listed above—not on interpreting original meaning.

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387. See the cases approving power to order any bridges to be altered to make navigation “reasonably free” in 1907 (by vote of six to two); to ban movies unless they are “harmless” in 1915 (unanimous); and to authorize railroad mergers in the “public interest” in 1932 (unanimous). See *supra* notes 272–75, 279 and accompanying text; see also *United States v. Grimaud*, 220 U.S. 506, 509 (1911) (unanimously upholding delegation to write a code of criminally-enforceable rules “to regulate [the national forests’] occupancy and use, and to preserve the forests thereon from destruction”); *Avent v. United States*, 266 U.S. 127, 129 (1924) (unanimously upholding delegation to make “reasonable rules” for what goods can be shipped in railroad cars with what priority, “as in [the agency’s] opinion will best promote the service in the interest of the public” if an “emergency” exists in the agency’s “opinion”); *Mahler v. Eby*, 264 U.S. 32, 40 (1924) (unanimously upholding delegation to deport “undesirable” immigrants); *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 408 (1928) (unanimously stating in strong dicta that power to set “just and reasonable” railroad rates is constitutional).

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