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Discretion as Delegation: The 'Proper' Understanding of the Nondelegation Doctrine

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Introduction

The nondelegation doctrine, as it has been traditionally understood, maintains that the federal Constitution places limits (however modest) on the kind and quantity of discretion that Congress can grant to other actors. Eric Posner and Adrian Vermeule have recently described this doctrine as a "neurotic burden"[1] on the legal system that "lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory."[2] They agree that the Constitution forbids Congress from delegating the formal power to enact legislation through the Article I voting process,[3] but they argue that "a statutory grant of authority to the executive branch or other agents can *never* amount to a delegation of legislative power,"[4] no matter how much or what kind of discretion the statute grants. They have recently reaffirmed this stark view of the nondelegation doctrine in response to criticisms by Larry Alexander and Sai Prakash;[5] their latest declaration is that "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."[6]

The recent exchange among Professors Alexander, Prakash, Posner, and Vermeule covers important and interesting issues ranging from the meaning of legislative power[7] to the proper interpretation of John Locke's pronounce-

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1 Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1723 (2002).

2 *Id.* at 1722.

3 *See id.* at 1723 ("[W]e agree that the Constitution bars the 'delegation of legislative power.' In our view, however, the content of that prohibition is the following: Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other *de jure* powers of federal legislators.").

4 *Id.*

5 *See* Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003).

6 Eric A. Posner & Adrian Vermeule, *Nondelegation: A Post-Mortem*, 70 U. CHI. L. REV. 1331, 1331 (2003). Posner and Vermeule are not entirely alone in their criticism of the traditional nondelegation doctrine. Kenneth Davis has long urged that the standard nondelegation doctrine is a judicial invention without constitutional foundation, *see, e.g.*, 1 KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 2.6, at 66 (3d ed. 1994), and Justices Stevens and Souter have expressed similar views, *see* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 489 (2001) (Stevens, J., concurring in part and concurring in the judgment).

7 *See* Alexander & Prakash, *supra* note 5, at 1304–20; Posner & Vermeule, *supra* note 6, at 1338–41.

ments on delegation,[8] but it does not engage the central constitutional question concerning delegation: does the Constitution in fact place limits on the kind and quantity of discretion that Congress may grant? Alexander and Prakash "have sympathy for the conventional nondelegation doctrine,"[9] but they make clear that they "have not sought to prove that the conventional nondelegation doctrine is the one enshrined in the Constitution."[10]

I seek to prove it here. I firmly resist Posner and Vermeule's prescribed "course of therapy"[11]—which seems more like a lobotomy—for the law's alleged nondelegation neurosis. As far as the original meaning of the Constitution is concerned, the traditional nondelegation doctrine, while not always formulated by courts or scholars in the most felicitous fashion and almost never applied properly by government actors, reflects a real principle embedded in the Constitution. Just as paranoids can sometimes have enemies, neurotic legal systems can occasionally worry about real problems. It is a genuine constitutional problem if Congress grants improper discretion to other actors.

This Article demonstrates that the traditional nondelegation doctrine, at least in its most general guise, has a solid constitutional grounding. To be sure, I do *not* defend the dominant modern formulation of that doctrine that regards an "intelligible principle"[12] as the touchstone for a constitutional grant of discretion. I similarly do not defend modern applications of the doctrine, which effectively treat it as a nullity.[13] Elsewhere, I have described at length the precise version of the nondelegation principle that I think is contained in the Constitution.[14] As aptly formulated by Chief Justice Marshall nearly 200 years ago, the nondelegation doctrine distinguishes "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."[15] Or, as I have restated (without necessarily improving upon) Chief Justice Marshall's formulation, "[i]n every case, Congress must make the central, fundamental decisions, but Congress can leave ancillary matters to the President or the courts."[16] But the precise formulation of the delegation

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8 *See* Alexander & Prakash, *supra* note 5, at 1320–23; Posner & Vermeule, *supra* note 6, at 1339, 1342.

9 Alexander & Prakash, *supra* note 5, at 1299.

10 *Id.* at 1328.

11 Posner & Vermeule, *supra* note 1, at 1723.

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

13 *See, e.g.*, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 472–76 (2001) (upholding as constitutional a grant of authority to the Environmental Protection Agency to set air quality standards that are "requisite to protect the public health," 42 U.S.C. § 7409(b)(1) (2000)).

14 *See* Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327 (2002). Needless to say, this effort was not well received by the therapeutic community. *See, e.g.*, Posner & Vermeule, *supra* note 1, at 1728 n.20, 1730, 1736 n.61.

15 Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 43 (1825) (emphasis added).

16 Lawson, *supra* note 14, at 376–77. Both formulations, of course, sound absurdly circular. They are in fact circular, but not absurdly so.

> One can try to find alternative ways to express the distinction between fundamental and ancillary matters, such as focusing on case-resolving power or demonstration of political commitment or choices among salient alternatives, but in the end, one

principle is not critical to this Article. My point here is only that the Constitution contains *some* limitation on the extent to which Congress can grant discretion to other actors; that abstract principle is what I describe as the "traditional nondelegation doctrine." Once the principle is established, we can always, as the old joke goes, haggle over the price.

Accordingly, this Article explains in detail how statutes vesting undue discretion in executive (or any other) actors exceed Congress's enumerated power under the Sweeping Clause of Article I,[17] because laws vesting excessive discretion in the executive (or in any other actor)[18] are not "necessary and proper for carrying into Execution" federal powers. Such laws are either not necessary, not proper, or both. They are not "necessary" when they fail to have, as James Madison put it, an "obvious and precise affinity"[19] with whatever federal power they seek to execute. Even when such laws are "necessary," they are not "proper" when they charge the President with excessive discretion. The essence of the executive power is "the execution of validly enacted law,"[20] but a law that exceeds Congress's power under the Sweeping Clause is not "validly enacted" and therefore does not count as "law" that the President may permissibly execute. That is what the traditional nondelegation doctrine rests upon, and it is right.

Along the way, I will make a number of observations about Posner and Vermeule's interpretative methodology, which in many respects seriously misunderstands originalism. To be sure, some of these observations are more than a bit unfair to Posner and Vermeule. Originalists are creatures that come in many different shapes and sizes—and those shapes and sizes are often fuzzy and shifting. Accordingly, it is understandable that Posner and Vermeule would cast a broad net to catch as many of these elusive and chameleonic creatures as they can. Nonetheless, it is not unreasonable to ask them to tailor their tools and traps a bit more precisely to the different species that they are hunting.

As anyone remotely familiar with my work can attest, I would not dream of criticizing Posner and Vermeule, or anyone else, for challenging entrenched, traditional understandings. The fact that a view is traditional does not make it right. But, occasionally, conventional wisdom is conventional

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> cannot really get behind or beneath the fact that law execution and application involve discretion in matters of "less interest" but turn into legislation when that discretion extends to "important subjects." That is the line that the Constitution draws, and there is no escape from it.

Id. at 377.

17 U.S. CONST. art. I, § 8, cl. 18 (granting Congress the power to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof"). Although it has become conventional in modern times to call this clause the "Necessary and Proper Clause," the founding generation uniformly called it the Sweeping Clause. If it was good enough for them, it's good enough for me.

18 For ease of exposition, I will henceforth speak only of discretion vested in the President. The same arguments developed here, however, apply to discretion vested in courts or other actors.

19 Letter from James Madison to Spencer Roane (Sept. 2, 1819), *in* 8 THE WRITINGS OF JAMES MADISON 447, 448 (Gaillard Hunt ed., 1908).

20 Posner & Vermeule, *supra* note 1, at 1730.

precisely because it is wisdom. The nondelegation doctrine represents conventional wisdom in this sense.

I. Where Do We Start? An Interpretative Introduction

To use an example of which I have become inordinately fond,[21] suppose that Congress passes the Goodness and Niceness Act of 2004. Section 1 of the statute outlaws all transactions involving interstate or foreign commerce that do not promote goodness and niceness. Section 2 of the statute provides that the President shall define the content of this statute by promulgating regulations to promote goodness and niceness in all matters involving commerce and shall specify penalties for violations of those regulations. As far as Posner and Vermeule are concerned, this statute seems perfectly constitutional. It does not grant to the President, or anyone else, the power to vote on legislation. It gives the President a specific, if open-ended, instruction; and to the extent that the President follows the instruction by promulgating goodness and niceness regulations, he[22] would appear simply to be exercising the "executive Power"[23] to carry into effect legislative enactments. If Congress is exercising its legislative power by enacting a statute and the President is exercising his executive power by obeying it, what's the problem? What, if anything, in the Constitution says that Congress cannot enact such a statute?

That is the wrong question. The right question is: what, if anything, in the Constitution says that Congress *can* enact such a statute? Congress, as with all federal institutions, can only exercise those powers conferred upon it by the Constitution. That is what is meant by "enumerated powers."

The second section of the Goodness and Niceness Act, which instructs the President to define the content of the first section, is not authorized by the Commerce Clause.[24] That clause empowers Congress "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[25] The statutory provision authorizing presidential regulations does not regulate commerce. It does not (unlike the first section of the hypothetical statute) command or forbid any conduct. Instead, it identifies a person who is authorized to command or forbid, i.e., regulate, conduct. The only power conferred by the Commerce Clause is the power to regulate, and a statute that identifies a regulator of conduct does not itself regulate. That does not mean, of course, that the statute is unconstitutional. It simply means that constitutional authorization for the statute must be found somewhere other than in the Commerce Clause.

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21 *See* GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 49–50 (3d ed. 2004); Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994).

22 The Constitution uses a generic male pronoun for the President. *See, e.g.*, U.S. CONST. art. I, § 7, cl. 2. I follow that practice without endorsing it.

23 *Id.* art. II, § 1, cl. 1.

24 Is the first section authorized by the Commerce Clause? Only if there is no real content to the term "regulate." Even then, the law could not constitutionally be enforced unless the enforcement provisions are authorized by the Sweeping Clause. But that is all beside the point here.

25 U.S. CONST. art. I, § 8, cl. 3.

The obvious place to look for constitutional authorization is the Sweeping Clause, which provides that Congress may "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers [identified in Article I, Section 8], and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof."[26] Perhaps the second section of the Goodness and Niceness Act is permissible because it helps "carry[ ] into Execution" the commerce power that Congress has exercised in the first section.

The Sweeping Clause, however, does not authorize all laws that help carry into execution federal powers. It only authorizes laws that are "necessary and proper for carrying into Execution" those powers.[27] Is the section of the Goodness and Niceness Act that authorizes the President to define goodness and niceness "necessary and proper" for carrying into execution the commerce power?

I seek to answer questions of that sort by reference to the Constitution's original meaning. There are, of course, plenty of other ways in which one can try to answer them, but they do not concern me here. Posner and Vermeule have sought to ground at least part of their case in terms of original meaning, and that is the only part that I am addressing.[28]

In order to search for original meaning, one must know for what one is searching. A number of originalists, and a somewhat larger number of nonoriginalists, often treat the search for original meaning as though it was a quest for the subjective mental states of some group of framers, ratifiers, or citizens. I do not. Properly understood, original meaning is a *hypothetical* rather than *historical* mental state. The ultimate question of original meaning is: "What would a fully informed public audience at the relevant [original] point in time, in possession of all relevant information about the Constitution and the world around it, have understood the Constitution to mean?"[29] Such an approach "best captures the real nature of argumentation concerning documentary meaning."[30] Both in the eighteenth century and today,

> people give *reasons* for their views of meaning, and those reasons do not inevitably reduce to some method for adding actual mental states. Those reasons can involve pointing out some feature of the document that one's opponents have not yet seen, or have undervalued, or have refused to acknowledge for political or other reasons. In other words, they refer to mental states that *would* or *might* exist under counterfactual circumstances. Those reasons can also, of

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26 *Id.* art. I, § 8, cl. 18.

