THE IRRELEVANCE OF THE NORTHWEST ORDINANCE EXAMPLE TO THE DEBATE ABOUT ORIGINALISM AND THE NONDELEGATION DOCTRINE

*Eli Nachmany**

With the Supreme Court's recent opinions in the vaccine-or-test mandate cases,[1] the nondelegation doctrine is back in the news.[2] The nondelegation principle is the rule that "Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."[3] Although the Court has not rigorously applied this doctrine in recent years,[4] a fiery dissent from Justice Gorsuch in a 2019 Supreme Court case has signaled a possible revival.[5]

The idea of the nondelegation doctrine's return has sparked much scholarly interest, igniting a debate about whether Justice Gorsuch is correct that the original meaning of the Vesting Clause of Article I of the Constitution embodied the nondelegation principle.[6] Professors Julian Mortenson and Nicholas Bagley published a thoughtful, provocative article in the *Columbia Law Review* arguing that

* J.D. Candidate, Harvard Law School Class of 2022. The author thanks Professors Julian Davis Mortenson, Gary Lawson, Chad Squitieri, and Ilan Wurman for helpful comments on earlier drafts of this piece.

1. *See* Biden v. Missouri, Nos. 21A240 & 21A241 (Jan. 13, 2022); NFIB v. OSHA, Nos. 21A244 & 21A247 (Jan. 13, 2022).

2. *See, e.g.*, Robert Iafolla, *Shot-or-Test Rule 'Dead' as High Court Dooms Further Litigation*, BLOOMBERG L. (Jan. 14, 2022, 9:52 AM), https://news.bloomberglaw.com/daily-labor-report/shot-or-test-rule-dead-as-high-court-dooms-further-litigation [https://perma.cc/LN6B-TM5V] ("Justice Neil Gorsuch penned a concurring opinion, joined by Justices Clarence Thomas and Samuel Alito, that went even further in contemplating restrictions on federal agencies, legal observers said. Gorsuch raised the non-delegation doctrine, which forbids Congress from giving agencies its authority to write legislation.").

3. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529 (1935).

4. *See* Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

5. *See* Gundy v. United States, 139 S. Ct. 2116, 2131 (2019) (Gorsuch, J., dissenting). *But see* Adrian Vermeule, *Never Jam Today*, YALE J. ON REGUL.: NOTICE & COMMENT (June 20, 2019), https://www.yalejreg.com/nc/never-jam-today-by-adrian-vermeule/ [https://perma.cc/Q8CF-WCY5].

6. *Gundy*, 139 S. Ct. at 2133.

the Constitution was not originally understood to contain a nondelegation doctrine.[7] Professor Ilan Wurman penned a powerful response in the *Yale Law Journal*, taking the opposite view.[8]

This essay argues that one of the core examples of "delegation at the founding" that Professors Mortenson and Bagley enthusiastically cite is inapposite to the nondelegation debate. In the professors' article, the two recount how "early Congresses adopted dozens of laws that broadly empowered executive and judicial actors to adopt binding rules of conduct."[9] One such instance was the Northwest Ordinance, whose 1787 iteration

> creat[ed] a bureaucratic apparatus headed by a governor, who was authorized not only to adopt a body of civil and criminal laws to govern the district, but also to "make proper divisions" of the territory, to "lay out the parts of the district in which the indian titles shall have been extinguished," and to establish "such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same."[10]

Two years later, "[o]ne of Congress's first acts was to 'continue' the Northwest Ordinance," which conveyed what the professors termed "standardless discretion to craft the entire body of laws for the territories—including criminal laws."[11] The Northwest Ordinance concerned affairs in the U.S. "territories northwest of the Ohio River, encompassing the area that would become the future states of Illinois, Indiana, Michigan, Ohio, Wisconsin, and part of Minnesota."[12]

This essay argues that Congress's passage of the Northwest Ordinance, as well as its passage of other early territorial legislation,[13] is irrelevant to the question whether a correct, originalist interpretation of the Constitution compels application of the nondelegation doctrine. Congress passed the Northwest Ordinance, as well as other territory-related legislation, pursuant to its power under the Property Clause of the Constitution, not any one of its Article I legislative

7. *See* Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277 (2021).

8. *See* Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490 (2021); *see also* Eli Nachmany, *To Delegate or Not to Delegate: Celebrating a Scholarly Exchange About Originalism and the Nondelegation Doctrine*, JOTWELL (Oct. 7, 2020) (reviewing Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. __ (forthcoming 2020), available at SSRN), https://conlaw.jotwell.com/to-delegate-or-not-to-delegate-celebrating-a-scholarly-exchange-about-originalism-and-the-nondelegation-doctrine/ [https://perma.cc/BZ9R-679G] ("Multiple Justices on the current Supreme Court are originalists . . . . If the evidence shows that nondelegation was indeed the rule at the founding, it follows that at least some members of the Court would seek to apply that restrictive rule to the modern administrative state.").

