

**THE DYNAMIC INCORPORATION OF FOREIGN LAW
AND THE CONSTITUTIONAL REGULATION
OF FEDERAL LAWMAKING**

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INTRODUCTION

The Constitution of the United States establishes an interrelated system of national and state governments, each with its own separate authority that partially complements and partially overlaps the powers lodged in the other. The Constitution assumes that states have their own independent legal sovereignty

drawn from their own constitutions and possess a general “police power” denied to the federal government.¹ The Constitution creates the national government and grants it exclusive authority to regulate some areas of responsibility, such as foreign affairs.² In cases of a conflict between state and federal law, the default rule is that the latter will supplant the former.³ The result is that the Framers left the states and their regulatory authority in place except insofar as necessary to enable the new federal government to protect and regulate the nation as a whole and to prevent the type of destructive interstate economic warfare that had characterized government under the Articles of Confederation.⁴ Yet, rather than always act as competitors, the federal and state governments have entered into a variety of cooperative endeavors, such as the different national social insurance programs that have existed since the New Deal.⁵

“The great innovation of this design was that ‘our citizens would have two political capacities, one state and one federal, each protected from incursion by the other’ — ‘a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its

1. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”); *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (noting that each state possesses “the police power—a power which the State did not surrender when becoming a member of the Union under the Constitution,” which includes “such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety”); *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 192–93 (1819); compare *License Cases*, 46 U.S. (5 How.) 504, 523–25 (1847) (the states possess a general police power), with *NFIB v. Sebelius*, 132 S. Ct. 2566, 2577–78 (2012) (the federal government does not).

2. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation”).

3. See U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

4. See *Kidd v. Pearson*, 128 U.S. 1, 21 (1888); THE FEDERALIST No. 7, at 60–61 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

5. See Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 NW. U. L. REV. 62, 80–82 & nn.55–58 (1990) (collecting examples of joint federal-state programs, such as Medicaid).

own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it.”⁶

Foreign governments play no role in that scheme. Just as no state grants another the right to intervene in its domestic politics, nations do not cede sovereignty to each other. The prospect that the United States would grant a foreign government the legal authority to govern the people of this nation is absurd. It certainly would seem bizarre to most Americans to suggest that the world’s oldest surviving representative democracy should give to a foreign country the bedrock right that our ancestors, families, and friends have purchased with blood, treasure, and honor for more than two centuries. History clearly looks askance on that possibility. The Declaration of Independence denounced King George III for “subject[ing] us to a Jurisdiction foreign to our Constitution, and unacknowledged by our Laws,” and for “taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Government.”⁷ The Colonists fought the American Revolution to overthrow foreign rule and to win the freedom to govern themselves.⁸ The Framers gathered in Philadelphia to form a national government for “ourselves and our Posterity.”⁹ The very first words in the Constitution declare that “We the People of the United States” adopted that document as the charter for that national government.¹⁰ The ordinary meaning of the term “republic” is a system of government in which the members of a polity rule themselves through elected represent-

6. *Printz v. United States*, 521 U.S. 898, 920 (1997) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

7. See THE DECLARATION OF INDEPENDENCE paras. 15, 23 (U.S. 1776).

8. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1993) (arguing that the actions of the nation’s founding generation established principles that help interpret the nature of our polity).

9. See Nicholas Quinn Rosenkranz, *An American Amendment*, 32 HARV. J.L. & PUB. POL’Y 475, 477–78 (2009) (“[F]oreign control over American law was a primary grievance of the Declaration of Independence. The Declaration’s most resonant protest was that King George had ‘subject[ed] us to a jurisdiction foreign to our constitution.’”) (footnote omitted).

10. See U.S. CONST. pmb. (“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defence, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”).

atives.¹¹ The Framers called this system “a Republican Form of Government.”¹² Indeed, it is fair to say that the average member of the public likely would find the scenario of foreign rule utterly preposterous.¹³

Yet, Congress has enacted several federal laws that have the effect of giving foreign nations legal authority over the conduct of Americans in certain respects.¹⁴ The Lacey Act¹⁵ makes it a federal offense to import fauna or flora in violation of a foreign nation’s law.¹⁶ This statute essentially incorporates whatever law foreign nations adopt governing the taking of animal or plant life, thereby delegating to every foreign nation the authority to define an element in a federal law. The Lacey Act achieves that result not merely to serve as a basis for extraditing to the foreign nation whose laws were allegedly violated whatever party is supposedly responsible for those crimes. No, the Lacey Act creates a federal offense that can be—and has been—prosecuted in federal court in this country.¹⁷

It is unusual to see American law impose criminal liability for what happens beyond our shores. Local or state officials bring

11. See, e.g., MICHAEL S. GREVE, *THE CONSTITUTION: UNDERSTANDING AMERICA’S FOUNDING DOCUMENT* 34, 36–37 (2013).

12. See U.S. CONST. art. IV, § 4 (the Guarantee Clause).

13. See Rosenkranz, *supra* note 9, at 477 (“France, for example, has declared that one of its priorities is the abolition of capital punishment in the United States. Yet surely the American people would rebel at the thought of the French Parliament deciding whether to abolish the death penalty—not just in France, but also, thereby, in the United States.”) (footnotes omitted).

14. See, e.g., 18 U.S.C. § 546 (2012) (prohibiting smuggling goods into a foreign nation in violation of its laws); 19 U.S.C. § 1527 (2012) (prohibiting the importation of wild mammals and birds in violation of a foreign nation’s law); 21 U.S.C. § 960(d)(2) (2012) (prohibiting the export of listed chemicals in violation of a foreign nation’s law). *But see* 15 U.S.C. § 1264(b) (2012) (exempting from domestic federal law the export of hazardous chemicals to a foreign nation where they are legal); 21 U.S.C. § 606 (2012) (exempting from domestic federal law the export of food products to a foreign nation where the products are legal).