27 *See id.*

28 Accordingly, I have no comment on Posner and Vermeule's policy arguments against a nondelegation principle, nor do I care to engage them at length about the proper reading of precedents—although I will gratuitously offer that their treatment of Chief Justice Marshall's sophisticated reasoning in *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1 (1825), is particularly problematic. *Compare* Lawson, *supra* note 14, at 355–61 (reading the case correctly), *with* Posner & Vermeule, *supra* note 1, at 1738–39 (doing otherwise).

29 GARY LAWSON & GUY SEIDMAN, THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY 9 (2004).

30 *Id.*

> course, include reference to actual mental states; one can certainly invoke the numbers, the eminence, or both of the proponents of a particular viewpoint. But those actual mental states are *evidence* of meaning; they are not *constitutive* of meaning. That is how dissenting voices on meaning can maintain, without absurdity, that they are right and the majority is wrong. And majorities typically do not consider it a full and complete response to any arguments about meaning to point out that the dissenting voices are not as loud as the majority's.[31]

In order to distinguish this species of originalism from other variants, one should call it something like "reasonable-observer originalism."

My interpretative focus on the hypothetical mental states of hypothetical fully informed observers, while not entirely idiosyncratic,[32] is likely to raise the hackles even of many self-described originalists. After all, how can the Constitution's authority as binding law possibly be grounded in what a hypothetical audience would have hypothetically believed?

This response, however, is grounded in a very basic, and very common, mistake about interpretation. It conflates the question of what the Constitution *means* with the very different question of why (or whether) anyone should *care* what the Constitution means. The first question is the only legitimate province of interpretative theory; the second question is in the domain of moral theory.[33] While it is an overstatement to say that never the twain shall meet, questions about the Constitution's *meaning* and questions about its *authority* do spend most of their time at a comfortable distance from each other.[34] One must determine what the Constitution actually means before one can intelligently decide whether that meaning has moral significance; a good interpreter does not let moral presuppositions get in the way of the search for meaning. And the best account of constitutional meaning is reasonable-observer originalism.[35]

Operationally, the difference between reasonable-observer originalism and "intentionalist" approaches concerns the *weight* that is properly given to pieces of evidence rather than the *admissibility* of that evidence. Reasonable-observer originalism focuses on what a fully informed, unbiased observer would have concluded after weighing all relevant evidence. The expressed

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31 *Id.* at 10.

32 *See, e.g.*, Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1132 (2003).

33 This is very bad news for the second question. One of the few things in this world more depressing than moral theory is moral theory in the hands of law professors and judges.

34 For a more detailed discussion of the distinction between constitutional meaning and constitutional authority, see Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823 (1997). For a brief discussion of the modest extent to which interpretation is necessarily a normative enterprise (which concerns the standard of proof for legal propositions), see LAWSON & SEIDMAN, *supra* note 29, at 208 n.15. And for those who will not shut up until I say whether I consider the Constitution's original meaning to be normatively binding, the answer is, "Yes, for public officials," but I do not believe that I can defend that position with the intellectual rigor appropriate to academic writing.

35 For a more extended discussion of this approach, see LAWSON & SEIDMAN, *supra* note 29, at 7–12; Kesavan & Paulsen, *supra* note 32.

views of concrete historical individuals can provide modest evidence of what a reasonable observer would have concluded, but they are hardly the touchstone of an inquiry into meaning. Actual participants in actual debates were not always in possession of all relevant information, were not always unbiased observers, and were not always (given the real-world stakes involved) necessarily honest about their own thoughts or their perceptions of the thoughts of others. This is true of all forms of expressed views, including statements or actions of framers or ratifiers, statements or actions of legislators or executive officials, and statements or actions of judges. Precedents, whether testimonial, legislative, or judicial, are relatively weak evidence of original meaning. Such evidence generally pales before evidence drawn from text, structure, interpretative conventions, and general background understandings about language, the document in question, and the world in which the document is embedded.

For intentionalist originalists, direct statements or actions of concrete historical individuals are very persuasive evidence of original meaning. The same is true for "Burkean" or "traditionalist" originalists, who see practices, and especially founding-era practices, as good evidence of original meaning. For such interpreters, materials such as "the records of the constitutional convention, the ratification debates, *The Federalist*, and early governmental practice"[36] may well be, as Posner and Vermeule describe them, "the canonical originalist sources."[37] For reasonable-observer originalists such as myself, however, such sources carry a lot of baggage relative to their probative value. To us, "arguments from structure and 'first principles' can easily outweigh even very impressive evidence about concrete historical understandings. Original *understandings* were not necessarily original *meanings*."[38]

Given this methodology, the task is to figure out what the words "necessary and proper," as they appear in the Sweeping Clause, would have meant to a fully informed reasonable observer of the Constitution in 1788.

At least one thing is very clear: the words would have meant something. They are not ciphers or embellishments. The Sweeping Clause does not say or mean that Congress may employ any means whatsoever to implement valid legislative ends. Nor does it say that Congress, in its discretion, is the sole judge of the necessity and propriety of executory laws. There are clauses in the Constitution that actually say that sort of thing,[39] but the Sweeping Clause, which refers to laws that objectively "*shall be* necessary and proper,"[40] is not one of them. The central question with respect to the nondelegation doctrine is therefore: can laws conferring discretion on execu-

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36 Posner & Vermeule, *supra* note 1, at 1733.

37 *Id.*

38 LAWSON & SEIDMAN, *supra* note 29, at 12.

39 *See, e.g.*, U.S. CONST. art. II, § 2, cl. 2 (Congress may "vest the Appointment of such inferior Officers, *as they think proper*, in the President . . . , in the Courts of Law, or in the Heads of Departments" (emphasis added)). For other examples and a detailed contrast of those provisions with the objective requirements of the Sweeping Clause, see Gary Lawson & Patricia B. Granger, *The "Proper" Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 276–85 (1993).

40 U.S. CONST. art. 1, § 8, cl. 18 (emphasis added).

tive actors ever fail to be "necessary and proper for carrying into Execution" federal powers?

Before we answer this question, one further methodological point bears mention. Posner and Vermeule insist that proponents of the nondelegation doctrine bear the burden of showing "that the Constitution contains some implicit principle that constrains the permissible scope or precision of otherwise valid statutory grants."[41] This burden is heavy, they claim, because it must overcome the inference against implied limitations on congressional powers generated by the express limitations contained in Article I, Section 9.[42] They have matters exactly backwards. Under the principle of enumerated powers, all exercises of federal power must affirmatively be grounded in a constitutional enumeration that authorizes the actor or institution in question to perform the relevant act. Only if such an authorization can be found do we then ask whether anything in the Constitution affirmatively prohibits the otherwise authorized exercise of power. Grants of discretion by Congress must find affirmative authorization in some constitutional source. If that source is the Sweeping Clause, as it normally must be, then the burden is on the proponent of federal power to prove, affirmatively, that such laws are "necessary and proper for carrying into Execution" some federal power.[43] The requirement in the Sweeping Clause that laws be "necessary and proper" is not a limitation, implied or otherwise, on congressional power. It is part of the affirmative grant of power contained in the Sweeping Clause; the phrase "necessary and proper for carrying into Execution" is part of the definition of the specific enumerated power in Article I, Section 8, Clause 18.[44] The burden of proof is accordingly on advocates of limitless grants of discretion to show that such grants are "necessary and proper for carrying into Execution" federal power.

II. Grants of Discretion Are Not Always "Necessary"

The meaning of the word "necessary" in the Sweeping Clause has been often plumbed. The term clearly describes some kind of causal connection between means and ends: a statute is "necessary" as a means for carrying into execution federal power if it bears a certain causal—or, as David Engdahl has termed it, a "telic"[45]—connection to the achievement of that end. There has been much debate since the time of the founding concerning the tightness of the required causal connection. Some founding-era figures such as Thomas Jefferson believed that laws under the Sweeping Clause were "necessary" only if they were "means without which the grant of the power would

41 Posner & Vermeule, *supra* note 1, at 1728–29.

42 *See id.* at 1729 ("Article I, § 9 crafts an elaborate set of express restrictions, such as the ex post facto and bill of attainder clauses, suggesting by negative implication that no other limitations should be recognized.").

43 For a modest defense, or rather an introduction to a defense, of the proposition that the initial burden of proof is always on the proponent of federal power, see Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL'Y 411, 425–27 (1996).

44 U.S. CONST. art. I, § 8, cl. 18.

45 DAVID E. ENGDAHL, CONSTITUTIONAL FEDERALISM IN A NUTSHELL 20 (2d ed. 1987).

be nugatory."[46] Others such as Alexander Hamilton, as reflected in the preamble to the bill for the First Bank of the United States, maintained that a law was "necessary" if it "might be conceived to be conducive" to achieving legislative ends,[47] which calls to mind so-called "rational basis" scrutiny in modern equal protection doctrine.[48] Still others, such as James Madison, thought that the word "necessary" as used in the Sweeping Clause required something in between these two extremes; Madison described the word as requiring "a definite connection between means and ends" in which the executory law and the executed power are linked "by some obvious and precise affinity."[49]

At a very basic level, any debate about the strength of the required causal connection is largely beside the point for present purposes.[50] Posner and Vermeule maintain that there is *no case even in principle* in which a law that does not transfer formal voting authority to a noncongressional actor is unconstitutional because of the kind or quantity of discretion that it confers. If there is even one instance in which a law delegating discretion to the President would, because of the kind or nature of the discretion involved, not be "necessary . . . for carrying into Execution" federal powers, the Posner/Vermeule position is wrong. Posner and Vermeule, accordingly, must say that the word "necessary" is literally meaningless—that there is no logically possible circumstance in which a grant of discretion can fail to meet the causal requirement embodied by the word. That is wrong even if one accepts the "rational basis" approach of Hamilton. Under the Hamiltonian standard, it may be extremely unlikely that a statute vesting discretion in the President will ever fail the test of necessity under the Sweeping Clause, and it may be even more unlikely that a court will enforce whatever restrictions the Constitution imposes, but the restrictions will still exist in principle. That is precisely what Posner and Vermeule deny.

Posner and Vermeule could, of course, claim a kind of moral victory by arguing that I have not described a "delegation" problem at all, but have instead described a "lack of congressional authority" problem. Whatever. The basic idea is that the Constitution places some limits on the extent to which Congress can vest discretion in the President. Traditionally, that idea has gone under the label of "nondelegation." It could just as well go under the label of "exceeding Congress's authority under the Sweeping Clause," reserving the "nondelegation" label only for formal transfers of voting authority. I will willingly grant Posner and Vermeule an academic trademark in the label "nondelegation" if they will grant the existence of the constitutional

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46 Thomas Jefferson, *Opinion on the Constitutionality of the Bill for Establishing a National Bank*, *in* 19 THE PAPERS OF THOMAS JEFFERSON 275, 278 (Julian P. Boyd ed., 1974).

47 2 ANNALS OF CONG. 1948 (1791) (statement of James Madison quoting the preamble to the first Bank Bill).

48 *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 11 (1992) ("[T]he Equal Protection Clause is satisfied so long as . . . the relationship of the classification to its goal is not so attenuated as to render the distinction arbitrary or irrational.").