9. Mortenson & Bagley, *supra* note 7, at 281.

10. *Id.* at 303–04 (citing 32 JOURNALS OF THE CONTINENTAL CONGRESS 1774–89, at 336 (Roscoe R. Hill ed., 1936) (recording an "Ordinance for the government of the territory of the United States North West of the river Ohio" (1787))).

11. *Id.* at 334.

12. *The Northwest Ordinance of 1787*, U.S. HOUSE OF REPS.: HIST., ART & ARCHIVES, https://history.house.gov/Historical-Highlights/1700s/Northwest-Ordinance-1787/ (last visited Feb. 16, 2022) https://perma.cc/7MGV-WHE4].

13. Mortenson & Bagley, *supra* note 7, at 336 (discussing legislation creating the Southwest Territory, Mississippi Territory, and Indiana Territory).

powers. The Property Clause is a differently worded, separately housed provision of the Constitution; an early Congress's delegation of legislative power respecting the territories might bear on the original meaning of the Property Clause, but it cannot shed light on Article I's restriction on delegation of legislative power.

I. THE STATE OF THE DEBATE

At the outset, it is important to note what this essay does not attempt to do. This essay does not purport to answer the question whether the nondelegation doctrine is originalist. Rather, it seeks to simply remove one block from the Jenga tower of founding-era evidence that Professors Mortenson and Bagley have compiled to stake their claim about originalism and delegation in the context of Article I. Moreover, this essay does not take any position on whether the Property Clause also embodies a nondelegation principle; that said, any defense of *that* position on originalist grounds will have to contend with the territorial legislation cited by Professors Mortenson and Bagley.[14]

The Property Clause of the Constitution is a provision of Article IV, and provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."[15] By contrast, the Vesting Clause of Article I reads as follows: "All legislative powers herein granted shall be vested in a Congress of the United States."[16] When Congress sets up and empowers territorial governments, just as when it regulates wild horses and burros on federal land,[17] it is acting pursuant to its Property Clause power, not its Article I power.

Professors Mortenson and Bagley address a different version of this argument, which Professor Wurman makes in his *Yale Law Journal* essay. Professor Wurman focuses on the delegee, arguing that Congress was merely "delegating authority to *local* governments to exercise *local* powers," obviating the nondelegation problem.[18] According to Professor Wurman, this distinction matters because the nondelegation bar prohibits delegation to another branch of the *federal* government—under the standard formulation, Congress cannot delegate to the *executive* or *judicial* branch of the U.S. government.[19] Professors Mortenson and Bagley have two responses. First, they claim that the Article I powers and the Property Clause powers are both legislative and both assigned to Congress alone; in their words, "[i]f originalists are right that Congress can't delegate its Article I authority to 'regulate Commerce,' it should follow that Congress also can't delegate its Article IV power to make 'needful Rules and Regulations respecting

14. *See generally* Mortenson & Bagley, *supra* note 7.

15. U.S. CONST. art. IV, § 3, cl. 2.

16. U.S. CONST. art. I, § 1.

17. *See* Kleppe v. New Mexico, 426 U.S. 529 (1976).

18. Wurman, *supra* note 8, at 1543–44; *see also* Chad Squitieri, *Towards Nondelegation Doctrines*, 86 MO. L. REV. 1239, 1272–73 (2021).

19. *See* Wurman, *supra* note 8, at 1543–44.

the Territory.'"[20] Second, the professors make a dog-that-didn't-bark argument,[21] contending that "[h]ad the Founders collectively believed (or even if they had reasoned their way to the view) that the nondelegation doctrine had less purchase when it came to territorial legislation, surely someone, somewhere, would have said as much. To our knowledge, however, no one ever did."[22]

The second point is more responsive to Professor Wurman's argument. While Professors Mortenson and Bagley do not address the delegee issue head-on, they do take the position that silence about this distinction is persuasive evidence that the Founders had not thought much about it. Bracketing that discussion, this essay explores the different challenge that Professors Mortenson and Bagley appear to be anticipating in their first response—the idea that delegation in the context of Article IV does not bear on the interpretation of Article I.