15. Lacey Act of May 25, 1900, ch. 553, 31 Stat. 187–89 (1900) (codified, as amended, at 16 U.S.C. §§ 3371–78 (2012)).

16. See 16 U.S.C. § 3372(a) (2012).

17. See, e.g., *United States v. McNab*, 331 F.3d 1228, 1238–39 (11th Cir. 2003); Rachel Saltzman, *Establishing a “Due Care” Standard Under the Lacey Act Amendments of 2008*, 109 MICH. L. REV. FIRST IMPRESSIONS 1, 2 (2010) (“The Lacey Act’s incorporation of foreign law violations can be viewed as part of a broader ‘emerging trend’ toward global enforcement, which represents a dramatic departure from conventional priorities.”).

the bulk of our criminal prosecutions.¹⁸ For historical, legal, practical, and political reasons, the charges almost always involve conduct that is entirely domestic.¹⁹ The result is that most criminal cases rarely involve crimes committed on foreign soil.

18. See WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 64–65 (2011).

19. The historical reason is that the common law did not apply beyond England's shores. Crimes were tried in the district where they were alleged to have occurred. Jurors drawn from that district were not impartial fact-finders ignorant of the case, but instead were witnesses or others with first-hand knowledge of the charge. Together, those facts made it impossible, practically speaking, for crimes committed overseas to be tried in England. See, e.g., MICHAEL HIRST, *JURISDICTION AND THE AMBIT OF THE CRIMINAL LAW* 4–5, 29–33 (2003).

As a legal matter, states rarely attempt to prosecute overseas crimes because their criminal laws may not have an extraterritorial reach. There is a strong presumption that federal legislation applies only within the territory of the United States. See *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013). That well-settled rule rests on the “presumption that United States law governs domestically but does not rule the world,” that Congress ordinarily legislates with respect to domestic, not foreign, matters. *Microsoft Corp. v. AT&T*, 550 U.S. 437, 454 (2007). That presumption is merely a canon of statutory interpretation, not a rule of constitutional law, but given the subordinate role that the states play in foreign relations, that canon should apply with even greater force when state courts construe their own state criminal statutes. Even if state law applied extraterritorially, states generally lack jurisdiction to regulate extraterritorial conduct. The Supreme Court long ago stated that a state can exercise sovereign power only within its own borders. See *Huntington v. Attrill*, 146 U.S. 657, 669 (1892) (“Laws have no force of themselves beyond the jurisdiction of the State which enacts them, and can have extra-territorial effect only by the comity of other States.”); *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (“No State can legislate except with reference to its own jurisdiction.”); *Penny v. Neff*, 95 U.S. 714, 722–23 (1878) (“[I]t is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions. ‘Any exertion of authority of this sort beyond this limit,’ says Story, ‘is a mere nullity, and incapable of binding such persons or property in any other tribunals.’”); see also *Bigelow v. Virginia*, 421 U.S. 809, 822–23 (1975) (“The Virginia Legislature could not have regulated the advertiser’s activity in New York, and obviously could not have proscribed the activity in that State.”). Generally, jurisdiction exists when every element of the crime occurs within the boundaries of the state. In rare cases a state can prosecute someone for out-of-state conduct with an in-state effect, but that would only occur where, for instance, a person in one state defrauds or shoots someone in another state or conspires elsewhere to commit a crime in that other state. See *Ford v. United States*, 273 U.S. 593, 620–24 (1927); *Strassheim v. Daily*, 221 U.S. 280, 284–85 (1911); WAYNE R. LAFAVE, *CRIMINAL LAW* § 4.4, at 223–24 (5th ed. 2010). Finally, several federal constitutional restrictions cabin a state’s exercise of its sovereign power to enforce its criminal laws to in-state conduct or out-of-state conduct with a direct in-state effect. For example, the Commerce Clause expressly empowers Congress to regulate interstate commerce, see U.S. CONST. art. I, § 8, cl. 3, but

The federal government occupies a different position. It enjoys authority that states lack to pass legislation with extraterritorial effect.²⁰ It also has an interest in regulating the conduct of Americans abroad and in cooperating with foreign governments over conduct they deem undesirable, regardless of the nationality of the responsible party.²¹ Congress has invoked that authority on various occasions over the past few decades to adopt federal criminal laws governing conduct overseas.²²

also impliedly limits the states' regulatory power over that subject under the "Dormant Commerce Clause." See *McBurney v. Young*, 133 S. Ct. 1709, 1719 (2013). Other constitutional provisions also may limit a state's authority to regulate extra-territorial conduct: (1) the Supremacy Clause, U.S. CONST. art. VI; see *Arizona v. United States*, 132 S. Ct. 2492, 2498–99 (2012); (2) the Due Process Clause, U.S. CONST. amend. XIV, § 1; see *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 408 (2003); (3) the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1; see *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 797 (1985); *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 n.1 (1914) (collecting cases); and (4) either the Privileges and Immunities Clause of Article IV, Section 2, or the Privileges or Immunities Clause of Section 1 of the Fourteenth Amendment; see *Toomer v. Witsell*, 334 U.S. 385, 395–403 (1948).

The practical reason is that the federal government has not only the sovereign prerogative to conduct foreign relations, see *Arizona*, 132 S. Ct. at 2498–99; *Blackmer v. United States*, 284 U.S. 421, 437–38 (1932), but also a superior ability to investigate transnational crimes. The Federal Bureau of Investigation is responsible for investigating various forms of white-collar crime that may cross national boundaries and has overseas offices to obtain the assistance of foreign governments. See FBI, WHAT WE INVESTIGATE, http://www.fbi.gov/about-us/investigate/what_we_investigate [<http://perma.cc/465X-DEJ2>]; *id.* LEGAL ATTACHÉ OFFICES, <http://www.fbi.gov/contact-us/legat> [<http://perma.cc/4M37-WMZL>]. The Justice Department also has an Office of International Affairs in the Criminal Division devoted to dealing with foreign governments. See U.S. DEP'T OF JUSTICE, CRIMINAL DIVISION ORGANIZATIONS (Aug. 28, 2013), <http://www.justice.gov/criminal/about/orgchart.html> [<http://perma.cc/BZC6-Z3NB>].