49 Letter from James Madison to Spencer Roane, *supra* note 19.

50 For a thorough treatment of the founding-era debate over necessity, see Randy E. Barnett, *The Original Meaning of the Necessary and Proper Clause*, 6 U. PA. J. CONST. L. 183, 188–203 (2003).

principle that I describe. I doubt they will take the bargain; Posner and Vermeule do not appear to be arguing about labels. They want to say that the Constitution does not limit the power of Congress to vest discretion in other actors.

But let us not draw conclusions too hastily about the effect of the necessity requirement on the nondelegation doctrine (or, if one prefers, the Congress-cannot-vest-too-much-discretion-in-the-President-under-the-Sweeping-Clause doctrine). If the strong Hamiltonian take on the word "necessary" in the Sweeping Clause is correct, Posner and Vermeule might still be in the game, at least as a practical matter. They are, after all, clever people, and clever people can surely gin up causal connections that will sustain even the most ridiculous statutes. Courts do it routinely.[51] I will even help them out in the case of the Goodness and Niceness Act: the statute delegating all practical decisionmaking power to the President may well fail the laugh test as a "necessary" means for carrying into execution the commerce power, but suppose that Congress explains that the purpose of section 2 of the Goodness and Niceness Act is to relieve Congress of the need to spend time on the specifics of commercial regulations so that it can concentrate its limited energy on other matters, such as designating the precise paths of postal routes.[52] Section 2 of the Act, in other words, would be justified as "necessary" for carrying into execution the postal power[53] and the commerce power considered as a pair. After all, the Sweeping Clause authorizes laws that carry into execution any powers granted by the Constitution; nothing in the clause says that each executory law must uniquely map onto one and only one enumerated power. If the telic connection required by the word "necessary" is loose enough, there may be literally no cases in which grants of discretion, however broad, would fail the test of necessity. The word "necessary" in the Sweeping Clause only poses a serious threat to the Posner/Vermeule thesis if it requires a substantial enough causal connection between means and ends to have serious bite.

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51 *See, e.g.*, Perez v. United States, 402 U.S. 146, 156–57 (1971) (finding an effect on interstate commerce in a prohibition on local loan-sharking); Wickard v. Filburn, 317 U.S. 111, 128–29 (1942) (finding an effect on interstate commerce from the consumption of homegrown wheat).

52 The first post road established by statute was:

> From Wisscassett in the district of Maine, to Savannah in Georgia, by the following route, to wit: Portland, Portsmouth, Newburyport, Ipswich, Salem, Boston, Worcester, Springfield, Hartford, Middletown, New Haven, Stratford, Fairfield, Norwalk, Stamford, New York, Newark, Elizabethtown, Woodbridge, Brunswick, Princeton, Trenton, Bristol, Philadelphia, Chester, Wilmington, Elkton, Charlestown, Havre de Grace, Hartford, Baltimore, Bladensburg, Georgetown, Alexandria, Colchester, Dumfries, Fredericksburg, Bowling Green, Hanover Court House, Richmond, Petersburg, Halifax, Tarborough, Smithfield, Fayetteville, Newbridge over Drowning creek, Cheraw Court House, Camden, Statesburg, Columbia, Cambridge and Augusta; and from thence to Savannah . . . .

Act of Feb. 20, 1792, ch. 7, § 1, 1 Stat. 232, 232.

53 U.S. CONST. art. I, § 8, cl. 7 (granting Congress the power "[t]o establish Post Offices and post Roads").

It does. As an original matter, the "rational basis" standard of Hamilton has no constitutional foundation.[54] The textual case against the Hamiltonian rational basis interpretation is simply devastating. Textually, it is linguistically bizarre to read the word "necessary" to mean anything like "rationally related to." Samuel Johnson's 1785 *Dictionary of the English Language* defined "necessary" as "1. Needful; indispensably requisite. 2. Not free; fatal; impelled by fate. 3. Conclusive; decisive by inevitable consequence."[55] This is not the stuff of which rational basis standards are made.[56] Moreover, when the Constitution means to give actors unfettered discretion with respect to means and ends, it knows how to do so.[57] The words "shall be" that precede "necessary" in the Sweeping Clause hammer home the idea that the clause means to grant only a limited power.

Intratextual evidence is (if this is possible) even more devastating to the Hamiltonian position. Consider the Constitution's uses of the words "necessary" and "needful." Samuel Johnson's 1785 dictionary cross-defined "necessary" and "needful" as synonyms: one of Johnson's definitions of "necessary" was "needful," and Johnson's entire definition of "needful" was simply "necessary; indispensably requisite."[58] On two separate occasions, including in the clause immediately preceding the Sweeping Clause, the Constitution uses the term "needful" to define Congress's powers: the District and Enclaves Clause gives Congress power of exclusive legislation over all land acquired from States "for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other *needful* Buildings,"[59] and the Territory and Property Clause authorizes Congress to make "all *needful* Rules and Regulations respecting" federal territory or property.[60] Both usages of "needful" involve contexts—federal enclaves, territory, and property—in which Congress acts with the powers of a general government and is not limited by the enumerations of subject matter

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54 As a matter of current doctrine, it has much to commend it—most notably an eight–one Supreme Court decision from 2004 proclaiming that a law is "necessary" under the Sweeping Clause when it accomplishes a valid legislative end "by rational means." Sabri v. United States, 124 S. Ct. 1941, 1946 (2004). Justice Thomas was the only member of the Court to get it right. *See id.* at 1949–51 (Thomas, J., concurring in the judgment) (endorsing Madison's test for necessity).

55 *See* SAMUEL JOHNSON, DICTIONARY OF THE ENGLISH LANGUAGE (1785).

56 Hamilton's famous observation that "[i]t is a common mode of expression to say, that it is *necessary* for a government or a person to do this or that thing, when nothing more is intended or understood, than that the interests of the government or person require, or will be promoted by, the doing of this or that thing," *Final Version of an Opinion on the Constitutionality of an Act to Establish a Bank*, *in* 8 THE PAPERS OF ALEXANDER HAMILTON 97, 102 (Harold C. Syrett & Jacob E. Cooke eds., 1965), appears to be blather. I am not a historian, so I cannot claim extensive familiarity with eighteenth-century discourse. But I have examined every usage of the word "necessary" prior to or contemporaneous with Hamilton's comment that appears in the (considerable) database contained on the American Freedom Library CD-ROM, and none of those usages even remotely conform to Hamilton's. Samuel Johnson would, unsurprisingly, appear to have much the better of this particular argument.

57 *See* U.S. CONST. art. II, § 2, cl. 2 (Congress may "vest the Appointment of such inferior Officers, *as they think proper*, in the President . . . , in the Courts of Law, or in the Heads of Departments" (emphasis added)); Lawson & Granger, *supra* note 38.

58 JOHNSON, *supra* note 55.

59 U.S. CONST. art. I, § 8, cl. 17 (emphasis added).

60 *Id.* art. IV, § 3, cl. 2 (emphasis added).

jurisdiction in Article I, Section 8.[61] If there was ever going to be occasion for giving terms such as "needful" or "necessary" a relatively loose construction, it would be when describing the legislative powers of a general government rather than when describing the legislative powers of a limited government. The Constitution appears to use "needful" when describing a less demanding means-ends requirement and "necessary" when describing a stricter one.

There are, of course, also intratextual reasons to reject Jefferson's extreme view of necessity, notwithstanding its strong linguistic pedigree. Chief Justice Marshall in *McCulloch v. Maryland*[62] famously highlighted the Imposts Clause, which provides that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be *absolutely necessary* for executing its inspection laws."[63] As Marshall cogently argued in *McCulloch*, if "necessary" alone already means something like "indispensable," as Jefferson and the counsel for the State of Maryland in *McCulloch* insisted,[64] what sense does it make to add the qualifier "absolutely" to the term?[65] If the Constitution uses "absolutely necessary" to mean "indispensable," the bare word "necessary" must mean something less.

That is all correct. The big question, however, is how much less than "indispensable" the word "necessary" means. Hamilton's view is not the only alternative to Jefferson's view. The textual and intratextual evidence in favor of a strict interpretation of the word "necessary" does not simply dissolve in the face of the Imposts Clause; it merely stops somewhere short of where Jefferson would have liked to see it. If one is to take the Constitution seriously, the task is to find an understanding of the word "necessary" in the Sweeping Clause that reflects the linguistic and structural evidence that points towards strict indispensability but that also takes account of the intratextual evidence that sets an upper bound on the tightness of the means-end connection that can plausibly be attributed to the Sweeping Clause.

James Madison found as good a solution to that puzzle as one will find.[66] Madison shared the concerns of Chief Justice Marshall in *McCulloch* about taking too stringent a view of necessity, though he grounded his concerns in prudence rather than intratextual analysis. In his 1791 remarks in Congress opposing the First Bank of the United States, Madison expressly rejected Jefferson's view of the Sweeping Clause. The reporter described Madison's position thusly:[67]

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61 *See* Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1, 42 (1890) (noting that Congress has "general and plenary" power over federal territories).

62 McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).

63 U.S. CONST. art. I, § 10, cl. 2 (emphasis added); *see McCulloch*, 17 U.S. (4 Wheat.) at 343.

64 *See McCulloch*, 17 U.S. (4 Wheat.) at 367 (argument of Mr. Jones) (defining "necessary" as "indispensably requisite").

65 *See id.* at 414–15.

66 It is hopefully evident that I do not invoke Madison as a binding authority, but simply as a very smart person who happened to have the right answer to this question.

67 The accuracy of early reports of debates in Congress is subject to serious question. *See* James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65

> Those two words ["necessary" and "proper"] had been, by some, taken in a very limited sense, and were thought only to extend to the passing of such laws as were indispensably necessary to the very existence of the government. He [Madison] was disposed to think that a more liberal construction should be put on them . . . for very few acts of the legislature could be proved essentially necessary to the absolute existence of government.[68]

At the same time, Madison warned against reading the means-ends requirement for executory laws too loosely:

> The essential characteristic of the Government, as composed of limited and enumerated powers, would be destroyed: If instead of *direct and incidental* means, any means could be used, which in the language of the preamble to the bill, "might be conceived to be conducive to the successful conducting of the finances; or might be conceived to tend to give facility to the obtaining of loans."[69]

How does one navigate between the Scylla of Jeffersonian indispensability and the Charybdis of Hamiltonian rational basis review?

Three decades later, Madison had the answer. "There is," he said in a letter to Spencer Roane in the aftermath of *McCulloch*, "certainly a reasonable medium between expounding the Constitution with the strictness of a penal law, or other ordinary statute, and expounding it with a laxity which may vary its essential character."[70] That reasonable medium, in the context of the Sweeping Clause, is to require of executory laws "a definite connection between means and ends,"[71] in which the executory law and the executed power are linked "by some obvious and precise affinity."[72]

This standard captures, as well as words can capture it, the nature of the causal connection between legislative means and ends prescribed by the Sweeping Clause. Textually, Madison's formulation conforms to the ordinary meaning of the word "necessary," which is not a term that one would likely use to describe remote and attenuated connections. Structurally, it makes sense of the other uses of the word "necessary" in the Constitution. Under a Madisonian view of "necessary," the phrase "absolutely necessary" in the Imposts Clause of Article I, Section 10[73] means that without congressional consent, states can only tax imports or exports if their inspection laws would otherwise be unenforceable. That is a sensible, and even obvious, interpretation of the Imposts Clause: it reads the qualifier "absolutely" to amplify—but not fundamentally to alter—the meaning of "necessary."[74] The word "necessary" also appears in the Recommendation Clause of Article II, which says

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TEX. L. REV. 1 (1986). The views of the Sweeping Clause attributed to Madison in the Bank Bill debate, however, cohere with other, more reliably related views.

