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Nondelegation: A Post-mortem

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In an earlier article, *Interring the Nondelegation Doctrine*,[1] we advanced the following account of the constitutional law bearing on delegation of federal legislative power. A statutory grant of authority to the executive branch or other agents can never amount to a delegation of legislative power. Agents acting within the terms of such a statutory grant are exercising executive power, not legislative power. The standard nondelegation doctrine, which holds that statutory grants of authority "amount to" or "effect" a delegation of legislative power if they are too broad or confer excessive discretion, is no more than a vague and ultimately uncashable metaphor. As it turns out, the standard nondelegation doctrine has no real pedigree in constitutional text and structure, in originalist understandings, or in judicial precedent; nor can plausible arguments from democratic theory or social welfare be marshaled to support it.

Larry Alexander and Saikrishna Prakash have written a response that criticizes our account.[2] (Although Alexander and Prakash criticize our view, they are noticeably ambivalent about the conventional doctrine.[3] As we shall see, their arguments commit them to defending a different, radically restrictive account of delegation, one in which any issuance of rules and regulations by the executive branch represents an unconstitutional exercise of legislative power.) Alexander and Prakash make three principal points. First, focusing on one implication of our account—that a delegation of legislative power would occur if federal legislators ceded their *de jure* legislative powers, such as voting rights, to nonlegislators—they say that our account "elevates form over substance" by permitting "equivalent" results to be produced

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1 Eric A. Posner and Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U Chi L Rev 1721 (2002).

2 Larry Alexander and Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U Chi L Rev 1297 (2003).

3 Alexander and Prakash reject our account, but explicitly refuse to definitively endorse the conventional doctrine. See id at 1299.

through statutory grants of authority.[4] Second, they advance an originalist account of constitutional lawmaking. In their view, "at the founding, the legislative power was understood as the authority to make rules for the governance of society, whether or not exercised by a legislature."[5] Third, they combine two residual criticisms of our account by saying both that the historical evidence for it is scant, and that our account would permit sweeping delegations of congressional authority.[6]

Each of these points is either irrelevant or unpersuasive. The first merely emphasizes that, as is common in constitutional law, the nondelegation doctrine is a formal rule that does not police all substitute mechanisms by which Congress might achieve a similar effect. Although Alexander and Prakash's argument might have force if statutory grants of policy discretion were a costless substitute for formal delegations of voting rights, they are not. As for the second point, the evidence supporting it is systematically ambiguous, and in any event that evidence does not yield the standard nondelegation doctrine. Instead it yields the eccentric view that any executive rulemaking[7] is constitutional "lawmaking." On this view, the administrative state is unconstitutional. The third point mistakes our historical claim, which was just that the originalist evidence is equivocal until the First Congress; and Alexander and Prakash's repackaged version of the slippery-slope argument against delegation rests on an implausible hypothesis about congressional behavior.

I. NONDELEGATION: FORM AND SUBSTANCE

On our account, when the President[8] engages in rulemaking or other action within the terms of a statutory grant of authority, he exer-

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4 Id at 1303.

5 Id at 1305.

6 Id at 1326–28. Another argument in this Part—that a constitutional constraint on formal voting delegations logically entails a constraint on statutory delegations—essentially repeats Alexander and Prakash's first point. Compare id at 1323–24 (arguing that "the logic of [our] arguments against the conventional nondelegation doctrine likewise suggests that there is no naïve prohibition"), with id at 1301 (claiming they "see little reason for specifying a detailed selection process if those selected may transfer the substance of their legislative discretion to persons who are not selected by that process").

7 As Alexander and Prakash use the term "rulemaking," it encompasses not only rulemaking in the technical sense of the Administrative Procedure Act, but also adjudication, or indeed any process by which executive agents issue legally binding edicts. See id at 1305–06 ("A general pronouncement creating, modifying, or rescinding legal obligations and rights is a law, regardless of who pronounces it and irrespective of whether the lawmaking is statutorily authorized or not.").