The political reason is that foreign citizens cannot vote in domestic elections, so state legislators generally care little about what foreigners want to be outlawed or protected by state law. See generally NICOLA LACEY, *THE PRISONERS' DILEMMA: POLITICAL ECONOMY AND PUNISHMENT IN CONTEMPORARY DEMOCRACIES* (2008); Paul J. Larkin, Jr., *Public Choice Theory and Overcriminalization*, 36 HARV. J.L. & PUB. POL'Y 715 (2013). For all those reasons, the states defer to the federal government over crimes with an international flavor.

20. See, e.g., *Church v. Hubbard*, 6 U.S. (2 Cranch) 187, 234 (1804) ("The authority of a nation within its own territory is absolute and exclusive But its power to secure itself from injury may certainly be exercised beyond the limits of its territory.").

21. See, e.g., *Blackmer v. United States*, 284 U.S. 421, 437–38 (1932) ("What in England was the prerogative of the sovereign in this respect, pertains under our constitutional system to the national authority which may be exercised by the Congress by virtue of the legislative power to prescribe the duties of the citizens of the United States.").

22. See, e.g., Foreign Corrupt Practices Act, Pub. L. No. 95-213, 91 Stat. 1494 (1977) (codified, as amended, at 15 U.S.C. §§ 78dd-1–78dd-3 (2012)); 18 U.S.C. § 32 (2012)

Federal law has expanded to the point that the federal government can charge American citizens (and foreign nationals) under federal law for a variety of actions that occur, at least in part, beyond our shores.²³

It is unusual for Congress to make domestic criminal liability turn on the issue of whether a party has broken a foreign sovereign's law. But it is precisely the government's ability to enforce the Lacey Act through use of the criminal law that transforms it from a peculiar curiosity of slight interest into a serious vexation for parties involved in the import business. Given that the United States is the world's largest wood products consumer and one of the major importers of tropical hardwood, the number of companies at risk of violating the Lacey Act may be quite large.²⁴ The problems are particularly acute for an importer that uses one or more intermediaries in the long and complex supply or production chain between the country of origin and this nation.²⁵ The Lacey Act applies to anyone who

(placing a bomb, or attempting or conspiring to place a bomb on an aircraft registered in a foreign country while the aircraft is in service); *id.* § 175(a) (using a biological weapon outside of the United States against a U.S. national); *id.* § 229(c)(3) & (4) (using chemical weapons outside of the United States against a U.S. national or U.S. property); *id.* § 351 (kidnapping, killing, or attempting or conspiring to kidnap or kill members of Congress, Supreme Court justices, and heads of federal departments); *id.* §§ 792–97 (committing espionage); *id.* § 798 (disclosing classified information); *id.* § 1114 (killing or attempting to kill any federal officer or employee, including members of the armed forces); *id.* § 1091 (committing genocide anywhere if the offender is present in the United States); *id.* § 1201(a)(5) (kidnapping or attempting to kidnap any federal officer or employee, including members of the armed forces); *id.* § 1512 (tampering with a victim, witness, or informant); *id.* § 1751 (kidnapping, killing, or attempting or conspiring to kidnap or kill the President, the Vice-President, or a member of their staffs); Arms Export Control Act, 22 U.S.C. §§ 2751–2799aa-2 (2012); 49 U.S.C. § 46502(a) (2012) (committing or attempting to commit air piracy); Export Administration Act, 50 U.S.C. §§ 2401–20 (2012). For a compendium of all those laws, see CHARLES DOYLE, CONG. RESEARCH SERV., 94-166, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW, 40–63 (2012), <http://www.fas.org/sgp/crs/misc/94-166.pdf> [<http://perma.cc/CWY6-BMSB>] (collecting federal laws with extraterritorial effect).

23. For discussion of that development, see generally Ellen S. Podgor, *A New Dimension to the Prosecution of White Collar Crime: Enforcing Extraterritorial Social Harms*, 37 MCGEORGE L. REV. 83 (2006); Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997).

24. See Saltzman, *supra* note 17, at 2.

25. See *id.* at 7 (“A final distinctive factor is an often . . . complex supply chain. Timber products, unlike lobster tails or parakeets, often go through many intermediaries, making it increasingly difficult to recognize a particular product or to keep

participates in that process, regardless of whether she intended to break a foreign country's law or even knew that a limitation existed. Any party in that chain—from the person who cuts timber in a foreign nation, to the person who exports that wood elsewhere, to the person who receives and takes it the last mile across our border—is at risk of violating the Lacey Act if anyone at any prior step has violated the original foreign nation's laws.²⁶ As that law stands today, the federal government can imprison a person for conduct done by someone else beyond our shores that violates no domestic law, but does violate some foreign law in the source country.

Defendants prosecuted under the Lacey Act have challenged the constitutionality of that statute on the ground that it unconstitutionally delegates federal lawmaking power. To date, however, the federal courts have rebuffed those claims. This Article maintains that the courts have overlooked or undervalued several of the constitutional issues posed by the Lacey Act. Congress's decision to authorize foreign governments and foreign officials to define the content of a domestic law raises legal issues residing at the core of any analysis of how the federal government may govern, and the legal challenges to the Lacey Act have far more heft than the federal courts have believed.²⁷

track of its origin. Even companies recognized as industry leaders in promoting sustainable wood harvesting may wind up using illegally harvested wood, as demonstrated by the recent government raid on the Gibson guitar factory in Nashville, Tennessee.") (footnote omitted).