68 4 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 417 (Jonathan Elliot ed., 2d ed. 1836) [hereinafter ELLIOT'S DEBATES].

69 1 ANNALS OF CONG. 1947–48 (1791) (emphasis added).

70 Letter from James Madison to Spencer Roane, *supra* note 19, at 451–52.

71 *Id.* at 448.

72 *Id.*

73 U.S. CONST. art. I, § 10, cl. 2.

74 Consider how the Imposts Clause reads if one plugs in a Hamiltonian understanding of

that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient."[75] Given that any laws ultimately enacted under the Sweeping Clause must be "necessary," the Madisonian understanding of "necessary" is an excellent fit with the Recommendation Clause as well.

If anything remotely resembling Madison's view of the means-ends requirement imposed by the Sweeping Clause is correct, the nondelegation doctrine is very much alive and kicking. If Congress wants to vest discretion in the President, Congress had better be prepared to show in a direct and immediate fashion how the precise scope and character of that discretion is important to the execution of federal powers.[76] Sometimes Congress will succeed. Sometimes Congress will fail. It is hard to imagine, for instance, a plausible argument, under a Madisonian view, for the necessity of section 2 of the Goodness and Niceness Act.[77] And any failure is enough to defeat Posner and Vermeule's position.

Modern constitutional law, needless to say, does not reflect Madison's view of the Sweeping Clause.[78] But modern constitutional law bungles almost everything that it touches. The Constitution's original meaning is what it is, regardless of what courts, past or present, do or do not say about it. Madison's understanding of the word "necessary" in the Sweeping Clause makes constitutional sense and other proferred understandings do not. That is the end of the matter with respect to original meaning, and it is also the end of the matter with respect to Posner and Vermeule's theory of nondelegation.

As I have already observed, however, Posner and Vermeule are clever people. It would not be astonishing if they found a plausible-sounding end run around even Madison's view of necessity. The Madisonian standard is, after all, a standard rather than a rule, and standards are notoriously malleable. It would be much more satisfying if there was another route for challenging the constitutionality of congressional grants of discretion besides arguing that such grants are not neccessary. The Sweeping Clause provides that route by requiring that laws executing federal powers be not merely "necessary" but "necessary and proper."

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necessity: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely conceivably conducive."

75 U.S. CONST. art. II, § 3.

76 It is tempting to try to relate the views of Jefferson, Madison, and Hamilton to the tiers of modern equal protection scrutiny, with Jefferson representing strict scrutiny, Madison representing intermediate scrutiny, and Hamilton representing rational basis scrutiny. But that is a story for another day.

77 *See supra* p. 238.

78 *See supra* note 54. It is more equivocal whether *McCulloch* did so. Madison obviously thought that *McCulloch* was wrongly decided, but Madison may have misapplied his own standard. *McCulloch* clearly rejected the Jeffersonian view of necessity, but it is less clear what view it actually adopted. Some passages in the opinion seem very Madisonian, *see, e.g.*, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 422–23 (1819), while others are distinctly Hamiltonian, *see, e.g.*, *id.* at 413–15. The point is irrelevant for determining original meaning; the Marshall Court's interest in the Constitution's original meaning was tepid at best.

III. Grants of Discretion Are Not Always "Proper"

A good percentage of my professional life has been devoted to the proposition that the word "proper" in the Sweeping Clause imposes limitations on executory legislation different from and complementary to the limitations imposed by the word "necessary." The argument for this proposition was outlined in 1993, in an article coauthored with Patricia B. Granger,[79] and a decade later I applied it to explain why the nondelegation doctrine has a sound constitutional footing.[80] The bottom-line conclusion is that a "proper" executory law must conform to "the 'proper' allocation of authority within the federal government; . . . the 'proper' scope of the federal government's limited jurisdiction with respect to the retained prerogatives of the states; . . . and . . . the 'proper' scope of the federal government's limited jurisdiction with respect to the people's retained rights."[81] Put as simply as possible, laws enacted under the Sweeping Clause "must be consistent with principles of separation of powers, principles of federalism, and individual rights."[82]

The best way to see how this understanding of the word "proper" relates to the nondelegation doctrine is to examine what Posner and Vermeule don't like about it. They have two basic objections: that the word "proper" in the Sweeping Clause is better understood as a redundancy rather than as a separate requirement, and that even if the word "proper" does have independent significance, it cannot ground a nondelegation principle. Both claims are wrong. The word "proper" has independent meaning, and it precisely grounds the traditional nondelegation doctrine.

A. "Necessary and Proper" Means "Necessary" and "Proper"

If the word "proper" in the Sweeping Clause adds nothing to the word "necessary," it obviously cannot serve as an independent source for a nondelegation doctrine; whatever limitations the word "necessary" imposes on grants of discretion would exhaust the substantive effect of the Sweeping Clause. That is what Posner and Vermeule maintain. According to them,

> Lawson's premise rests on an idiosyncratic reading of the [Sweeping] Clause, one which holds that the single word "proper" incorporates structural principles of separation of powers, federalism, and individual rights as limits on Congress's affirmative authority. . . . A more plausible reading because a less dramatic one, is just that the phrase "necessary and proper" is an example, among many in the Constitution, of an internally redundant phrase. Consider other instances in Article I, § 8, such as "Taxes, Duties, Imposts and Excises" (cl 1), "Government and Regulation" (cl 14), or "organizing, arming and disciplining (cl 16). On this view, "proper" just means "appropriate," reinforcing the Supreme Court's longstanding and

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79 *See* Lawson & Granger, *supra* note 39. For those who wonder about such things: my coauthor is now Patricia B.G. Lawson. We were married just a few months before the article came out. In this Article, I continue to refer to her as Ms. Granger to avoid confusion.

80 *See* Lawson, *supra* note 14.

81 Lawson & Granger, *supra* note 39, at 297.

82 *Id.*

> capacious interpretation of the companion word "necessary" as meaning "useful" or "conducive to."[83]

In prior work, Ms. Granger and I spent a fair amount of time and energy demonstrating that the words "necessary" and "proper" in the Sweeping Clause are not redundant. We devoted, not one, but two subsections in our article to that specific proposition.[84] Most of the rest of our article implicitly explained how textual, intratextual, structural, and historical considerations all support the view that "necessary" and "proper" are distinct terms. The case for our position, however, is actually *much* stronger than we let on, as the ensuing amplification will demonstrate.

The case begins, very modestly and quietly, with the venerable maxim that one ought to try to give each word in a legal instrument some meaning. A construction that renders a word meaningless or irrelevant should be disfavored.[85] As Posner and Vermeule correctly point out, it is easy to make too much of this maxim. Lawyers love redundancy (as anyone who has ever read a contract or deed provision along the lines of "give, grant, bargain, sell, and convey" can attest),[86] and the Constitution was written largely by lawyers. Although Posner and Vermeule picked really, *really* bad examples to illustrate the Constitution's willingness to indulge redundancy,[87] there are in fact a significant number of places in which the Constitution—for reasons of caution, emphasis, or carelessness—contains duplicative provisions. For instance, at least some of the specifically enumerated Article I powers to prescribe punishments[88] are surely duplicative of the general power to prescribe punishment granted by the Sweeping Clause. Many of the provisions in Sections 2 and 3 of Article II, such as the Commander-in-Chief Clause[89] and the Opinions Clause,[90] replicate and clarify powers conferred on the President by the Article II Vesting Clause.[91] And as I have vigorously argued elsewhere, the Bill of Rights was largely redundant given the original Constitution's scheme of enumerated powers.[92] Arguments from redundancy must be made with care.

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83 Posner & Vermeule, *supra* note 1, at 1728 n.20.

84 *See* Lawson & Granger, *supra* note 39, at 275–76 ("*B. 'Necessary' and 'Proper' Are Distinct Requirements*"); *id.* at 289–91 ("*B. 'Necessary' As Distinct From 'Proper'*").

85 *See* Caleb Nelson, *Originalism and Interpretive Conventions*, 70 U. CHI. L. REV. 519, 564 (2003) (describing the founding-era pedigree of this principle).

86 *See* Moskal v. United States, 498 U.S. 103, 120 (1990) (Scalia, J., dissenting).

87 *See infra* pp. 251–52.

88 *See, e.g.*, U.S. CONST. art. I, § 8, cl. 6 (authorizing Congress "[t]o provide for the Punishment of counterfeiting the Securities and current Coin of the United States").

89 *Id.* art. II, § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . .").

90 *Id.* ("[H]e may require the Opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices . . . .").

91 *Id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."); *see* LAWSON & SEIDMAN, *supra* note 29, at 46–47 (discussing the superfluity of the Commander-in-Chief and Opinions Clauses).

92 *See* LAWSON & SEIDMAN, *supra* note 29, at 189; Gary Lawson, *The Bill of Rights As an Exclamation Point*, 33 U. RICH. L. REV. 511 (1999).

But that does not mean that they cannot be made at all. It simply means that they must be made with care. For a number of reasons, a limited argument from redundancy makes a good measure of sense in the specific context of the Sweeping Clause.

First, it is easier to find redundancy in the Constitution among *provisions* than among *words*. The Constitution seems more willing to replicate *powers* or *limitations* for emphasis or clarity than to replicate specific *terms* within a provision. That is not surprising. In a Constitution driven by a skeptical view of human nature, and of political actors in particular,[93] one should expect to see provisions layered over themselves in an effort to anticipate and avoid potential problems. It is not impossible for the same considerations to affect the language within specific clauses, but that is a less direct way to confront risks of interpretative error than is the construction of "back-up systems" through redundant provisions.

The efforts of Posner and Vermeule to find examples of linguistic redundancy within Article I provide a good illustration of this general constitutional tendency to prefer redundancy of provisions over redundancy of terms. Posner and Vermeule cavalierly proclaim that the language in the Taxing Clause authorizing Congress to lay and collect "Taxes, Duties, Imposts and Excises"[94] is redundant.[95] As Jeffrey Renz has ably demonstrated, however, the distinction among these different forms of revenue measures was actually enormously significant to the founding generation, reflecting a basic distinction between revenue measures and regulatory tools.[96] It is especially odd to treat the phrase "Taxes, Duties, Imposts and Excises" as redundant when the Taxing Clause itself distinguishes "Taxes" from "Duties, Imposts and Excises,"[97] and the Constitution elsewhere separately treats "Duties and Imposts."[98] In fairness to Posner and Vermeule, Madison agreed with them at least in part; in an 1828 letter, Madison declared that "[t]he term *taxes*, if standing *alone*, would certainly have included duties, imposts, & excises,"[99] and the Constitution's own usages of the various taxing terms are sometimes hard to fathom. For the reasons documented by Professor Renz, however, Madison's basic assertion that the term "Taxes" is necessarily all encompassing seems clearly false, and a study of founding-era materials on taxation reveals persistent, even if often fuzzy, demarcations among duties, imposts, and excises,[100] especially between imposts and excises.[101] Strike one.

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93 For a brief discussion of the view of human nature reflected in the Constitution, see Steven G. Calabresi & Gary Lawson, *Foreword: Two Visions of the Nature of Man*, 16 HARV. J.L. & PUB. POL'Y 1 (1993).

94 U.S. CONST. art. I, § 8, cl. 1.

95 Posner & Vermeule, *supra* note 1, at 1728 n.20.

96 *See* Jeffrey T. Renz, *What Spending Clause? (or the President's Paramour): An Examination of the Views of Hamilton, Madison, and Story on Article I, Section 8, Clause 1 of the United States Constitution*, 33 J. MARSHALL L. REV. 81, 88–94 (1999).

97 U.S. CONST. art. 1, § 8, cl. 1 ("[A]ll Duties, Imposts and Excises [but not Taxes] shall be uniform throughout the United States . . . .").