8 Or other statutorily authorized agents. See Posner and Vermeule, 69 U Chi L Rev at 1725 & n 9 (cited in note 1) (emphasizing that nothing "turns on the identity of the delegate" and that, as far as the nondelegation doctrine is concerned, the recipient of the statutory grant of authority could be the President, any other executive officer or independent agency, or even parties

cises executive power—the power to execute a duly enacted statute—regardless of the broad scope or discretionary character of the grant. The President exercises legislative power when, as the majority opinion in *Youngstown Sheet & Tube Co v Sawyer*[9] said, he makes binding rules *without* constitutional or statutory authority;[10] on our account, this is the only situation in which executive-branch rulemaking amounts to legislation. A corollary of this picture is that a congressional grant of authority does not transfer or delegate legislative power; instead it represents an exercise of legislative power. Congress might delegate legislative power in other ways, however. Consider Justice Scalia's example: "[L]egislative powers have never been thought delegable" in the sense that "Senators and Members of the House may not send delegates to consider and vote upon bills in their place."[11]

Alexander and Prakash think this picture excessively formalistic. They dispute that constitutional law should draw a line between prohibited formal delegations and permitted grants of statutory authority. In their view, barring delegation of legislators' *de jure* powers, such as the power to vote, while permitting "equivalent" statutory grants of authority is "pointless."[12] That combination of rules, they contend, allows Congress to circumvent the prohibition of *de jure* delegations through statutory grants that amount to *de facto* delegations.

But this is a perfectly ordinary problem of form and substance, or of rules and standards; the problem is ubiquitous in constitutional law. It is the most common thing in the world for law to take the form of rules rather than standards, even though any rule is exposed to Alexander and Prakash's charge that the rule is underinclusive[13] relative to its purposes, and thus permits circumvention through substitutes.[14] To speak only of constitutional rules, consider a small selection of other settings in which the Constitution (as written or as interpreted) adopts formal limits or prohibitions while permitting close substitutes that have similar *de facto* effects to go unpoliced.

• To begin with Article I: The Commerce Clause authorizes Congress to enact direct coercive regulation of commerce-related subjects;

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outside the federal government altogether).

9 343 US 579 (1952).

10 See id at 585, 589 ("The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself.").

11 *Mistretta v United States*, 488 US 361, 425 (1989) (Scalia dissenting).

12 Alexander and Prakash, 70 U Chi L Rev at 1303 (cited in note 2).

13 Or overinclusive, but Alexander and Prakash do not make this point.

14 See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* 32 (Oxford 1991) (stating that the under-inclusiveness of rules results in their "not covering some states of affairs that would produce in particular cases the consequence representing the justification for the rule").

the Supreme Court in some eras (roughly, before 1937 and after 1995) polices the Commerce Clause by invalidating statutes that exceed the Clause's scope. Under the Spending Clause and Treaty Clause, however, Congress may use bribes or international agreements to institute policies that it could not enact directly under the Commerce Clause. Although some decisions of the *Lochner* Court attempted to police this circumvention of Commerce Clause authority,[15] those decisions are now widely discredited,[16] and the Court's current stance is quite permissive of congressional circumvention under both the Spending Clause and the Treaty Clause.[17] Nor have occasional academic complaints, much like Alexander and Prakash's, changed the picture.[18]

• An Article III example involves the finality of judicial judgments. Under the rule of *Plaut v Spendthrift Farm, Inc*,[19] Congress may not enact statutes that formally reopen the final judgments of Article III courts. This rule would, it seems, permit Congress to enact a close substitute: a statute that retroactively extends the statute of limitations for new causes of action.[20] Alexander and Prakash are committed to condemning *Plaut* as a pointless formalism, and to proposing that constitutional law police any substitutes that achieve the same effect as formal reopening of judgments.[21]

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15 See, for example, *United States v Butler*, 297 US 1 (1936) (finding the Agricultural Adjustment Act unconstitutional because it attempted to use Congress's taxing power to regulate agriculture, which Congress does not have the power to regulate).

16 Compare id with *Steward Machine Co v Davis*, 301 US 548 (1937) (upholding a federal tax inducing states to offer unemployment insurance).

17 See *South Dakota v Dole*, 483 US 203 (1987) (holding that congressional use of federal highway funds to indirectly regulate alcohol age limits in states is a valid use of the spending power); *Missouri v Holland*, 252 US 416 (1920) (holding that a treaty protecting migratory birds from intrastate harms does not violate the Tenth Amendment or general principles of federalism, even if an equivalent statute would exceed Congress's commerce power).