II. LEGISLATIVE POWER AND DELEGATION ACROSS THE CONSTITUTION

One can reasonably claim that the Property Clause power is legislative. Judge Neomi Rao has said as much, positing that "[i]n addition to the Article I, Section 8, powers . . . the other powers of Congress are also exclusively legislative, allowing Congress to set out rules, regulations, and prohibitions in various contexts."[23] But what is the consequence of this formulation? In addition to conferring authority to "make all needful Rules and Regulations respecting the territory . . . belonging to the United States," the Property Clause also authorizes Congress to manage federal land and other public property.[24] Professor David Schoenbrod has written that "[a] statute allowing the Executive broad discretion to manage public property to the extent such management does not govern private conduct is not a delegation of legislative power."[25] To appreciate Professor Schoenbrod's claim here, it is important to understand the difference between a

20. Mortenson & Bagley, *supra* note 7, at 336.

21. The "dog-that-didn't-bark" metaphor has its roots in one of Sir Arthur Conan Doyle's short stories about Sherlock Holmes, entitled *Silver Blaze*. *See* Mike Skotnicki, "*The Dog that Didn't Bark:" What We Can Learn from Sir Arthur Conan Doyle About Using the Absence of Expected Facts.*, BRIEFLY WRITING (July 25, 2012), https://brieflywriting.com/2012/07/25/the-dog-that-didnt-bark-what-we-can-learn-from-sir-arthur-conan-doyle-about-using-the-absence-of-expected-facts/ [https://perma.cc/6B6A-FMDD]. The story concerns the "disappearance of a famous racehorse the night before a race and the murder of the horse's trainer. Sherlock Homes solves the mystery in part by recognizing that no one he spoke to in his investigation remarked that they had heard barking from the watchdog during the night." *Id.* Holmes' discovery led him to the "conclusion that the evildoer was a not a stranger to the dog, but someone the dog recognized and thus would not cause him to bark." *Id.* For our purposes, the upshot of a "dog-that-didn't-bark" argument is that one can draw important inferences from a significant actor's silence about a given thing—in this case, what Professors Mortenson and Bagley contend is the founders' silence about delegation.

22. *Id.* at 336–37.

23. Neomi Rao, *Why Congress Matters: The Collective Congress in the Structural Constitution*, 70 FLA. L. REV. 1, 35–36 (citing, among other provisions of the Constitution, U.S. CONST. art. IV, § 3, cl. 2). *But see* Lance F. Sorenson, *The Hybrid Nature of the Property Clause: Implications for Judicial Review of National Monument Reductions*, 21 U. PA. J. CONST. L. 761 (2019).

24. U.S. CONST. art. IV, § 3, cl. 2.

25. David Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?*, 83 MICH. L. REV. 1223, 1265 (1985).

power being "legislative" and an act of Congress that "delegates" that power amounting to a *constitutionally impermissible* "delegation of legislative power."

Professor Schoenbrod makes a few points in support of his argument that the Constitution would permit Congress to grant power to the executive branch to manage public property, so long as such power did not include the authority to govern private conduct. This part focuses on two of them. One claim is that "the administration of public property or enterprises has not been and should not be considered legislative."[26] Here, Professor Schoenbrod points to the idea that "[t]he management of public enterprises differs critically from the governance of private conduct," distinguishing Congress's role as "proprietor" of public lands from that of "law-giver" in the context of regulation of private conduct.[27]

So far, so good for Professors Mortenson and Bagley. The Northwest Ordinance *did* confer power to regulate private conduct.[28] But Professor Schoenbrod makes a separate point. He explains that

> the power to regulate and manage public property, though vested in Congress, is not an *article I* legislative power. It is granted separately, by article IV, in the property clause. Congress' exercise of this seemingly plenary power by vesting it in the Executive, which would then have an article II obligation to execute that power, is therefore not subject to limitations placed on the delegation of powers under article I.[29]

The point is that, to understand whether legislative power has been delegated, one must look to the *location* of the grant of power. The Court's nondelegation precedents have "found a limit *in article I* on Congress' power to delegate the power of legislation to other branches of government."[30] Justice Gorsuch's *Gundy* dissent appears to adopt a similar approach, taking the position that "[i]f Congress could pass off its legislative power to the executive branch, the

26. *Id.* at 1266. *But see* John Harrison, *Executive Discretion in Administering the Government's Rights and the Delegation Problem*, at 5, available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3686204 ("Making general and prospective rules for conduct is not just a very familiar exercise of legislative power. It is in a sense the core of legislative power, because it is a distinctively sovereign function. . . . Federal legislative power is not limited to that central use of it. It is often used to create a program in which the government does nothing that a private person may not do. . . . The National Par[k] Service operates campgrounds on federal land, and many private people operate campgrounds on private land."). The debate about what exactly constitutes "legislative power" is fertile ground for scholarly inquiry. Professors Mortenson and Bagley made a significant contribution to the literature when they argued that "[t]he standard understanding of legislative power" at the founding encompassed more than just "the promulgation of 'generally applicable rules of conduct governing future actions by private persons.'" Mortenson and Bagley, *supra* note 7, at 294. The professors contend that the framers took "legislative power" to mean the "general will of the state." *Id.* But for present purposes, even if the passage of the Northwest Ordinance was an exercise of legislative power, the point is that it was not the exercise of an *Article I* legislative power.