98 *Id.* art. I, § 10, cl. 2.

99 Letter from James Madison to Joseph Cabell (Sept. 18, 1828), http://www.constitution.org/jm/18280918_cabell.htm.

100 For a brief elaboration of the distinction between the various forms of taxation, see

Posner and Vermeule are also much too eager to announce that the terms "organizing, arming, and disciplining" in the Militia Clause,[102] all have the same meaning.[103] An eighteenth-century observer would have been startled to be told that granting Congress power over, say, the disciplining of the militia also granted Congress power over the militia's structure, command, training, and equipment. At the Constitutional Convention, Rufus King explained that "by *organizing*, the committee meant, proportioning the officers and men—by *arming*, specifying the kind, size, and calibre of arms—and by *disciplining*, prescribing the manual exercise, evolutions, &c,"[104] which is exactly what ordinary language would suggest is meant by the different terms. Strike two.

Posner and Vermeule's third pitch is the provision granting Congress power "[t]o make rules for the Government and Regulation" of the military.[105] This provision was incorporated into the Constitution, without any reported debate or subsequent discussion, directly from the Articles of Confederation.[106] I frankly do not know whether "Government" and "Regulation" mean precisely the same thing in this context—and I venture to guess that Posner and Vermeule are equally clueless. There is, however, some reason to think that the term "Regulation," as it is used in the Constitution on more than one occasion, has a narrower meaning than "Government,"[107] though persons better versed in the lore of military history than Posner, Vermeule, or I are better situated to sort this out. Let's give them a foul tip on this one and let the reader decide whether the catcher hung on.

The point is not that redundancy of terms in the Constitution, and in Article I in particular, is nonexistent or inconceivable. Arguments from redundancy or surplusage should not be relied upon to excess.[108] But they are a reasonable starting point for an inquiry into constitutional meaning, especially when the arguments pertain to redundancy of language within a clause rather than to redundancy of provisions across the Constitution as a whole. The maxim that one should construe legal documents to avoid linguistic redundancy had some power for the founding generation, and Article I of the Constitution simply does not exhibit the kind of consistently carefree use of language that Posner and Vermeule are much too eager to find. Moreover, the maxim was the linchpin of Chief Justice Marshall's rejection of the strict

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JOSEPH A. STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 156, at 103–04 (1854).

101 *See, e.g.*, 1 ELLIOT'S DEBATES, *supra* note 68, at 368 (Luther Martin's letter).

102 U.S. CONST. art. I, § 8, cl. 16.

103 Posner & Vermeule, *supra* note 1, at 1728 n.20.

104 5 JAMES MADISON, DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION 464 (Jonathan Elliot ed., 1845) (statement of Rufus King); *see* Brannon P. Denning, *Palladium of Liberty? Causes and Consequences of the Federalization of State Militias in the Twentieth Century*, 21 OKLA. CITY U. L. REV. 191, 202 (1997).

105 U.S. CONST. art. I, § 8, cl. 14; Posner & Vermeule, *supra* note 1, at 1728 n.20.

106 ARTS. OF CONFEDERATION art. IX, ¶ 4 (1777).

107 *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, 68 U. CHI. L. REV. 101, 139–42 (2001) (discussing the meaning of the term "regulate" in the Commerce Clause).

108 *See* Nelson, *supra* note 85, at 573–74 (noting Madison's caution about using such rules of construction).

Jeffersonian meaning of "necessity" in *McCulloch*. Without that maxim as applied to the Imposts Clause, the textual and intratextual evidence in favor of the strict Jeffersonian understanding of necessity is simply overwhelming. Posner and Vermeule probably want to think twice before jettisoning this maxim too quickly.

The best understanding of the Constitution is that the use of different words within a clause creates a presumption that the words have independent meaning. One should not be startled to find that presumption overcome in particular cases—by, for instance, evidence of consistent linguistic usage that treats certain terms as synonymous or redundant. But one ought to start an inquiry into the meaning of the Sweeping Clause with a presumption that the words "necessary" and "proper" have independent meaning.

There is no consistent pattern of usage that overcomes this initial presumption. There was, in fact, a fair number of founding-era figures, including such luminaries as Patrick Henry, James Monroe, and Daniel Webster, who either argued or assumed that the word "proper" added nothing to the Sweeping Clause.[109] One of the nine definitions of "proper" provided by Samuel Johnson would linguistically sustain the claim that "necessary" and "proper" were essentially redundant.[110] But the evidence demonstrates that this was not a standard usage that trumps the otherwise governing interpretative convention. To the contrary, there are numerous instances, from the ratifying conventions through the first few decades under the Constitution, of people treating "necessary" and "proper" as distinct terms.[111] Most of the definitions found in Johnson's dictionary, including the first four, reflect a very different meaning than could plausibly be attributed to "necessary." That is more than enough evidence to sustain the presumption in favor of independent meaning.

Further examination of the Constitution confirms that "necessary" and "proper" most likely have independent meaning. There are instances in which the Constitution uses the word "necessary" without further qualification.[112] At other times, the Constitution uses the word "needful" without qualification.[113] On one occasion, the Constitution qualifies the term "necessary" with the adjective "absolutely."[114] On another occasion, the Constitu-

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109 *See* Lawson & Granger, *supra* note 39, at 275 & n.26 (identifying Henry's and Monroe's views); *id.* at 289 (identifying Webster's view).

110 *See* JOHNSON, *supra* note 55 (defining "proper" as "1. Peculiar; not belonging to more; not common. 2. Noting an individual. 3. One's own. It is joined with any of the possessives: as *my* proper, *their* proper. 4. Natural; original. 5. Fit; accommodated; adapted; suitable; qualified. 6. Exact; accurate; just. 7. Not figurative. 8. It seems in *Shakespeare* to signify, mere; pure. 9. Elegant; pretty."). The fifth definition seems to reflect the same idea of causal or telic connection as is represented by the word "necessary."

111 Lawson & Granger, *supra* note 39, at 289–90.

112 *See* U.S. CONST. art. I, § 7, cl. 3 (imposing a presentment requirement for "[e]very Order, Resolution, or Vote to which the Concurrence of the Senate and House of Representatives may be necessary"); *id.* art. II, § 1, cl. 3 (stating that when the House must choose the President, "a Majority of all the States shall be necessary to a Choice").

113 *See id.* art. I, § 8, cl. 17 (referring to "needful Buildings"); *id.* art. IV, § 3, cl. 2 (referring to "all needful Rules and Regulations").

114 *See id.* art. I, § 10, cl. 2.

tion conjoins "necessary" with "expedient."[115] The Sweeping Clause uses the phrase "necessary and proper."[116] To an unbiased observer, this at least suggests that the different usages might be meant to convey different messages. Perhaps on close examination that initial suspicion will dissolve, but the Constitution's pattern of usage of "necessary" and similar terms should at least raise a flag that the pattern might have significance. At a minimum, the pattern reinforces the presumption that should arise from the general interpretative maxim to try to give each word in a clause some meaning.

Posner and Vermeule offer two responses to this evidence that "necessary" and "proper" most likely have different meanings in the Sweeping Clause. First, they dismiss the argument as "idiosyncratic."[117] Second, they claim that reading "necessary" and "proper" as redundant is "[a] more plausible reading because a less dramatic one."[118]

Because the charge of idiosyncrasy is substantively empty (idiosyncratic arguments can be either right or wrong), I could easily let it pass. But, of course, I won't. A word of high praise such as "idiosyncratic" should be reserved only for positions that deserve it; and while I am proud to say that many of my positions, including some that involve applications of the Sweeping Clause, might well merit such a compliment,[119] the simple view that the words "necessary" and "proper" have distinct meanings, and that the word "proper" incorporates some set of structural principles into the Sweeping Clause, is downright banal. That view has been specifically endorsed by a large assortment of scholars, including (and these are just the major scholars who I personally know will not be offended by being named) Randy Barnett, Steve Calabresi, Stephen Gardbaum, Richard Garnett, Mike Paulsen, and Sai Prakash.[120] Less to the point for me, though perhaps more to the point for others, the position has been specifically endorsed by the Supreme Court on at least three occasions in recent years.[121] As scary as the thought may be, I am actually the law on this point.[122]

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115 *See id.* art. II, § 3 (stating that President shall recommend to Congress "such Measures as he shall judge necessary and expedient").

116 *Id.* art. I, § 8, cl. 18.

117 Posner & Vermeule, *supra* note 1, at 1728 n.20.

118 *Id.* Yes, those are the only arguments that they made.

119 *See, e.g.*, Gary Lawson, *Controlling Precedent: Congressional Regulation of Judicial Decision-Making*, 18 CONST. COMMENT. 191, 223–24 (2001) (claiming that the Federal Rules of Evidence are unconstitutional under the Sweeping Clause).

120 *See, e.g.*, Randy E. Barnett, *Constitutional Legitimacy*, 103 COLUM. L. REV. 111, 145 (2003); Steven G. Calabresi & Saikrishna Prakash, *The President's Power to Execute the Laws*, 104 YALE L.J. 541, 587 (1994); Stephen Gardbaum, *Rethinking Constitutional Federalism*, 74 TEX. L. REV. 795, 813–14 (1996); Richard W. Garnett, *The New Federalism, the Spending Power, and Federal Criminal Law*, 89 CORNELL L. REV. 1, 79 (2003); Michael Stokes Paulsen, *Abrogating Stare Decisis by Statute: May Congress Remove the Precedential Effect of* Roe *and* Casey*?*, 109 YALE L.J. 1535, 1568 (2000); Saikrishna Prakash, *The Essential Meaning of Executive Power*, 2003 U. ILL. L. REV. 701, 737. Modesty forbids disclosing the full results of my latest WESTLAW search.

121 *See* Jinks v. Richland County, 538 U.S. 456, 462–65 (2003); Alden v. Maine, 527 U.S. 706, 732–33 (1999); Printz v. United States, 521 U.S. 898, 923–24 (1997).

122 Those who consider this cause to fear for the future of our republic can console themselves by rereading footnote 54.

Of course, any or all of the people who agree with me at an abstract level might well roundly reject much of the specific content that I would attribute to the word "proper," including the specific view that the word "proper" holds the key to the nondelegation doctrine. The basic idea, however, that the word "proper" in the Sweeping Clause has something important to say for structural constitutionalism is now (and it pains me deeply to say this) blandly conventional. This is hardly proof of the argument's soundness. But it does leave one wondering how and why the word "idiosyncratic" cropped up in this context.

As for whether a reading is preferable if it is less "dramatic" than another: I have absolutely no idea what Posner and Vermeule are talking about. If by "dramatic" they mean "contrary to settled law," they need both to read the previous paragraph and to explain why drama of that character has any relevance for an argument concerning original meaning. If by "dramatic" they mean "having consequences," then I suppose they are right that my reading of the word "proper" is more "dramatic" than theirs, though I would be interested to hear them defend the proposition that, all else being equal, one ought to prefer whatever interpretations of the Constitution have the fewest consequences.

All things considered, an inquiry into the meaning of the Sweeping Clause should begin with an inclination to attribute different meanings to the words "necessary" and "proper." One must stand ready to abandon that inclination if the evidence so warrants, but the presumption should be in favor of a reading of "proper" that complements rather than replicates the reading of "necessary."

B. Laws That Grant Too Much Discretion Are Not "Proper"

It is one thing to say that the word "proper" most likely means something different than the word "necessary." It is another matter altogether to specify that meaning and to show that it bears on the nondelegation doctrine.