26. See *infra* notes 43 & 47.

27. A related debate is over whether customary international law is part of federal common law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 102(2) (1987) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation."). The academy is split on the issue, although there likely is a majority in favor of an affirmative answer. Compare Harold Hongju Koh, *Is International Law Really State Law?*, 111 HARV. L. REV. 1824 (1998) (arguing that customary international law is part of federal common law), with Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 30 HARV. J.L. & PUB. POL'Y 65 (2006) (arguing the contrary position). As explained below, however, no foreign government or official may create a federal common law crime. See *infra* notes 389–412 and accompanying text. The second issue is whether courts should construe the Constitution in light of foreign constitutions and the interpretive rulings by foreign courts. Most academics have applauded that prospect. See Gerald L. Neuman, *International Law as a Resource in Constitutional Interpretation*, 30 HARV. J.L. & PUB. POL'Y 177 (2006). But a strong minority has found it problematic at best, illegitimate at worst. See Frank H. Easterbrook, *Foreign Sources and the American Constitution*, 30 HARV. J.L. & PUB. POL'Y 223 (2006);

Part I discusses the Lacey Act. It explains that the statute incorporates a virtually unlimited number of foreign legal edicts and makes it a federal offense to violate whatever a foreign nation designates as “law.” Part II next discusses the federal lawmaking process. It explains that, while the text of Article I presumes that only Congress may exercise “legislative Powers,” the Supreme Court has upheld a variety of congressional delegations of lawmaking authority to other parties, such as federal administrative agencies. The Lacey Act is unlike any statute that the Court has upheld, however, because it vests domestic federal lawmaking in foreign governments or their officials. Part III addresses the constitutional flaws in the Lacey Act. That part starts by explaining that the statute supplies no “intelligible principle” for foreign governments to use when deciding what conduct to make a crime and leaves American importers, for example, bereft of the ability to rely on the general legal principles that someone learns in the United States. Part III next explains why the Due Process Clause of the Fifth Amendment places an additional restriction on the federal lawmaking power by prohibiting Congress from delegating substantive lawmaking authority to a party that is neither legally nor politically accountable for its actions to supervisory federal officials or to the public. Part III also discusses why the Lacey Act violates Article II because it delegates federal lawmaking authority to individuals—foreign government officials—who clearly do not fit into the category of parties to whom Congress may delegate federal lawmaking authority. Part IV concludes by explain-

Ganesh Sitaraman, *The Use and Abuse of Foreign Law in Constitutional Interpretation*, 32 HARV. J.L. & PUB. POL’Y 653 (2009). The third debate is over the issue whether the United States government can enter into an international agreement that cedes to foreign nations or international bodies the authority to adopt rules that apply in this nation or to resolve disputes that otherwise would be adjudicated in Article III courts. Scholars disagree whether such an agreement is constitutional. Compare David Golove, *The New Confederation: Treaty Delegations of Legislative, Executive, and Judicial Authority*, 55 STAN. L. REV. 1697 (2003), with John C. Harrison, *International Adjudicators and Judicial Independence*, 30 HARV. J.L. & PUB. POL’Y 127 (2006). That issue is relevant to the subject of this Article. As explained below, the Article II Appointments Clause, U.S. CONST. art. II, § 2, cl. 2, would prohibit granting federal authority to anyone not appointed consistently with that clause. That would forbid Congress or the Executive Branch from deeming the judgment of a foreign nation or an international body as “the supreme law of the land” for purposes of the Supremacy Clause.

ing why the Lacey Act cannot be defended as constitutional under a form of a “necessity defense.”²⁸

I. THE LACEY ACT AND THE INCORPORATION OF FOREIGN LAW

At common law, the English crown had the authority to regulate the taking of wild game, and each state in this nation inherited the right to regulate hunting within its borders.²⁹ In the nineteenth century, however, states found that out-of-state poachers were stymieing their regulatory efforts. Because interstate transportation and communications were still in their nascent stages—trains and horses were still the principal means of transportation, and the telegraph was the principal interstate communications tool—poachers could travel from, for example, Colorado to adjacent Wyoming, violate Wyoming’s game laws, and escape back into Colorado before the local authorities even got wind that a crime had been

28. Congress has considered legislation that would decriminalize the Lacey Act. In 2012, Senator Rand Paul of Kentucky and Representative Paul Broun of Georgia each introduced a bill entitled the Freedom from Over-Criminalization and Unjust Seizures Act of 2012 (FOCUS Act) that would repeal the criminal penalties from the Lacey Act. The Senate bill, S. 2062, 112th Cong. (2012) and the House bill, H.R. 4171, 112th Cong. (2012), were identical as introduced. A House subcommittee held a hearing on H.R. 4171 (among other bills) last year. See H.R. 3210, “Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act” and H.R. 4171, “Freedom From Over-Criminalization and Unjust Seizures Act of 2012”: *Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Consular Affairs of the H. Committee on Natural Resources*, 112th Cong., 109 (2012), <http://www.gpo.gov/fdsys/pkg/CHRG-112hrg74144/pdf/CHRG-112hrg74144.pdf> [<http://perma.cc/ANK5-6Z4W>]. In 2013, the Subcommittee on Fisheries, Wildlife, Oceans, and Insular Affairs of the House Committee on Natural Resources held two oversight hearings on the Lacey Act. See *Oversight Hearing on the 2008 Lacey Act Amendments Part 1 and 2: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans, and Insular Affairs of the H. Comm. on Natural Res.*, 113th Cong. 16 (2013) (statement of Paul J. Larkin, Jr., at hearing held on July 17, 2013) [hereinafter *Lacey Act Oversight Hearing*]; *id.* (hearing held on May 16, 2013). The House Judiciary Committee also has taken note of the issue of “overcriminalization” caused by statutes such as the Lacey Act. See, e.g., *Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 151 (2010); *Over-Criminalization of Conduct/Over-Federalization of Criminal Law: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec. of the H. Comm. on the Judiciary*, 111th Cong. 67 (2009).

29. See, e.g., *Geer v. Connecticut*, 161 U.S. 519, 522–35 (1896); *Rupert v. United States*, 181 F. 87, 88–91 (8th Cir. 1910).

committed. The problem created a classic need for interstate cooperation or federal regulation.