27. Schoenbrod, *supra* note 25, at 1266.

28. *See The Northwest Ordinance of 1787*, *supra* note 12.

29. Schoenbrod, *supra* note 25, at 1265 (footnotes omitted) (emphasis added).

30. *Id.* at 1224 (emphasis added) (citing A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 529–30 (1935); Panama Ref. Co. v. Ryan, 293 U.S. 388, 421 (1935); Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 41–48 (1825)).

'[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'"[31]

But would the point about location stand if the power in question was the regulation of private conduct, if one accepts that such a power is legislative in nature? It seems that it would—the power is located in the same place. Moreover, is the Property Clause power "vested" in Congress? Perhaps not. Whereas Article I explicitly uses the word "vested" to describe the grant of power,[32] Article IV does not.[33] Relatedly, Professor Thomas Merrill has argued that under a "narrow reading" of the phrase "herein granted" in Article I, the clause does not refer to the Property Clause power.[34] To be sure, one might contend that Justice Gorsuch's mention of "the entire structure of the Constitution" incorporates the argument that Congress cannot delegate its Property Clause power (at least not the power to regulate private conduct).[35] But the underlying article that Justice Gorsuch cites to make his Vesting Clause point—Gary Lawson's *Delegation and Original Meaning*[36]—dispels this notion.

Professor Lawson engages with Professor Schoenbrod's writing on delegation, noting the locational argument that the Property Clause "simply escape[s] Article I's nondelegation principle" because it is housed in Article IV.[37] As Professor Lawson writes, Professor "Schoenbrod is right, but not quite for the right reasons."[38] The Property Clause (or the Territories Clause, as Professor Lawson describes it) "is a self-contained grant of authority to Congress" which "itself provides authorization for any ancillary legislation concerning the subjects within its compass."[39] The distinction, for Professor Lawson, appears to be between the "necessary and proper" limitation of Article I and the mere "needful" requirement of Property Clause-pursuant legislation ("[u]nless," writes Professor Lawson, "the term 'needful' can be read to incorporate background norms of constitutional structure").[40] It should be noted that a forthcoming paper from Professor Lawson appears to approach the nondelegation question from a different perspective, emphasizing a private law framework.[41]

31. Gundy v. United States, 139 S. Ct. 2116, 2134–35 (2019) (Gorsuch, J., concurring) (alterations in original) (citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002) [hereinafter Lawson, *Delegation and Original Meaning*]).

32. U.S. CONST. art. I, § 1.

33. U.S. CONST. art. IV, § 3, cl. 2.

34. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2136–38 (2004); *see also* Squitieri, *supra* note 18, at 1261–62.

35. Justice Gorsuch's dissent placed a great emphasis on the connection between the nondelegation doctrine and the regulation of private conduct. *See Gundy*, 139 S. Ct. at 2134 (2019) (Gorsuch, J., concurring) ("Why did the framers insist on this particular arrangement? They believed the new federal government's most dangerous power was the power to enact laws restricting the people's liberty.").

36. *See* Lawson, *Delegation and Original Meaning*, *supra* note 31.

37. *Id.* at 392.

38. *Id.*

39. *Id.* at 392–93.

40. *Id.* at 393.

41. *See* Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation* (Bos. U. Sch. of L. Pub. L. & Legal Theory Paper No. 20-16, May 2020), available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3607159 [https://perma.cc/4XRB-5YVE].

In any event, the textual differences run deeper. As noted above, the Property Clause does not employ the word "vest." Professor Lawson described how "[t]he Constitution does not merely create the various institutions of the federal government; it *vests*, or clothes, those institutions with specific, distinct powers."[42] Simply asserting that Congress "shall have" a given power, one might argue, is different than vesting that power.[43] To caveat this part, recent scholarship by Professor Jed Shugerman has called into question the traditional understanding of the meaning of the word "vest" in the Constitution.[44]

Perhaps one might simply fall back on the argument that it is dubious that no evidence exists of the Founders arguing for the distinction.[45] Fair enough. Still, the dog-that-didn't-bark argument is a general contention about the founding-era evidence, not a particular response to a specific example. In addition, at least one scholar takes the view "that even if [Professors Mortenson and Bagley's] Article's list of early federal practices reveals some delegation, it should be no surprise that practices sometimes depart from principles. On this obvious assumption, one should not discount the Constitution's principles because of minor or occasional deviations."[46] This essay merely means to cleave one early federal practice—the territorial legislation—from Professors Mortenson and Bagley's herd of delegation examples.