I have spent much of my career presenting and defending the view that a "proper" law under the Sweeping Clause must respect background principles of federalism, separation of powers, and individual rights. Some aspects of that view have been subjected to detailed criticism.[123] This is not the place to rehearse the entire argument for (as Ms. Granger and I chose to call it) a

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123 *See* J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 U. ILL. L. REV. 581, 636–48 (objecting to the use of the word "proper" to refer to limitations other than means-ends constraints); Thomas B. McAffee, *The Federal System as Bill of Rights: Original Understanding, Modern Misreadings*, 43 VILL. L. REV. 17, 46–140 (1998) (objecting to using the word "proper" as a source of individual rather than structural rights). I have elsewhere responded to McAffee, whose criticisms are largely (and wisely) targeted at the claimed implications of the Lawson/Granger interpretation of the Sweeping Clause for individual rights rather than for its implications for structural arguments. *See* Lawson, *supra* note 14, at 348–49. Indeed, if I understand McAffee correctly, he is likely to be on my side of the present debate. Beck's argument, as with McAffee's, relies too heavily on history and not heavily enough on structure and principles. Statements from individuals during and after the founding era, on which Beck almost entirely focuses, establish the *linguistic feasibility* of the Lawson/Granger view of the Sweeping Clause, but they are not the primary sources of evidence concerning the clause's meaning. The argument must play out in terms of textual, intratextual, and structural argu-

"jurisdictional" interpretation of the Sweeping Clause.[124] One does not need to accept everything that I say about the Sweeping Clause—such as its implications for Ninth Amendment analysis[125] or for congressional statutes regulating the judicial process[126]—in order to see that the Sweeping Clause forbids excessive grants of discretion. That turns out to be a relatively easy case. Accordingly, the "short form" of the argument is sufficient for present purposes.[127] Even the short-form argument, however, must proceed in steps. First, I demonstrate that the word "proper" requires laws under the Sweeping Clause to respect principles of federalism and separated powers. Second, I show that this requirement extends further than a mere obligation not to violate express constitutional provisions. Third, I show that the requirement extends even further than an obligation not to violate principles that are intratextually and structurally derivable from the rest of the Constitution. Fourth, and finally, I show that, under either the second or third step, one of the principles that must be respected by a "proper" executory law is the principle against exessive grants of discretion.

1. Propriety and Reasonableness

If the word "proper" is to mean something different from the word "necessary," it must refer to something other than the causal connection, or "fit," between executory laws and executed powers. If no such plausible meaning for "proper" is available, or if such a meaning is available in principle but evidence of original meaning does not support it, one must conclude that the terms "necessary" and "proper" are essentially the same and that the Constitution uses two words rather than one merely for emphasis.

A plausible meaning for "proper" that distinguishes it from the meaning of "necessary" is readily available. Samuel Johnson's first definition of "proper" was "1. Peculiar; not belonging to more; not common."[128] His second, third, and fourth definitions were "2. Noting an individual. 3. One's own . . . . 4. Natural; original."[129] In the context of a provision granting legislative power to Congress, this would mean that a law that is "proper . . . for carrying into Execution" federal power is a law that peculiarly and naturally belongs to the national legislature. With respect to a legislature of limited and enumerated powers that is situated within a governmental framework that is divided horizontally by principles of federalism and vertically by principles of separated powers, this would mean that executory laws must be the sorts of laws that would peculiarly and naturally belong to such a legislature.

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ments, with historical data playing a decidedly supporting role. I discuss Beck's sole textual argument *infra* note 142 and accompanying text.

124 As Beck points out, there is some ambiguity in that label, *see* Beck, *supra* note 123, at 636 n.364, but I have been unable to think of a better one.

125 *See* Lawson & Granger, *supra* note 39, at 326–30.

126 *See* Lawson, *supra* note 119.

127 For the long version, see Lawson & Granger, *supra* note 39, at 297–326.

128 *See* JOHNSON, *supra* note 55.

129 *Id.*

The general validity of this approach is demonstrated by a number of textual and structural considerations. First, in the two contexts in which Congress *does not* serve as a limited legislature, the word "proper" is conspicuously absent. The Territory and Property Clause grants Congress power to make "all *needful Rules and Regulations* respecting the Territory or other Property belonging to the United States."[130] The District and Enclave Clause gives Congress power "[t]o exercise *exclusive Legislation in all Cases whatsoever*"[131] over the nation's capital and federal enclaves within states. The difference in language between these provisions and the Sweeping Clause highlights the fundamental distinction between a general legislature, which describes Congress when it is legislating with respect to federal territory or property, and a limited legislature, which describes Congress when it is legislating in other contexts. One would not expect Congress, acting as a general legislature for federal territory, to have to worry about federalism issues or separation of powers principles that are not specifically reflected in the text—no more than one would expect a state government in an equivalent position to have to worry about such things. This is consistent with the fact that the phrase "necessary and proper" did not appear in any state constitutions prior to the federal Constitution. The state governments were all general rather than limited governments, which further points to the idea that the "necessary and proper" phrase is distinctively tailored to the limited character of the federal Congress.[132]

Second, an understanding of "necessary and proper" in which "necessary" refers to causal connections, or "fits," and "proper" refers to substantive criteria, such as proportionality and consistency with background principles, conforms perfectly to the principle of reasonableness (as it is now called) that in the eighteenth century was at the heart of English administrative law.[133] The principle of reasonableness holds[134] that delegations of implementational power are always subject to the implied condition that exercises of such power must be reasonable. In the classic application of the doctrine in *Rooke's Case*,[135] Sir Edward Coke explained that sewer commissioners exceeded their powers by forcing one landowner to bear the costs of

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130 U.S. CONST. art. IV, § 3, cl. 2 (emphasis added).

131 *Id.* art. I, § 8, cl. 17 (emphasis added).

132 The phrase "necessary and proper" appeared in the Georgia state constitution shortly after ratification of the federal Constitution. *See* GA. CONST. OF 1789, art. I, § 16 ("The general assembly shall have power to make all laws and ordinances which *they shall deem necessary and proper* for the good of the State, which shall not be repugnant to this constitution." (emphasis added)). For an explanation of how the intriguing phraseology of that provision further demonstrates the limited and limiting character of the word "proper" in the federal Sweeping Clause, see Lawson & Granger, *supra* note 39, at 313–14.

133 For a more detailed discussion of the principle of reasonableness and its relevance to American constitutional interpretation, see LAWSON & SEIDMAN, *supra* note 29, at 52–57. One should strongly place the accent on the "Seidman" part of this pairing; I am profoundly indebted to Guy Seidman for pointing out to me the significance of the principle of reasonableness, of which I was blissfully unaware in 1993.

134 Even today, the principle of reasonableness is a central precept of English administrative law. *See* SIR WILLIAM WADE & CHRISTOPHER FORSYTH, ADMINISTRATIVE LAW 353–54 (8th ed. 2000).

135 Rooke's Case, 5 Co. Rep. 99b, 77 Eng. Rep. 209 (C.P. 1598).

repairs to a river bank that benefited many landowners, even though the authorizing statute placed no limit whatsoever on the commissioners' discretion.[136] Discretion, explained Lord Coke, "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."[137] In other words, delegated power always had to be exercised in a substantively reasonable fashion that took due account of the rights and interests of affected parties. Later cases elaborated the principle of reasonableness by, for example, holding in 1773 in *Leader v. Moxon*[138] that a statute giving paving commissioners power to make repairs "in such a manner as the commissioners shall think fit" did not authorize raising a street to such a level that it obstructed a citizen's doors and windows.[139] William Blackstone, who was one of the judges in the latter case, mentioned the principle of reasonableness, and its grounding in *Rooke's Case*, in his *Commentaries on the Laws of England*,[140] a primary reference source for Americans of the founding generation.

Drawing together the basic features of the principle of reasonableness, one can say that it requires exercises of delegated power to be *causally efficacious, measured and proportionate*, and *respective of background rights*. This principle constrains the federal executive and judicial powers under the American Constitution even without textual specification; the principle was part of the very nature of delegated executive and judicial power in the eighteenth-century English legal tradition.

The principle of reasonableness, however, did not apply to Parliament (or to the King in Parliament) because Parliament exercised inherent rather than delegated authority. The federal Congress, of course, possesses only delegated rather than inherent legislative authority, so if the principle of reasonableness is seen as a facet of delegated power per se, the principle would bind Congress as well as executive and judicial actors, at least when Congress was exercising implementational powers (as opposed to the general powers of an unlimited legislature, which Congress possesses in some limited contexts). But perhaps someone could argue, correctly or incorrectly, that Parliament was exempt from the principle of reasonableness simply because it was a legislative rather than executive or judicial body, in which case Congress, as a legislative body, would similarly be exempt. A constitutional drafter who wanted Congress's delegated implementational powers to be subject to the principle of reasonableness would likely look for some mechanism to prevent this inference. The obvious answer is language that makes clear that the principle of reasonableness applies in America to *all* exercises of delegated implementational authority, including those exercised by the

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136 *See* 23 Hen. 8, c. 5, § 3, cl. 2–3, 4 Stat. at Large 223, 224 (1531) (Eng.) (giving sewer commissioners power to order repairs "as case shall require, after your wisdoms and discretions" and granting them power to apportion the costs of repairs as they "shall deem most convenient to be ordained").

137 *Rooke's Case*, 5 Co. Rep. at 100a, 77 Eng. Rep. at 210.

138 Leader v. Moxon, 96 Eng. Rep. 546 (K.B. 1773).

139 *Id.* at 546–47.

140 *See* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *74.

legislature. The language "necessary and proper" performs this task quite elegantly.[141] The term "necessary" describes the element of causal efficacy, and the term "proper" (interpreted in the Lawson/Granger manner) describes the substantive criteria, such as proportionality and respect for background rights, reflected in the foundational cases such as *Rooke's Case* and *Leader v. Moxon*. The Lawson/Granger interpretation of the Sweeping Clause reflects the principle of reasonableness that was a basic aspect of delegated power in the late eighteenth century.

The only textual, intratextual, or structural argument against the Lawson/Granger position of which I am aware involves the grammatical structure of the Sweeping Clause, which

> focuses on whether legislation is *proper for* the purpose of carrying a given power into execution. The text thus appears to address the relationship between the legislation and the legislative end in view, rather than, say, the relationship between Congress and the states. This inference is strengthened by the fact that the companion term "necessary" is understood to regulate the means-end relationship.[142]

The argument begs the question. It assumes that the phrase "proper for carrying into Execution" can only concern means-ends relationships, which is the very point at issue. There is nothing linguistically odd about saying that a law is not "proper for carrying into Execution" a federal power if the law violates structural principles or other substantive criteria.[143] It is only odd if one starts from the premise that the phrase "necessary and proper" only concerns the *extent* to which laws "carry[ ] into Execution" federal power and not the *manner* in which they do so. That is precisely what we are trying to determine. And given the presumption against construing the terms "necessary" and "proper" to be synonymous, the fact that the word "necessary" regulates the means-ends relationship supports rather than undercuts the Lawson/Granger thesis.

Textually, intratextually, and structurally, the word "proper" in the Sweeping Clause is best understood as a substantive term that does not merely duplicate the causal function of the word "necessary." It requires Congress to legislate in a manner that respects substantive considerations. In the American governmental structure, those substantive considerations include the prerogatives of the states and of competing federal institutions. For a law to be "proper for carrying into Execution" federal powers, it must be

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141 Why not just mention the principle of reasonableness by name? Because it did not have a name in 1788 that one could just mention.