Congress might have left that problem to the states to work out via an interstate agreement,³⁰ but Congress instead decided that federal legislation was necessary. Congress passed the Lacey Act in 1900 in order to protect each state's ability to enforce its game laws and to prevent the extinction of local animal species.³¹ Congress later expanded the reach of the Lacey Act on several occasions: in 1930 and 1935 to include importation of wildlife obtained in violation of foreign law,³² in 1981 to

30. The relevant constitutional provision is the Compact Clause, U.S. CONST. art. I, § 10, cl. 3 ("No State shall, without the Consent of Congress, lay any Duty of Tonnage, keep Troops, or Ships of War in time of Peace, enter into an Agreement or Compact with another State, or with a foreign Power, or engage in War, unless actually invaded, or in such imminent Danger as will not admit of delay."). The clause prevents states from conspiring to project authority beyond their boundaries or to infringe on federal power. *See, e.g.,* *Cuyler v. Adams*, 449 U.S. 433, 440 (1981); Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 YALE L.J. 685, 694–95 (1925). Although the text of the Clause would appear to prohibit all interstate agreements of any kind, the Supreme Court has not read the clause literally and, instead, has construed it with an eye toward its purpose. *See Cuyler*, 449 U.S. at 440 ("Where an agreement is not 'directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States,' it does not fall within the scope of the Clause and will not be invalidated for lack of congressional consent.") (citation omitted). Accordingly, interstate agreements designed to assist their signatories apprehend poachers likely would have passed muster. That is particularly true because such an agreement would parallel the requirements of the Interstate Rendition Clause. *See* U.S. CONST. art. IV, § 2, cl. 2 ("A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction of the Crime.").

31. *See, e.g.,* Lacey Act of May 25, 1900, § 1, ch. 553, 31 Stat. 188; S. REP. NO. 91-526, at 1–2 (1969); H.R. REP. NO. 56-474, at 1–2 (1900); *Lacey Act Oversight Hearing*, *supra* note 28, at 96–97 (2013) (statement of Kristina Alexander, Legislative Attorney, American Law Division, Congressional Research Service). A related, contemporary statute was the Federal Black Bass Act of May 20, 1926, ch. 346, 44 Stat. 576 (repealed 1981). It prohibited the out-of-state transportation of bass in violation of that state's laws. *See United States v. Howard*, 352 U.S. 212, 212(1957). Congress merged that statute into the Lacey Act in 1981. *See* Act of Nov. 16, 1981 § 9(b), Pub. L. No. 97-79, 95 Stat. 1073 (1981); H.R. REP. NO. 97-276, at 5, 30 (1981); S. REP. NO. 97-123, at 18 (1981). For an exhaustive history of the birth and growth of the Lacey Act, see C. Jarrett Dieterle, Note, *The Lacey Act: A Case Study in the Mechanics of Overcriminalization*, 102 GEO. L.J. 1279 (2014).

32. *See* Tariff Act of 1930, ch. 497, 46 Stat. 590, 741 (1930); Act of June 15, 1935, ch. 261, 49 Stat. 378 (1935); H.R. REP. NO. 74-886 (1935); H.R. REP. NO. 71-7, at 181 (1929); *see also*

include interstate transportation of domestic plants in violation of state law,³³ and in 2008 to include importation of plants obtained in violation of foreign law.³⁴

In that last year, acting at the behest of an odd coalition of environmental organizations, members of the domestic timber industry, and labor unions,³⁵ Congress (perhaps unwittingly³⁶) amended the Lacey Act to include plants (primarily timber) taken or processed and imported in violation of a foreign nation's law. The ostensible rationale underlying the 2008 amendment was the desire to protect foreign ecosystems and the domestic timber industry by targeting an alleged billion-dollar black market in foreign logging.³⁷ The theory was that, by approaching the problem from the demand side, incorporating foreign law violations would help safeguard wildlife and timber in foreign countries that are at risk of becoming extinct and thus contributing to species depletion and global warming, while also protecting the domestic timber industry against lower-priced imported wood from foreign nations.³⁸ The 2008 Lacey Act amendment had the

S. REP. NO. 91-526, at 12 (1969). One observer has noted that the global and domestic trade in illegal wildlife involves millions of animals, birds, and fish and results in billions of dollars. See Robert S. Anderson, *The Lacey Act: America's Premier Weapon in the Fight Against Unlawful Wildlife Trafficking*, 16 PUB. LAND L. REV. 27, 31-32 (1995).

33. See Act of Nov. 16, 1981, 95 Stat. 1073.

34. See Food, Conservation, and Energy Act of 2008, Pub. L. No. 110-234, 122 Stat. 923 (2008). For a discussion of that and other amendments to the original act, see Dieterle, *supra* note 31, at 1288-93.

35. Environmental organizations such as Greenpeace, the World Wildlife Fund, the Natural Resources Defense Council, and the Sierra Club sided with the National Hardwood Lumber Association, the Society of American Foresters, the International Brotherhood of Teamsters, and the United Steelworkers to support the 2008 Lacey Act amendments. See Dieterle, *supra* note 31, at 1292; Francis G. Tanczos, Note, *A New Crime: Possession of Wood—Remedying the Due Care Double Standard of the Revised Lacey Act*, 42 RUTGERS L.J. 549, 555-58 (2011).

36. The 2008 Lacey Act amendments were part of a far larger bill that was addressed to the entirely different subject of farm policy. See Food, Conservation, and Energy Act of 2008, 122 Stat. 923; Tanczos, *supra* note 35, at 549 n.2. It is possible that members who voted on the farm bill were unaware of the Lacey Act amendments that the farm bill contained.

37. See H.R. Rep. No. 110-627, 110th Cong. (2008); KRISTINA ALEXANDER, CONG. RESEARCH SERV., R4206, THE LACEY ACT: PROTECTING THE ENVIRONMENT BY RESTRICTING TRADE 2, 6 (2012); Tanczos, *supra* note 35, at 549-50 & n.4.