18 On spending, see Lynn A. Baker, *Conditional Federal Spending after* Lopez, 95 Colum L Rev 1911, 1916 (1995) (arguing that the Court "should reinterpret the Spending Clause to work in tandem, rather than at odds, with its reading of the Commerce Clause"). On treaties, see Curtis A. Bradley, *The Treaty Power and American Federalism*, 97 Mich L Rev 390, 394 (1998) (arguing "that *if* federalism is to be the subject of judicial protection—as the current Supreme Court appears to believe—there is no justification for giving the treaty power special immunity from such protection").

19 514 US 211, 240 (1995) (holding a federal statute unconstitutional "to the extent that it requires federal courts to reopen final judgments entered before its enactment").

20 See Richard H. Fallon, Daniel J. Meltzer, and David L. Shapiro, *Hart and Wechsler's The Federal Courts and The Federal System* 107 (Foundation 4th ed 1996) ("In the absence of a final judgment dismissing a lawsuit, the Court in Plaut did not question Congress' power to enact laws ... to authorize suits that otherwise would be time-barred.").

21 Alexander and Prakash suggest a different Article III analogy. Assume that Article III judges may not cede their *de jure* voting rights to executive officials. Surely, according to Alexander and Prakash, a court could not circumvent this rule by saying that the "rights and duties of the parties are whatever [the executive official] determines those legal rights and duties to be." See Alexander and Prakash, 70 U Chi L Rev at 1302–03. But see *Chevron v Natural Resources Defense Council, Inc*, 467 US 837 (1984) (establishing that where statutes are silent or ambiguous, Article III courts say that the law is whatever executive officials say the law is). Alexander

• The most pointed example, however, stems from Article II rather than Article III, and involves delegation itself. If (as on the conventional nondelegation view) the vesting of legislative powers in the Congress entails some restriction on the scope or precision of congressional grants of statutory authority to executive agents, then by parity of reasoning the Article II Vesting Clause, which vests the "executive power" in the President, should entail a parallel restriction on the scope or precision of delegations by the President to his agents. Defenders of the conventional view ought to subscribe to a parallel Article II nondelegation doctrine, under which the President must provide an "intelligible principle" sufficient to guide the legal discretion of subordinate executive officers. Lacking such a principle, the grants of authority to subordinate officers would amount to an unconstitutional delegation of executive authority, which the Constitution vests in the President alone. But to our knowledge, no one has ever suggested that the Subdelegation Act[22] violates the Constitution, even though it authorizes executive delegations that lack any intelligible principle.[23] Where the Act authorizes subdelegation,[24] the only legal *restriction* on presidential grants of executive authority is that the action of subordinate executive officials must comply with the terms of the grant—precisely the restriction our account imposes on congressional delegations to the executive.

To be sure, there might be good constitutional reasons to treat intrabranch delegations (within the executive) differently from interbranch ones (from Congress to the executive). But this response is not open to Alexander and Prakash, because their concern about circumvention is too blunt an instrument to handle such nuances. The President may not cede to another the *de jure* powers of his office, such as the power to execute the laws; why then, on Alexander and Prakash's

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and Prakash's position on delegation parallels the criticism, as yet unsuccessful, that *Chevron* in effect cedes to executive agencies the judiciary's power to say "what the law is." See Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 Colum L Rev 452, 452, 456 (1989). Our position parallels the prevailing view: A legal rule like *Chevron* itself says what the law is, with the content of the law filled in by the executive acting within the statute's scope. See Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 Mich L Rev 303, 350–51 (1999) ("It is odd to say that a statute violates the nondelegation doctrine because of how it has been construed by the relevant agency. . . . This idea converts the nondelegation doctrine into something else altogether.").

22 Pub L No 82-248, 65 Stat 710, 713 (1951), codified at 3 USC § 301 et seq (2000) (authorizing the President to delegate any of his executive powers to the head of any executive department or agency).

23 See Donald A. Dripps, *Delegation and Due Process*, 1988 Duke L J 657, 666 ("[D]elegation of executive power is not subject to the intelligible principle requirement.").

24 The Act does not authorize subdelegation if a statute affirmatively prohibits it or specifically designates an officer to whom the authority may be subdelegated. See 3 USC § 302.

reasoning, should he be allowed to achieve the same end by delegating law-enforcement power to subordinates?