142 Beck, *supra* note 123, at 641. Evan Caminker has made a similar point. *See* Evan H. Caminker, *"Appropriate" Means-Ends Constraints on Section 5 Powers*, 53 STAN. L. REV. 1127, 1138 n.47 (2001) (noting that "'proper' clearly modifies 'for carrying into execution' rather than the 'laws' themselves, and thus syntactically serves a teleological function").

143 That is why it is *relevant*—though not *central*—to the Lawson/Granger argument that other people have actually spoken as we do. *See* Lawson & Granger, *supra* note 39, at 298–308. If no one ever used the word "proper" to describe anything other than a causal means-end connection, it would be harder (though not impossible) to make the case that the word "proper" describes anything other than a causal means-end connection.

substantively reasonable in light of the Constitution's scheme of federalism and separated powers.

2. *Propriety and Externality*

All of the foregoing, of course, is highly abstract.[144] What does it operationally mean to say that a "proper" executory law must respect principles of federalism and separated powers?

The Constitution is full of express clauses that concern federalism and separation of powers. With respect to federalism, for instance, the Slave Trade Clause specifically forbade Congress until 1808 from interfering with the decision of states to permit the importation of slaves.[145] With respect to separation of powers, for instance, the Appointments Clause specifically defines the role of Congress in appointing federal officers: it provides no role for Congress as such in the appointment process, but provides an advise and consent role for the Senate and a role for Congress in determining when inferior officers may be appointed without the participation of the Senate.[146] Perhaps an executory law fails to be "proper" if, but only if, it violates some such express prohibition.

That would indeed give the word "proper" a meaning different from the word "necessary," but it would be a remarkably stupid meaning. "Oh, by the way, don't violate otherwise applicable provisions of the Constitution" is not an especially helpful injunction. That does not logically rule it out, but it does incline one to ask to see the evidence that the Constitution contains such a ridiculous provision. There is no such evidence.

Some arguments about federalism and the separation of powers, of course, do not rely on express provisions such as the Slave Trade Clause, but instead rely on more complex and subtle inferences. Suppose that one believes (as Posner and Vermeule, to their great credit, evidently do) that the Article II Vesting Clause affirmatively grants to the President the "executive Power," which includes the power to execute federal laws.[147] What if Congress now enacts a statute specifically instructing the President to arrest and

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144 Posner and Vermeule do not like abstractions. They regard them as unable to resolve specific questions, such as the existence *vel non* of a nondelegation principle. *See* Posner & Vermeule, *supra* note 1, at 1730 n.27 (decrying "banalities about the separation of powers"); Posner & Vermeule, *supra* note 6, at 1340 (complaining about arguments "pitched at a higher level of abstraction"). That is often enough true to make the point a valuable one. But that does not mean that abstractions cannot serve as premises in arguments that ultimately yield very specific conclusions. That is how I am using abstractions—and I suspect that it is how everyone else that Posner and Vermeule criticize also uses them.

145 U.S. CONST. art. I, § 9, cl. 1 ("The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .").

146 *Id.* art. II, § 2, cl. 2 (decreeing that the President "shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all . . . Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments").

147 *See* Calabresi & Prakash, *supra* note 120, at 570–71; Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1397–98 (1994).

prosecute certain suspected offenders and forbidding the President from arresting and prosecuting others? There is no express clause in the Constitution that forbids Congress from doing this. But if the Article II Vesting Clause is a grant of prosecutorial power to the President, it requires relatively little by way of inference to say that Congress cannot dictate the exercise of that power—just as Congress cannot tell courts how to decide specific cases. When powers are granted to specific institutions within a scheme of divided government, it makes sense to presume (subject to rebuttal by contrary evidence) that the exercise of those powers cannot formally be dictated by other actors. Perhaps a law is not "proper for carrying into Execution" federal power if, and only if, it attempts to control power vested in other actors even when there is no express prohibition against such control.

This understanding of "proper" would save Posner and Vermeule's argument: the grants of discretion with which the traditional nondelegation doctrine is concerned do not normally attempt to control powers vested in other actors. But there is nothing to support this understanding of "proper" beyond the fact that it would save Posner and Vermeule's argument. Once it is admitted that at least some arguments from inference help define what counts as a "proper" executory law, one cannot rule out candidates for such arguments a priori. One has to ask in each case whether the particular argument from inference does or does not help define what counts as a "proper" executory law.

In the case of statutes purporting to control how the President or the courts carry out their functions, the relevant principle is what I have elsewhere called a principle of *decisional independence*, "under which each department should be understood to operate outside the direct control of other departments unless the Constitution instructs to the contrary."[148] No such principle expressly appears in the Constitution. Nonetheless, there are a host of reasons why such a principle is more consistent with the overall structure of the Constitution than is the contrary principle that would allow Congress to dictate the decisionmaking of coordinate departments.[149] It is straightforward and natural to read the word "proper" to refer at least to these kinds of principles derived from the Constitution's internal structure. Perhaps, then, the nondelegation principle can be grounded in the same manner as the principle of decisional independence; more on that in a moment.

The final question is whether the word "proper" can ever refer to principles that are not directly derivable from other constitutional provisions. Posner and Vermeule, naturally enough, think not. They claim that "'proper' has no work to do unless the relevant constitutional principle can be traced to some other valid source of constitutional law,"[150] presumably meaning some other provision(s) of the Constitution. The obvious hypothetical test case would be a statute enacted in 1789, before ratification of the Bill of Rights,

148 Lawson, *supra* note 119, at 204.

149 *See id.* at 205–07.

150 Posner & Vermeule, *supra* note 1, at 1728 n.20. Others have made similar claims. *See, e.g.*, Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125, 201; Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601, 1628–29 (2000).

that authorized the use of general warrants to enforce the customs law (and, just to make it interesting, further required congressional preapproval of all newspaper editorials criticizing the use of general warrants unless the newspaper editors are Protestant). There is no express prohibition in the original Constitution concerning the use of general warrants (or regulations of the press or religion). Nor are there provisions from which one can make direct structural inferences against this kind of law comparable to the provisions from which one can infer a principle of interdepartmental decisional independence. Would the law have been constitutionally authorized by the Sweeping Clause?

One could, of course, object to at least some of the law's provisions as not "necessary" and hence beyond the powers granted by the Sweeping Clause. But can one kill the whole statute on the ground that it is not a law "proper for carrying into Execution" the customs laws? It is, of course, conceivable that the original Constitution permits such a statute, from which we were rescued by the Bill of Rights. Many supporters of the Bill of Rights obviously thought precisely this.[151] But it is also conceivable that the reverse is true. Many defenders of the original Constitution steadfastly maintained that the unamended Constitution gave Congress no power to authorize general warrants, regulate the press or religion, abolish the civil jury, or violate other cherished rights.[152] The only plausible textual grounding for this position is the view that a "proper" law must (as the principle of reasonableness would demand) respect the rights and interests of the people—that is, that the word "proper" looks beyond the four corners of the rest of the Constitution to background principles that shape the (for lack of a better word) proper exercise of Congress's implementational legislative power.[153] The question is which conceivable view of the Sweeping Clause is, all things considered, a better view of the Constitution's original meaning.

Is it relevant to this question that the founding-era arguments against the power of Congress to provide for general warrants and such were not generally based on express references to the word "proper" in the Sweeping Clause?[154] Of course it is relevant—just as it is relevant that founding-era debates were not filled with references to *Rooke's Case*. But the Constitution's meaning consists of what a fully informed audience would have believed, not what the actual audience in fact believed. If a reasonable observer in 1788 would have listened to my argument about the word "proper" and its relation to the principle of reasonableness and said, "Yeah, that seems right," then that reflects the Constitution's original meaning. The jurisdictional interpretation of "proper" dovetails so elegantly with so many background principles and understandings that it likely would have com-

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151 *See* Lawson & Granger, *supra* note 39, at 321–22.

152 *See id.* at 317–21, 322–23.

153 This does not mean, of course, that the jurisdictional interpretation of the Sweeping Clause itself looks "outside" the Constitution. The word "proper" in the Sweeping Clause is as much a part of the Constitution as is the word "Law" or "Commerce." The question is what the word "proper," as it is used in the Sweeping Clause, means. Whatever meaning one ultimately attributes to the word is a meaning that is "inside" rather than "outside" the Constitution.

154 *See* Beck, *supra* note 123, at 638–39.

manded this kind of hypothetical consensus.[155] Or, at least, so goes the argument.

The nondelegation doctrine is a part of any plausible view of the Sweeping Clause. If one limits the scope of the word "proper" to inferences drawn primarily from intratextual and structural considerations, the nondelegation principle has the same status as the principle of decisional independence: it is not a principle expressly stated in the Constitution, but it is a better inference from the overall structure of the Constitution than is the contrary principle. For fairly obvious reasons advanced by Alexander and Prakash in their response to Posner and Vermeule's thesis,[156] and by Mike Rappaport[157] in an important discussion that is given short shrift by Posner and Vermeule,[158] it is a far more plausible view of the Constitution's structural and procedural provisions to say that they limit the extent to which discretion can be conferred than to say the contrary.

Consider just the structure of Article I, Section 8. Its first seventeen clauses contain provisions that give Congress power to perform such actions as to "lay and collect," "borrow," "regulate," "establish," "coin . . . , regulate . . . , and fix," "provide," "establish," "promote . . . by securing," "constitute," "define and punish," "declare . . . , grant . . . , and make Rules concerning," "raise and support," "provide and maintain," "make Rules for the Government and Regulation of," "provide for calling forth," "provide for organizing, arming, and disciplining," and "exercise exclusive Legislation in all Cases whatsoever, over."[159] At the end of the list is a clause giving Congress power to make laws that are "necessary and proper for carrying into Execution" these other actions. Exactly who, in this governmental scheme, is supposed to be doing the lion's share of the laying and collecting, borrowing, regulating, establishing, coining, regulating, fixing, providing, establishing, promoting by securing, constituting, defining and punishing, declaring, granting, making Rules concerning, raising and supporting, providing and maintaining, making Rules for the Government and Regulation of, providing for calling forth, providing for organizing, arming, and disciplining, and exercising exclusive Legislation in all Cases whatsoever, over? It is not difficult to reach the conclusion that a law that puts the substance of these tasks in someone else's hands is not "proper for carrying into Execution" these congressional powers because it puts too much strain on the obvious architecture of the document considered as a whole. The point is not that one can logically deduce, in a strict fashion, the nondelegation doctrine from principles of federalism, separation of powers, bicameralism, and checks and balances, no more than one can logically deduce a principle of decisional independence.

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155 That does not necessarily mean that the word "proper" draws a principle of state sovereign immunity into the Sweeping Clause, as the Supreme Court has held in *Alden v. Maine*, 527 U.S. 706, 732–33 (1999). I haven't studied the question carefully enough to have a strong view either way.

156 Alexander & Prakash, *supra* note 5, at 1300–03.

157 Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for* Clinton v. City of New York, 76 TUL. L. REV. 265, 305–09 (2001).

158 *See* Posner & Vermeule, *supra* note 1, at 1730 n.27.

159 U.S. CONST. art. I, § 8, cls. 1–17.

The point, rather, is that the traditional nondelegation principle is *more* consistent with the government created by the Constitution than is the nondelegation principle advanced by Posner and Vermeule. And at least one function of the word "proper" in the Sweeping Clause is to "textualize" these background principles to insure that Congress obeys them when legislating under the Sweeping Clause.[160]

If the word "proper" imports the full range of background principles that frame the powers of the limited legislature in a limited, divided government created by the Constitution, it is even more obvious that extreme grants of discretion are out. How could it be "proper"—or consistent with the principle of reasonableness—to make hash out of the Constitution's allocation of governmental responsibilities? One can, as Posner and Vermeule have done, logically imagine such a regime. It is much harder to imagine a fully informed eighteenth-century observer choosing the Posner/Vermeule regime as the best understanding of what constitutes a "necessary and proper" means for executing federal power.