38. See *United States v. Molt*, 452 F. Supp. 1200, 1203-04 (E.D. Pa. 1978) *aff'd*, *United States v. Molt*, 599 F.2d 1217, 1218-20 (3d Cir. 1979); S. REP. NO. 91-526, at 1; Saltzman, *supra* note 17, at 2.

effect of transforming a federal law designed to help states deal with poaching into a broader environmental statute.³⁹

Under the Lacey Act, it is unlawful to “import, export, transport, sell, receive, acquire, or purchase” fish, wildlife, or plants that have been “taken, possessed, transported, or sold . . . in violation of any foreign law.”⁴⁰ A person who “knowingly” imports or exports wildlife or plants in violation of the Act can receive a sentence of five years’ imprisonment and a fine of \$250,000 (\$500,000 for corporations).⁴¹ The Act also makes it a crime to negligently violate its provisions. A person who “in the exercise of due care” should have known that the statute prohibited his actions can receive one year’s imprisonment and a fine of \$100,000 (\$200,000 for an organization).⁴² What is more, a party such as an importer is liable if anyone in the potentially long and convoluted chain of parties responsible for the harvesting, processing, transportation, and final entry of original material (such as wood) or a processed item (such as bagpipes) violated a foreign law.⁴³ In addition, the act seeks to punish criminal con-

39. See Dieterle, *supra* note 31, at 1289.

40. 16 U.S.C. § 3372(a)(2)(A)–(B) (2012). In *Molt*, 599 F.2d at 1219 n.1, the Third Circuit concluded that the Lacey Act does not require proof of a foreign law violation because “[t]he illegal taking is simply a fact entering into the description of the contraband article . . .” Some private parties have made the same argument. See *Lacey Act Oversight Hearing*, *supra* note 28, at 62–63 (testimony of Marcus A. Asner). The text of the Lacey Act, however, is clearly to the contrary. Whether a case involves “fish” “wildlife,” or “any plant,” Section 3372(a)(2)(A) and (B) of Title 16 requires the government to prove that item was “taken, possessed, transported, or sold . . . in violation of any foreign law” (emphasis added). 16 U.S.C. § 3372(a)(2)(B) (2012). The italicized phrase is an element of the criminal offense.

41. 16 U.S.C. § 3373(d) (2012); 18 U.S.C. § 3571 (2012); ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., LACEY ACT PRIMER AND UPDATES 8 (Aug. 2013) [hereinafter LACEY ACT PRIMER] (“The underlying violation need not be committed by the person charged with violating the Lacey Act—a third party might have taken the product illegally.”), http://www.aphis.usda.gov/plant_health/lacey_act/downloads/LaceyActPrimer.pdf [<http://perma.cc/A4WG-Y76G>].

42. 16 U.S.C. § 3373(d)(2) (2012).

43. See, e.g., *United States v. Lee*, 937 F.2d 1388, 1393 (9th Cir. 1991) (holding employee commercial fisherman liable); LACEY ACT PRIMER, *supra* note 41, at 7; *id.* at 19 (“Example: Bagpipes with wooden pipes . . . HTS Section 92059020—no declaration required . . . The Lacey Act itself still applies to the wooden pipes . . . If the pipes were made from illegally harvested trees then the bagpipe shipment is in violation of the Lacey Act”); Dieterle, *supra* note 31, at 1303. Justice Department lawyers and environmental organizations agree with that interpretation of the act. See PATRICIA ELIAS, LOGGING AND THE LAW: HOW THE U.S. LACEY ACT HELPS REDUCE ILLEGAL LOGGING IN THE TROPICS 12 (2012) (“[T]he Lacey Act prohibits all trade in plant

duct in a granular fashion by dictating that “each violation shall be a separate offense” without defining what constitutes a “violation” of the Act.⁴⁴ The result is potentially to multiply the punishment that an offender can receive. A fisherman who hauls in hundreds of fish with each net or thousands of fish each day, or an importing agent who brings into the United States hundreds or thousands of individual pieces of raw timber or separate finished wood products, can receive a prison sentence far in excess of one to five years.⁴⁵ The Lacey Act therefore has the potential to expose a person engaged in a facially legitimate activity—such as fishing or manufacturing furniture—to the type of sentence that society ordinarily reserves for the most dangerous felons and most heinous crimes.

The predicate for a violation of the Act is a violation of a domestic or foreign law.⁴⁶ The Act does not limit the type or number of domestic or foreign laws that serve as predicate violations of the statute, and the effect of that omission is to treat every law of every foreign nation as a potential ground for a violation of the Lacey Act.⁴⁷ That interpretation of the term “any foreign law” is breathtaking for a number of reasons.

products that are illegally sourced from any U.S. state or foreign country; illegally sourced plant products are defined as furniture, paper, lumber, and other products logged, manufactured, and/or traded in violation of any country’s law. Illegally sourced plant products include those that have been stolen, logged from protected areas, logged without authorization, or for which appropriate taxes, fees, and transport regulations have not been paid or met.”) http://www.ucusa.org/assets/documents/global_warming/illegal-logging-and-lacey-act.pdf [<http://perma.cc/RN29-YBN6>]; Anderson, *supra* note 32, at 61 (“The Lacey Act violator need not be the same person who took, possessed, transported, or sold the wildlife in violation of the underlying law” (footnote omitted)) (the author was an attorney in the Justice Department, *id.* at 27 n.1).

44. 16 U.S.C. § 3373(d) (2012); LACEY ACT PRIMER, *supra* note 41, at 8.

45. See Paul J. Larkin, Jr., *Defanging the Lacey Act: The Freedom from Over-Criminalization and Unjust Seizures Act of 2012*, THE HERITAGE FOUNDATION (Mar. 16, 2012), <http://www.heritage.org/research/reports/2012/03/defanging-the-lacey-act-the-freedom-from-over-criminalization-and-unjust-seizures-act-of-2012> [<http://perma.cc/U86H-RHZB>].