The upshot of these examples is that Alexander and Prakash's charge of excessive formalism seems arbitrarily selective. Constitutional rules are "pointless," in just Alexander and Prakash's sense, whenever they are underinclusive relative to their purposes; and this sort of underinclusion is extremely common, because legal formality has systemic virtues that Alexander and Prakash's approach neglects. In the delegation case, for example, a rule barring only formal delegations is far easier for constitutional interpreters (legislators as well as judges) to monitor and enforce than the inquiry that the conventional nondelegation test requires. Alexander and Prakash's circumvention complaint, which essentially converts all rules into standards by arguing that rules must always be tailored to their underlying purposes, ignores systemic costs of this sort. Of course it is true that, in some circumstances, constitutional law attempts to police *de facto* circumventions of formal first-order rules; in the choice between rules and standards, context is all. If Alexander and Prakash are claiming, however, that the bare possibility of circumvention is sufficient to undermine rules, their account is dramatically overbroad. Alexander and Prakash would need to offer a more nuanced account, one that specifies what features of the current setting distinguish it from a myriad of other settings in which their concern carries no constitutional weight. Alexander and Prakash have offered no such account here.

In any event, Alexander and Prakash's speculation about circumvention is unconvincing on its own terms. Alexander and Prakash's argument can be characterized as a sort of economic claim: Statutory grants of authority are not merely a substitute for formal delegations of voting authority, but in fact a *costless* one. However, to repeat, it is not clear that this economic point gets any constitutional leverage. In some of the examples above the constitutionally permissible substitutes are costly, while in others the substitute seems entirely costless, as in the use of executive orders to delegate presidential powers. There is no particular reason to think that the costliness of the substitute is a constitutionally relevant consideration. But the claim is also implausible, even granting its premises.

The crucial premise of this view must be that legislators desire to abdicate: to cede as much of their power as possible for as long as possible. (We take up the empirical plausibility of this picture below; for now let us follow the logic where it leads.) A constitutional regime that barred formal delegations of voting authority while permitting a costless substitution to statutory grants of authority would, on this view, impose no constraints whatsoever on legislative behavior. But these alternative routes to abdication are not, in fact, equivalently

costly. For one thing, Alexander and Prakash seem to make the unfounded assumption that formal voting delegations could only be accomplished by statutory enactments.[25] But the right to vote on proposed statutes must be a right held by individual legislators, not by a majority of each House; otherwise it would be inexplicable that the Constitution places elaborate restrictions, including supermajority requirements, on the power of either House to strip its members of their *de jure* legislative powers by expelling the member from the body.[26] In a regime that permitted formal voting delegations as well as statutory grants of authority, individual legislators could thus cede their votes to outsiders without incurring the costs of assembling a majority coalition to vote the delegation into effect. Of course, the benefits to outsiders might be lower as well, at least assuming that less than a majority of individual legislators opted to cede their votes, but this just means that formal delegations and statutory grants are very different legal instruments with a different mix of costs and benefits. Rational constitutional framers might sensibly prohibit one while leaving the other to policing by future politics.

Even if statutory delegations of voting rights are at issue, Alexander and Prakash recognize that "giving a vote in Congress to the Secretary [of Commerce] is different from giving the Secretary Congress's policy discretion in this respect: When Congress votes to retract the latter, the Secretary cannot vote, whereas if he has been validly given a vote in Congress, he may vote on its retraction."[27] In other words, the constitutional requirement that Congress transfer power by granting rulemaking authority, rather than voting rights, impedes a

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25 Alexander and Prakash are cagey about this; it is never quite made explicit. See, for example, Alexander and Prakash, 70 U Chi L Rev at 1300, 1302, 1304 n 20. Discarding this assumption also obviates Alexander and Prakash's argument that formal voting delegations, like statutory grants of discretion, must be enacted through bicameralism and presentment. See id at 1302.