All that is left—and all that was really there in the first place—is Posner and Vermeule's insistence that the Constitution's allocation of governmental responsibilities is purely formal: the President's "executive Power" just means the power to execute whatever statutes Congress enacts (and the judicial power presumably means the power to decide cases in accordance with whatever laws Congress enacts). Those laws, of course, cannot violate express constitutional provisions[161]—the President cannot execute a law delegating the formal right to vote or abolishing the slave trade before 1808—but otherwise, they say, the Constitution has nothing to say about the matter.

As should be evident by now, this is fundamentally wrong for two complementary reasons. First, it begs (or, more precisely, incorrectly answers) all of the relevant questions concerning the meaning of the Sweeping Clause. The Sweeping Clause does not authorize any conceivable laws for implementing federal powers that do not violate express constitutional prohibitions. That is not what it says, and it is not what it means. If a statute "for carrying into Execution" federal power is not "necessary and proper" for that purpose, the President cannot execute it because it does not count as a law. A law telling the President to go forth and promote goodness and niceness is no more "proper" than is a law forbidding the President from arresting certain individuals, telling courts to rule for certain plaintiffs, or (if one is prepared to take this step) authorizing the use of general warrants in 1789.

Second, Posner and Vermeule's position turns on the view that the "executive Power," in its law-implementing guise,[162] is nothing more than the

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160 Does that mean that Congress need not obey these principles when legislating through vehicles other than the Sweeping Clause, such as the Territory and Property Clause, or perhaps the Commerce Clause directly? For an answer of "mostly yes," see Lawson, *supra* note 119, at 208–10.

161 *See* Posner & Vermeule, *supra* note 1, at 1724, 1755.

162 The "executive Power" has other guises as well, such as the power to command the military, to make treaties, to govern occupied territory during wartime, and to conduct foreign affairs. *See* LAWSON & SEIDMAN, *supra* note 29, at 47–51; Saikrishna B. Prakash & Michael D. Ramsey, *The Executive Power over Foreign Affairs*, 111 YALE L.J. 231 (2000).

formal power to execute whatever statutes Congress enacts.[163] But they nowhere explain why this view of the executive power is remotely plausible—much less more plausible than an alternative view such as, "the power to execute statutes, provided that those statutes do not put the President in the position of making rules for governance on important matters, though the President is permitted to make rules on ancillary matters." This alternative view is exactly what the traditional nondelegation doctrine understands the "executive Power" to involve. That understanding of the "executive Power" has been advanced and defended by Mike Rappaport, who argues that this narrower conception of "executive Power" would have seemed more plausible to an eighteenth-century observer because it better serves the Constitution's scheme of separated powers, bicameralism, federalism, and checks and balances.[164] Posner and Vermeule (weakly) respond that statutes vesting discretion formally comply with this scheme because they must be enacted in accordance with the Constitution's "presentment," "bicameralism," and federalism provisions,[165] but that badly misses the point. The argument is not, as I have said, that one can rigorously deduce a nondelegation principle from the Constitution's other provisions. The argument is instead that an objective, fully informed eighteenth-century observer would be more likely to assent to a view of executive power that complements principles underlying the Constitution's formal lawmaking provisions. Posner and Vermeule do not seem seriously to consider the possibility that the "executive Power" (and the corresponding duty to "take Care that the Laws be faithfully executed"[166]) extends only to statutes of a particular *kind* and *character*.[167] That is a grave mistake.

It is clear that the "executive Power" does not include the power to act without statutory authorization by, for instance, acting as though there is a statute prohibiting abortions on federal property when there is not.[168] It is also clear that the "executive Power" does not include the power to "interpret" laws in ridiculous ways by, for instance, "construing" the Administrative Procedure Act's definition of adjudication[169] to prohibit abortions on

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163 *See* Posner & Vermeule, *supra* note 1, at 1725–30. Under this view, if Congress enacts unconstitutional statutes, then of course they may not be executed, but not because of any formal properties of the "executive Power."

164 *See* Rappaport, *supra* note 157, at 305–09.

165 Posner & Vermeule, *supra* note 1, at 1750–51.

166 U.S. CONST. art. II, § 3.

167 They do, however, raise questions about the extent to which broad grants of discretion would or would not disserve the values protected by presentment, bicameralism, etc. *See* Posner & Vermeule, *supra* note 1, at 1750. Those are not the right questions to raise. For whatever reasons, to serve whatever values, the Constitution contains provisions that instantiate certain principles of separated powers, bicameralism, federalism, and checks and balances. All else being equal, it makes more sense to assume that other provisions, relating to the same general subject matter, have meanings that cohere with the instantiated principles than it does to assume the contrary. That is the true meaning of formalism: the provisions have meaning independent of the extent to which they actually serve the values that motivated them.

168 On this, at least, we all agree. *See* Lawson, *supra* note 14, at 340; Posner & Vermeule, *supra* note 1, at 1725; Posner & Vermeule, *supra* note 6, at 1333.

169 5 U.S.C. § 551(7) (2000) (defining "'adjudication'" as "agency process for the formulation of an order").

federal property.[170] The principle of reasonableness holds at least that much. But if not everything done by the President in the guise of executing a statute is an exercise of the "executive Power," it is fair to ask why presidential action pursuant to crisp, clear legislative commands cannot ever be said to exceed the limits of the "executive Power" as the term is used in the Constitution. If a reasonable observer in 1788 was presented with the Goodness and Niceness Act, would he or she say that presidential regulations pursuant to that statute were simply an exercise of "executive Power," or would he or she instead say that the power goes beyond the substantive content of the "executive Power"? Though the Rappaport/Lawson view that "executive Power" is bounded by certain exercises of discretion is less rule-like than the purely formal Posner/Vermeule view, there is no good reason to think that all constitutional provisions should be interpreted in the most rule-like fashion possible. If the best understanding of the Constitution as a whole has the "executive Power" stop before it reaches the power to make important rules for governance, Congress cannot authorize the President to make such rules. And for essentially the same reasons that the Sweeping Clause is best read not to authorize Congress to grant limitless discretion to the President, the Article II Vesting Clause is best read not to permit the President to receive any such grant of discretion from Congress.

But didn't the First Congress grant precisely such limitless discretion to the President? Posner and Vermeule have invoked, as did opponents of the nondelegation doctrine before them,[171] a series of statutes from the First Congress that vested considerable discretion in executive agents.[172] I dealt with these statutes at length in an earlier work. Most fundamentally, I argued that enactments of the First Congress are at best very weak evidence of original meaning.[173] Moreover, I showed that most of these early statutes grant a kind and quantity of discretion that is consistent with the traditional nondelegation doctrine.[174] The nondelegation doctrine, after all, does not forbid Congress from vesting *any* discretion, or even a considerable degree of discretion, in other agents. It permits Congress to grant discretion with respect to matters ancillary to a statutory scheme but forbids grants of discretion on fundamental matters. The First Congress generally conformed to this principle. The few statutes that do not seem consistent with the traditional nondelegation doctrine are no threat to the nondelegation doctrine because

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170 *See* Lawson, *supra* note 14, at 339–40, 344–45.

171 *See* DAVIS & PIERCE, *supra* note 6, at 66.

172 Posner & Vermeule, *supra* note 1, at 1735–36; Posner & Vermeule, *supra* note 6, at 1340.

173 *See* Lawson, *supra* note 14, at 398.

> Enactments of early Congresses are particularly suspect because members of Congress, even those who participated in the drafting and ratification of the Constitution, are not disinterested observers. They are political actors, responding to political as well as legal influences, who are eminently capable of making mistakes about the meaning of the Constitution. Their work product constitutes post-enactment legislative history that ranks fairly low down on the hierarchy of reliable evidence concerning original meaning.

Id. This echoes a much more elaborate argument from Steve Calabresi and Sai Prakash. *See* Calabresi & Prakash, *supra* note 120, at 551–59.

174 *See* Lawson, *supra* note 14, at 396–402.

they either involve subjects, such as military or foreign affairs matters, in which the Constitution permits Congress to grant the President more than the usual measure of discretion[175] or represent mistakes committed by a fallible First Congress.

Posner and Vermeule are unconvinced. Without disputing the general methodological objection to heavy reliance on early legislative enactments, they claim that because "[a]ll of the affirmative originalist evidence for the delegation metaphor . . . is also post-ratification material[,] [t]o take Lawson's general objection seriously is to wipe out all of the affirmative founding-era evidence that nondelegation proponents possess."[176] Posner and Vermeule have a strange understanding of what counts as "affirmative originalist evidence."[177] The argument for the nondelegation doctrine that I have constructed, here and elsewhere, does not rely at all on "snippets from Madison and early legislators."[178] Nor could it, given my methodological predilections. Such statements are (even if only barely) admissible evidence of original meaning, but they are hardly the focus of argument for a reasonable-observer originalist. The "affirmative originalist evidence" for the nondelegation doctrine consists precisely of the arguments from text, structure, and principle that point towards a construction of the Sweeping Clause (and the Article II Vesting Clause) that limits the extent to which Congress may confer discretion on the President. That argument does not rely, in any fundamental sense, on evidence of concrete historical understandings, from the First Congress or otherwise.

With respect to the substance of the statutes, Posner and Vermeule retreat to their favorite redoubt: the ad hominem. "Nondelegation proponents," they exclaim, "may chip away at the early statutes as much as they please, adding ingenious epicycles to square the statutes with the theory, but the cumulative impression these statutes create is that early Congresses just didn't take constitutional objections to delegation very seriously."[179] I confess to being quite fond of the "ingenious epicycles" label—the epicycles, of course, were astoundingly accurate as tools for predicting planetary motions in all but the most extreme cases—but I am a bit less willing to accept the characterization of a detailed, painstaking discussion of founding-era statutes,[180] superimposed upon another article by Mike Rappaport that further addresses some of these statutes,[181] as an attempt to "chip away" at anything. I rather think that, between us, Professor Rappaport and I convincingly crushed their claims about founding-era statutes. The point, however, is only of minor interest as far as original meaning is concerned.[182]

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175 *See* Rappaport, *supra* note 157, at 310 & n.154, 346–53.

176 Posner & Vermeule, *supra* note 1, at 1736–37 n.61.

177 They also have a mistaken view about exactly who has the burden of producing affirmative evidence on this point. *See supra* p. 242.

178 Posner & Vermeule, *supra* note 1, at 1736 n.61. I made that very clear in my last article on this subject. *See* Lawson, *supra* note 14, at 341 n.51.

179 Posner & Vermeule, *supra* note 1, at 1737 n.61.

180 *See* Lawson, *supra* note 14, at 398–402.

181 *See* Rappaport, *supra* note 157.

182 Of even less interest, I suppose, is evidence from the Second Congress showing deep constitutional concern on the part of some members about delegations of broad authority to the

Conclusion

The evidence from text, intratextual analysis, structure, and background principles that forms the bedrock of any good (reasonable-observer) originalist argument overwhelmingly shows that the Constitution imposes limits on the extent to which Congress can grant discretion to other actors. That leaves the difficult task of figuring out exactly how much and what kind of discretion Congress may grant.[183] But that task, rather than the burial of the nondelegation doctrine, is the task set upon us by the Constitution.

President with respect to the location of post roads. *See* Lawson, *supra* note 14, at 402–03. Posner and Vermeule do not appear to have anything to say about this evidence.

183 For my lengthy crack at this task, see *id.* at 353–95.