46. 16 U.S.C. § 3372(a) (2012).

47. The federal government takes the position that there is no material limitation on the foreign laws that the Lacey Act incorporates. See LACEY ACT PRIMER, *supra* note 41, at 7; ANIMAL & PLANT HEALTH INSPECTION SERV., U.S. DEP’T OF AGRIC., LACEY ACT AMENDMENTS: COMPLETE LIST OF QUESTIONS AND ANSWERS 2 (Nov. 13, 2013) (“It is the responsibility of the importer to be aware of *any foreign laws that may pertain to their merchandise prior to its importation into the United States.*”),

First, the Act does not limit the “foreign” nations whose laws are incorporated into domestic law. Countries with a civil law background, like Italy, are as eligible for inclusion as countries like Great Britain, from whence our common law arose. Countries with a sectarian code, like Saudi Arabia, are also included along with countries with secular codes, like Canada. Countries ruled by dictators, like Sudan, are afforded the same treatment as countries governed by parliaments, like Hungary. Second, the act does not restrict the type of foreign “law” that is incorporated. The foreign law need not be a criminal law; a foreign law with only a civil penalty can trigger federal criminal liability.⁴⁸ Third, the foreign law need not altogether forbid taking an animal or plant. Violation of a foreign law regulating only the process of harvesting wood can trigger federal criminal liability, as can the failure to pay an export fee or the erroneous

http://www.aphis.usda.gov/plant_health/lacey_act/downloads/faq.pdf [http://perma.cc/S4FY-AMYJ] (emphasis added); H.R. 3210, the “Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act” and H.R. 4171, “Freedom from over-criminalization and unjust seizures act of 2012”: Hearing Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources 112th Cong. 63–64 (2012) (statement of Eileen Sobeck, Deputy Ass’t Director for Fish and Wildlife and Plants, U.S. Dep’t of the Interior) (“The Lacey Act prohibits trafficking and illegally taken fish, wildlife and plants. Its premise is simple but effective. People who take wildlife in violation of a State, tribal or foreign law and then engage in interstate commerce with the wildlife are violating U.S. Federal law.”); H.R. 1497, *Legal Timber Protection Act: Hearing on H.R. 1497 Before the Subcomm. on Fisheries, Wildlife and Oceans of the House Comm. on Natural Resources*, 110th Cong. 7 (2007) (Statement of Eileen Sobeck, Deputy Assistant Att’y Gen., Env’t & Natural Res. Div., U.S. Dep’t of Justice) (“One unique feature of the Lacey Act is that it allows the incorporation of foreign law as an underlying law or predicate offense that ‘triggers’ a Lacey Act violation The law or regulation must be of general applicability, but may be a local, provincial, or national law. The defendant need not be the one who violated the foreign law.”).

48. See *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 828–29 (9th Cir. 1989) (holding that the Lacey Act makes it a federal crime to violate a foreign law imposing only civil sanctions); LACEY ACT PRIMER, *supra* note 41, at 7 (“The underlying foreign law violation does not have to be a criminal violation, nor one actively enforced in the foreign country.”); Anderson, *supra* note 32, at 81–82. If the Lacey Act were limited to the violation of a foreign nation’s criminal law, the Act could be said to resemble the “dual criminality” principle in extradition law. Under that principle, extradition treaty signatories are required to transfer a person to the nation where he committed a crime if the nation from which extradition is sought has a criminal law comparable to the one allegedly violated by the suspect in the requesting nation. See *Factor v. Laubenheimer*, 290 U.S. 276, 286–87 (1933). The Lacey Act, however, differs from the laws used to satisfy that requirement because the Act is not limited to violations of a foreign nation’s penal code.

completion of required paperwork.⁴⁹ Fourth, the Lacey Act does not restrict the form that foreign law may take. That law can be a statute, a regulation, a local ordinance, a nation's interpretation of one of its laws, or anything else that a foreign nation defines as "law."⁵⁰ For example, in 2012 the Department of Justice investigated the Gibson Guitar Corporation for a violation of the laws of Madagascar, which the government described as "Departmental Memorandum 001/06/MINENVEF/Mi" and as Madagascar Interministerial Order 16.030/2006.⁵¹ That interpretation suggests that a foreign legal edict of any type can trigger criminal liability. Fifth, the Lacey Act incorporates not only the foreign laws in effect at the time that statute was adopted, but also whatever laws a foreign nation may hereafter adopt.⁵² Sixth, the Act does not require that the foreign law, in whatever land and in whatever form it appears, be readily accessible or even be written in English. In the Gibson Guitar case, the Department of Justice investigated Gibson Guitar for a violation of the laws of Madagascar even though at least one of the relevant laws had to be translated into English.⁵³ Finally, to top it off, one federal circuit court has gone so far as to uphold a conviction for the violation of a foreign law *even after the Attorney General of that country and one of its courts*

49. See 16 U.S.C. § 3372(a)(2)(B)(ii) (2012) (making it a crime to import a plant that was "taken, possessed, transported, or sold without the payment of appropriate royalties, taxes, or stumpage fees required for the plant by any law or regulation of any State or foreign law").

50. See 594,464 *Pounds of Salmon*, 871 F.2d at 825 n.2, 828–30 (holding that the Lacey Act makes it a federal crime to violate a Taiwanese board's "announcement" that was not technically a "regulation"); Anderson, *supra* note 32, at 82–83.

51. See Letter Containing a Deferred Prosecution Agreement from Jerry E. Martin, U.S. Attorney, M.D. Tenn., et al., to Donald A. Carr & William M. Sullivan Jr. App. A, at 6 (July 27, 2012) [hereinafter GIBSON GUITAR DPA] (referring to "the Department's translation of Interministerial Order 16.030/2006"), <http://www.legaltimes.typepad.com/files/gibson.pdf> [<http://perma.cc/RQV9-F2WB>].