26 Alexander and Prakash have two criticisms of this view. First, they say, the text of the Article I Vesting Clause shows that legislative powers are held by Congress, not by individual legislators; otherwise the Clause would read: "All powers to vote in Congress and all related powers of legislators herein granted shall be vested in a Congress." Id at 1307. This rests on an equivocation. Of course "Congress" is an ambiguous term; sometimes it denotes the federal legislative institution (the first occurrence in Alexander and Prakash's paraphrase), sometimes it just denotes the summation of individual legislators (the second occurrence). Presumably Alexander and Prakash do not think that some entity called "Congress," over and above the summation of individual legislators, has the right to vote on pending legislation. Alexander and Prakash also complain that we have assumed, in a separate work, that the federal legislative power is restricted to the subjects enumerated in Article I, § 8 (and other provisions); Alexander and Prakash claim that the earlier assumption is inconsistent with our view here. See id at 1309 n 41, citing Eric A. Posner and Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 Yale L J 1665, 1675 (2001). But this is quite puzzling. Nothing in our account of delegation is at all inconsistent with the view that the *de jure* powers of individual legislators, such as legislative voting rights, extend only to statutes falling within the enumerated powers.

27 Alexander and Prakash, 70 U Chi L Rev at 1300.

legislature hell-bent on abdication; it prevents Congress from hampering the ability of a future Congress to revoke the abdicating statute, or, for that matter, from enacting new laws that overlap with or contradict the rules created by the delegate. A statutory grant of policy discretion is thus a costly, hence imperfect, substitute for formal delegation of voting rights. Alexander and Prakash try to patch the wound with the observation that a later statute retracting policy discretion previously granted to the executive branch would be subject to presidential veto.[28] The problem, though, is that the same is true of a later statute retracting an earlier delegation of formal voting rights. So the presidential veto washes out.

Alexander and Prakash might reply that a statutory grant of rulemaking authority, with an entrenchment, would accomplish the total legislative abdication that they think the ban on the transfer of voting rights was intended to prevent. (We assume that they do not make this argument because they do not believe that legislative entrenchment is possible or constitutionally permissible.)[29] But an entrenched grant of rulemaking authority is not the same thing as a transfer of voting rights. Entrenchment statutes are hard to draft because of their reflexive character, and courts may well require an especially clear statement before finding entrenchment.[30] Thus entrenchment poses extra risks, and incurs extra costs, not present in a formal delegation of voting power. Rules can always be circumvented, but truly costless circumventions are hard to find.

II. NONDELEGATION AND LEGISLATIVE POWER

Alexander and Prakash argue that the original understanding of the "legislative power" undermines our account of nondelegation. On Alexander and Prakash's account, which they take to be the "conventional view," the legislative power is the power to make rules for social governance, regardless of which branch of government exercises that

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28 See id at 1300. Alexander and Prakash add that "of course, Congress could specify that the Secretary could not vote on bills that would retract his authority." Id. But this loses the thread of the argument. If the premise is that Congress is intent on permanent abdication, Congress would not want to include such a clause.

29 A hint of this idea can be found in id at 1328 n 109, but the argument there is focused on the problem of excessive grants of discretionary authority. To repeat, there is no inconsistency between our nondelegation argument and the entrenchment argument we made in Posner and Vermeule, 111 Yale L J at 1665 (cited in note 26). Contrary to Alexander and Prakash's claim, we do not use "legislative powers" in a special way, nor does our entrenchment argument rely on any particular definition of that term. See Alexander and Prakash, 70 U Chi L Rev at 1309 n 41 (cited in note 2).

30 See Posner and Vermeule, 111 Yale L J at 1667–68 (cited in note 26). See also *Reichelderfer v Quinn*, 287 US 315, 321 (1932) (construing an ambiguous statute to avoid deciding the permissibility of entrenchment).

power. The account fails in at least three respects: the evidence that Alexander and Prakash offer for their account is systematically ambiguous; the conclusion to which this evidence points has radical, hence implausible, consequences; and Alexander and Prakash's account is inconsistent with their professed sympathy for the conventional nondelegation doctrine. We will take up these points in turn.