One of the most compelling arguments that Professors Mortenson and Bagley make against the nondelegation doctrine flows from their collection of founding-era examples of delegation—the idea that "[i]f the nondelegation doctrine had brooded secretly in the interstices of the Constitution's Vesting Clauses, it would have precluded much early legislation and shown up repeatedly in extensive debates."[47] Removing the Northwest Ordinance example (and, more broadly, any example of similar territorial legislation) from their list, therefore, serves to make this argument at least somewhat less compelling. This essay does not take on the other examples listed by Professors Mortenson or Bagley, and it does not take on their other arguments. Its purpose is limited. But to adequately assess the arguments for and against the nondelegation doctrine, it is important to agree on what we are talking about. Legislation about U.S. territories, passed pursuant to Congress's Property Clause power, is not relevant to a discussion about Article I's bar on delegating legislative power to another branch.

42. Lawson, *Delegation and Original Meaning*, *supra* note 31, at 340–41 (emphasis added) (citing Steven G. Calabresi, *The Vesting Clauses as Power Grants*, 88 NW. U. L. REV. 1377, 1380–82 (1994)).

43. *See* Calabresi, *supra* note 42, at 1380–82; Philip Hamburger, *Delegating or Divesting?*, 115 NW. L. REV. ONLINE 88, 88 (2020); *see also id.* at 104–05 (describing territorial legislation as an exercise of power within a "federal enclav[e] where Congress enjoys local power").

44. *See* Jed Handelsman Shugerman, *Vesting*, 74 STAN. L. REV. (forthcoming 2022), available at SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793213 [https://perma.cc/ACZ9-UT8A].

45. *See, e.g.*, Mortenson & Bagley, *supra* note 7, at 336–37.

46. Hamburger, *supra* note 43, at 106.

47. Mortenson & Bagley, *supra* note 7, at 282.

III. PROPERTY CLAUSE NONDELEGATION IMPLICATIONS

Does this mean that the nondelegation doctrine does not apply in the context of the Property Clause? Not necessarily. Scholars are divided on this question. In the past, Professor Lawson has taken the position that "the Court's longstanding conclusion that the nondelegation doctrine simply does not apply to territorial legislation is correct."[48] But the late Professor Peter Appel took the opposing view, writing that "the nondelegation doctrine applies to the exercise of the Property Clause power."[49] Moreover, the nondelegation doctrine might apply to the Property Clause, but in a different manner than it applies in the context of Article I.[50]

It is here that we may come full circle to Professor Wurman's arguments about delegees. In the Northwest Ordinance, Congress was not delegating power to the executive or judicial branch of the federal government. Rather, the territorial statutes delegated "authority to *local* governments to exercise *local* powers."[51] As Professor Wurman explains, "[t]hese governments do not exercise the judicial power 'of the United States,' nor the legislative or executive power of the United States."[52] The rule, therefore, might be that while Congress can delegate legislative power under the Property Clause to local governments, it cannot do so to another co-equal branch of the federal government. This essay takes no position on the question.

CONCLUSION

This essay seeks to do one, and only one, thing: demonstrate the irrelevance of the Northwest Ordinance to the nondelegation debate. The traditional formulation of the nondelegation doctrine is that the Vesting Clause of Article I of the Constitution bars Congress from delegating legislative power. Professors Mortenson and Bagley argue that this principle does not comport with the original meaning of the Constitution, contending in part that the existence of a panoply of founding-era delegations of legislative power by Congress proves the point. But one example of theirs—the Northwest Ordinance (and, by extension, all similar territorial legislation)—is irrelevant. In this instance, Congress was legislating pursuant to its Article IV Property Clause power, not its Article I power. And regardless of whether the Property Clause-pursuant regulation of private conduct in the territories might be termed legislative, the relevant power is housed in a different, textually distinct part of the Constitution. The Northwest Ordinance example has no bearing on the original meaning of what the nondelegation doctrine is traditionally understood to be.

48. Lawson, *Delegation and Original Meaning*, *supra* note 31, at 393. To be sure, Professor Lawson's position appears to have evolved since he published his 2002 article. *See supra* note 41.

49. Peter A. Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1, 105 (2001).

50. *See* Squitieri, *supra* note 18, at 1273.

51. Wurman, *supra* note 8, at 1543.

52. *Id.* at 1544.