First, the evidence that Alexander and Prakash offer is systematically ambiguous for present purposes; for reasons we will explain, it predictably fails to cut between the competing conceptions of delegation at issue. We cannot do a full review of the evidence in this limited compass, so two brief examples will have to stand in for the whole. Alexander and Prakash say we have misunderstood Locke's position on delegation; their centerpiece is Locke's argument that:

> This *Legislative* [power] is . . . unalterable in the hands where the Community have once placed it; nor can any Edict of any Body else, in what Form soever conceived, or by what Power soever backed, have the force and obligation of a *Law*, which has not its *Sanction from* that *Legislative*, which the publick has chosen and appointed.[31]

Nothing here, however, is inconsistent with our account of delegation. On our view, of course, "Edict[s]" or rules promulgated by the executive branch pursuant to statutory authority *do* have precisely the "sanction from [the] Legislative [body]" that Locke requires. Locke's point is that executive edicts have no legal force unless they enjoy legislative authorization—a point that the *Youngstown* Court reiterated,[32] and one that is part and parcel of our view. Alexander and Prakash simply misread this passage to say that the relevant sanction or authorization must come directly from the people,[33] rather than (as Locke permits) indirectly, from the legislators that the people have "chosen and appointed." A similar point applies to Alexander and Prakash's treatment of Montesquieu, whom they cite principally for the abstract proposition that the legislative and executive powers should not be combined in the same hands.[34] We agree. The question at

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31 John Locke, *The Second Treatise of Government*, in *Two Treatises of Government* § 134 at 356 (Cambridge 1988) (Peter Laslett, ed).

32 343 US at 585 (explaining that the President's power to issue a regulation "must stem either from an act of Congress or from the Constitution itself").

33 See Alexander and Prakash, 70 U Chi L Rev at 1321 (cited in note 2) ("Locke repeatedly insists that *only* the people can authorize someone else to make laws/rules for them. If someone not appointed by the people attempts to make binding rules, these rules are illegitimate because the people have not ceded to these individuals the power to make laws over them.").

34 See id at 1312 (noting that Montesquieu "claimed that when the executive and legislative powers are 'united in the same person, . . . there can be no liberty, because apprehensions may arise lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner'"), quoting Montesquieu, *The Spirit of the Laws* 182 (D. Appleton 1900) (Tho-

issue here, however, is whether statutory grants of discretionary rulemaking authority to the executive violate the separation of powers (the conventional view), or do not violate it (our view). On that entirely distinct question Montesquieu has nothing to say.

The ambiguity in Alexander and Prakash's evidence is chronic and systematic, for good reason. As we discussed in our original treatment, early political theorists and the founding generation simply did not focus on the question whether statutory grants of rulemaking authority count as prohibited delegations. Their analyses, like Montesquieu's, are pitched at a higher level of abstraction; their general endorsements of the separation of legislative and executive powers fail to arbitrate between competing views about what counts as a violation of the separation of powers—in particular, whether statutory grants of authority effect a combination of legislative and executive power. That relatively fine-grained institutional question was not taken up until the First Congress actually began to run a government, with results that support our account of delegation[35]—a point that Alexander and Prakash conspicuously fail to dispute.

Secondly, whatever its other traits, Alexander and Prakash's view of the legislative power can hardly be described as conventional. On their view, remarkably, the power to enact statutes by voting in legislatures is concededly "outside"[36] the constitutional definition of legislative power. Rather, the legislative power is a power to make rules that bind society. This means that the executive exercises legislative power whenever it makes binding legal rules, even if the rulemaking occurs under a valid grant of statutory authority; Alexander and Prakash are quite explicit about this.[37] But this means, of course, that the administrative state is unconstitutional.[38] The executive engages in constitutional lawmaking, and thus exercises the legislative power that Article I vests in Congress alone, whenever the executive makes administrative rules. This is, of course, a proposition that the Supreme Court has repeatedly and emphatically rejected.[39]

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mas Nugent, trans).

35 See Posner and Vermeule, 69 U Chi L Rev at 1735–36 (cited in note 1).

36 Alexander and Prakash, 70 U Chi L Rev at 1308 (cited in note 2).

37 See id at 1305–06 (claiming that "[a] general pronouncement creating, modifying, or rescinding legal obligations and rights is a law, regardless of who pronounces it and irrespective of whether the lawmaking is statutorily authorized or not").

38 Compare Gary Lawson, *The Rise and Rise of the Administrative State*, 107 Harv L Rev 1231, 1231 (1994) (arguing that "[t]he post-New Deal administrative state is unconstitutional").

39 See *INS v Chadha*, 462 US 919, 953 n 16 (1983) ("When the Attorney General performs his duties pursuant to § 244 [of the Immigration and Nationality Act], he does not exercise 'legislative' power."); *United States v Grimaud*, 220 US 506, 521 (1911) ("[T]he authority to make administrative rules is not a delegation of legislative power.").

In a footnote Alexander and Prakash try to pull back from the cliff's edge, saying that "we don't believe that all rulemaking occurring outside of Congress necessarily amounts to an exercise of legislative power. . . . [F]or the Founders, the legislative power was a matter of the degree/scope of the discretion."[40] But this is an arbitrary retreat from the logical consequences of their view. Recall that, on Alexander and Prakash's account, the legislative power was and is "the power to enact rules for society, whether those rules were called statutes, rules, [or] regulations."[41] Any executive rulemaking that governs social behavior (a category that includes rulemaking through administrative adjudication, not just rulemaking in the technical administrative-law sense) is necessarily an impermissible exercise of legislative power; there is no mistaking Alexander and Prakash's position here. Given this radical premise, the only saving idea for Alexander and Prakash would be Justice Stevens's idiosyncratic view that even if executive rulemaking is lawmaking, Congress may delegate (some of) its lawmaking power to the executive.[42] But the Court has squarely rejected that view,[43] and it seems most unlikely that Alexander and Prakash really want to defend it.

Our last point on legislative power and delegation is just that Alexander and Prakash have no consistent view of the subject. Sometimes they seem to be defending a radically restrictive view of delegation, one in which all executive rulemaking is unconstitutional. Sometimes they profess sympathy for the conventional nondelegation doctrine. But these two positions are mutually exclusive alternatives, not complements. Of course Alexander and Prakash's project is just to criticize our original critique of the conventional view. But one can derive any proposition at all from a contradiction; it is not surprising that Alexander and Prakash manage to derive their critical points from a position that is at odds with itself.

III. SOME FURTHER ISSUES

A. Originalist Evidence

In our earlier article, we presented textual and structural arguments against the existence of the nondelegation doctrine. We also

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40 Alexander and Prakash, 70 U Chi L Rev at 1310 n 43.

41 Id at 1310.

42 See *Whitman v American Trucking Associations*, 531 US 457, 488 (2001) (Stevens concurring) (claiming that the Court "could choose to articulate [its] ultimate disposition of this issue by frankly acknowledging that the power delegated to the EPA is 'legislative' but nevertheless conclude that the delegation is constitutional because adequately limited by the terms of the authorizing statute").

43 See id at 472 (recognizing that the Constitution "permits no delegation" of Congress's legislative powers).

said that the historical evidence about the eighteenth-century meaning of "legislative power" is sparse and ambiguous.[44] Given the strong textual and structural arguments against the doctrine, we thought it obvious that the weak historical evidence could not have any bearing on the question. Alexander and Prakash say that if we "believe that there is insufficient historical evidence in favor of the sophisticated view, [we] must think that even more true of the naïve prohibition."[45] But we thought there was insufficient evidence for *either* view; that is, the historical evidence predating the First Congress simply does not shed light on the question of what the framers believed. Having read Alexander and Prakash's survey of Locke, Montesquieu, and Blackstone, we are even more firmly of this view. The historical evidence shows that "legislative power" was not a term of art that was used in a single way. It was used in too abstract a fashion to arbitrate between competing views of delegation; therefore, the appearance of that term in the Constitution and contemporary debates tells us nothing about the nondelegation doctrine. In the absence of dispositive historical evidence, our other textual and structural arguments stand on their own feet.

B. The Parade of Horribles Revisited

Alexander and Prakash criticize us for "downplay[ing] the possibility of grand delegations."[46] They argue that "one important reason why Congress might not have passed [ ] grand delegations in the past is that Congress never understood that it had such authority."[47] They do not provide any evidence for this dubious claim. The alternative hypothesis is that Congress understood that it had the authority but did not exercise it, just as Congress understood that it had the authority to grant federal question jurisdiction to a federal court even though it did not exercise this authority until 1875.[48] There is no historical evidence, as far as we know, that Congress ever considered a grand "delegation" (as Alexander and Prakash use the word) but then refrained from acting because of the nondelegation doctrine; not even a debate or public discussion in which a grand "delegation" was urged by one member of Congress and opposed on nondelegation grounds by another.

Alexander and Prakash assume that the nondelegation doctrine was so deeply internalized by every member of Congress—and pre-

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44 See Posner and Vermeule, 69 U Chi L Rev at 1733 (cited in note 1).

45 See Alexander and Prakash, 70 U Chi L Rev at 1326 (cited in note 2).

46 Id at 1327.

47 Id.

48 Fallon, Meltzer, and Shapiro, *Federal Courts* at 349 (cited in note 20).

sumably the public as well—that it never occurred to anybody to propose, even to speculate publicly about, a grand "delegation." What gives this argument its air of unreality—aside from the fact that the well-educated framers and their successors knew of the historical examples of legislative abdication—is that Congress has repeatedly vested enormous rulemaking powers in agents, and the difference between what Congress has done and what Alexander and Prakash have in mind is just a matter of degree. For a short period of time some statutes were expansive enough to worry the Supreme Court.[49] Since the New Deal, the nondelegation doctrine has never been used to strike down a statute—so the content of the doctrine, if not zero, is trivial—and yet Congress has not considered the disappearance of the nondelegation idea as a judicially enforced rule to be an invitation to vest rulemaking power in a dictator. Why not? Surely not because of the small possibility that the Supreme Court would resurrect the doctrine. The possibility of judicial interference rarely prevents Congress from enacting a constitutionally questionable statute. If Congress wants to accomplish something, it is willing to take a risk that a statute will be struck down. The reason that Congress has not engaged in a "grand delegation" is that it has not wanted to.

We suspect that Alexander and Prakash are led astray by an overly conceptual notion of legislative power and constitutional restriction. They do not realize just how much "delegation" (in their sense) is permitted by courts. Take this passage from another part of their article:

> Suppose the President negotiates a treaty with China that authorizes the President to make international law commitments through a document called the "P-treaty." Such P-treaties would have the force of law upon presidential signing and would not need Senate approval. Should the Senate ratify the initial treaty with China, one might conclude that any subsequent P-treaties would result from faithful presidential "execution" of the U.S.-China Treaty. But we think it would be difficult to refute the notion that the President is in fact making treaties without following the specified constitutional process, and that he and the Senate are evading the Senate's treaty role. Calling presidential treaty-making "treaty execution" does not avoid the issue.[50]

Though the Senate has not gone this far, it is widely accepted in foreign relations law that the President may on his own conclude agreements that are expressly authorized by, or even "reasonably in-

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[49] See *Panama Refining Co v Ryan*, 293 US 388 (1935) (invalidating the hot oil provisions of the National Industrial Recovery Act).

[50] Alexander and Prakash, 70 U Chi L Rev at 1303 n 15 (cited in note 2).

ferred" from, a prior treaty that had the consent of the Senate, and thousands of international agreements with the force of law are the result of such agreements between the President (alone) and foreign heads of state.[51] The nondelegation doctrine is as dead in the law of foreign relations as it is in domestic law.

Our point is not that there is no conceivable world in which Congress would vest its rulemaking powers in a dictator or in some other way abdicate its responsibilities; indeed, critics of the administrative state have been accusing Congress of abdication since the New Deal. Our point is that constitution makers cannot foresee all possible bad political outcomes and design a constitution that prevents them. The drafters of the U.S. Constitution placed their faith in some very general structural elements, a benign political culture, and a virtuous citizenry. Because they believed that the branches would seek to expand their power, not that they would try to give it away to each other in a game of hot potato, the framers did not give much attention to constitutional restrictions on the abdication of power. The framers did not foresee the era of party politics, so they did not design the Constitution to prevent the pathologies of party politics, such as the one that Alexander and Prakash describe.[52] The framers understood that a constitution designed to prevent any possible misuse of power would be unworkable, and thus they avoided fine-tuning that might have prevented both the grand delegations that Alexander and Prakash fear and the administrative state that they seem to condemn. And the Supreme Court, after some tinkering in the late nineteenth and early twentieth centuries, came to accept this judgment.

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[51] See Restatement (Third) of the Foreign Relations Law of the United States § 303(3) (ALI 1986) (stating that "the President may make an international agreement as authorized by treaty of the United States"); Treaties and Other International Agreements: The Role of the United States Senate, S Rep No 106-71, 106th Cong, 2d Sess 86–87 (2001) (noting that "the President's authority to conclude [agreements pursuant to treaties] seems well-established").

[52] See Alexander and Prakash, 70 U Chi L Rev at 1327 (cited in note 2).