52. See H.R. 3210, "Retailers and Entertainers Lacey Implementation and Enforcement Fairness Act" and H.R. 4171 "Freedom from Over-Criminalization and Unjust Seizures Act of 2012": *Before the Subcomm. on Fisheries, Wildlife, Oceans and Insular Affairs of the H. Comm. on Natural Resources*, 112th Cong. 8–9 (2012) (statement of Sen. Rand Paul).

53. See GIBSON GUITAR DPA, *supra* note 51, App. A, at 6.

had officially concluded that the local code was invalid under that nation's domestic law.⁵⁴

In sum, the Lacey Act incorporates anything and everything that a foreign nation deems "law." As the federal government has told Congress and the public, the act makes it a federal offense to violate *any* provision of *any* law adopted by *any* foreign nation in *any* form the law may appear, and even *any* statement of "law" that would not be deemed "law" in this country.⁵⁵ To quote the Environmental Protection Agency, "the Lacey Act does not impose U.S. law on sovereign nations. 'Illegally sourced' is defined by the content of sovereign nations' own laws."⁵⁶ If that is true, to paraphrase the Bard, something has gone very wrong in the United States.⁵⁷

II. THE FEDERAL LAWMAKING PROCESS

A. *The Vesting of Legislative Authority in Congress: The Article I Bicameralism and Presentment Clauses*

The story of the American Revolution and creation of the Constitution is well known.⁵⁸ The Framers went to Philadelphia with orders to design revisions to the Articles of Confederation, which had proven manifestly incapable of creating the new nation that the colonists had won by arms.⁵⁹ Instead, realizing that the Articles were beyond repair, the Framers took the law into

54. See *United States v. McNab*, 331 F.3d 1228, 1248 (11th Cir. 2003). The *McNab* case is discussed extensively in Edwin Meese III & Paul J. Larkin, Jr., *Reconsidering the Mistake of Law Defense*, 102 J. CRIM. L. & CRIMINOLOGY 725, 777–82 (2012).

55. See *supra* note 47.

56. Env't Investigation Agency, *The U.S. Lacey Act: Frequently Asked Questions About the World's First Ban on Trade in Illegal Wood* (2008), <http://www.greenpressinitiative.org/documents/LaceyActFAQ.pdf> [<http://perma.cc/Q9TQ-ES4F>].

57. See WILLIAM SHAKESPEARE, *HAMLET* act I, sc. 4 ("Something is rotten in the state of Denmark.").

58. See, e.g., BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); SAMUEL ELIOT MORISON, *THE OXFORD HISTORY OF THE AMERICAN PEOPLE 171–281* (1965); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (1998).

59. See, e.g., GREVE, *supra* note 11, at 6 ("The convention was a response to a failed political experiment. The Articles of Confederation, under which the states had operated since 1781, had saddled the union with grave political problems—for example, a mountain of public debt at level that tends to spell public rebellion and the ruin of nations.").

their own hands. They proposed junking the Articles in favor of an entirely new charter that would establish a tripartite national government while respecting the independent sovereignty of the states.⁶⁰ Congress was to play the role of Parliament, but in keeping with the then-dominant theory that divided government power prevented tyranny, Congress was to be a bicameral legislature, consisting of a House of Representatives and a Senate.⁶¹ Accordingly, in order to exercise its “legislative Power” by creating a “Law,” each chamber must pass an identical bill, and the President must sign it (or both houses re-pass it by a two-thirds vote following a veto).⁶² Along with a Congress, the Constitution would create separate Executive and Judicial Branches, each with its own powers and duties, the former responsible for executing the laws that Congress passes,⁶³ the latter entrusted with the responsibility for interpreting those laws and for enforcing the Constitution against the other two branches.⁶⁴

The bicameralism and presentment requirements are not like the lines at the department of motor vehicles—something to be endured, not respected. Rather, they are “integral parts of the

60. See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 16 (2005); THE FEDERALIST NO. 22, at 143–45 (Alexander Hamilton) (Clinton Rossiter ed., 1961); RICHARD A. EPSTEIN, THE CLASSICAL LIBERAL CONSTITUTION: THE UNCERTAIN QUEST FOR LIMITED GOVERNMENT 3 (2014).

61. See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

62. See U.S. CONST. art. I, § 7; *INS v. Chadha*, 462 U.S. 919 (1983); cf. *Clinton v. City of New York*, 524 U.S. 417 (1998) (noting that Article I requires the same process in order to repeal or amend an existing law). Article I defines a rigorous process for the House and Senate to enact a “Bill” and “[e]very Order, Resolution, or Vote” requiring the approval of both chambers. U.S. CONST. art. I, § 7, cls. 2 & 3. The Congress need not present every proposal to the President. The most common example is a joint agreement to adjourn for more than three days, see *id.* art. I, § 5, cl. 4, but the most important example is the submission to the States of a proposed amendment to the Constitution, see *id.* art. V; *Hollingsworth v. Virginia*, 3 U.S. (3 Dall.) 378, 381–82 (1798). The Constitution also vests certain powers in one chamber. The House alone has the power to initiate impeachment. U.S. CONST. art. I, § 2, cl. 5. The Senate alone has the power to try impeachments, to approve or reject presidential appointments, and to ratify treaties. *Id.* art. I, § 3, cl. 6; *id.* art. II, § 2, cl. 2. See *Chadha*, 462 U.S. at 955–56 n.21.

63. See U.S. CONST. art. II, § 3 (“[The President] shall take Care that the Laws be faithfully executed”).

64. See U.S. CONST. art. III, § 1 (“The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803).

constitutional design for the separation of powers.”⁶⁵ The Framers believed that by distributing legislative power between the two branches of Congress and the lawmaking power between Congress and the President, they could prevent any one of those three entities from creating a law by itself.⁶⁶ By forcing the Senate, the House of Representatives, and the President to cooperate to pass a law, the Framers sought to give them ample opportunity for scrutiny and debate over any proposal, as well as to compel each one to take a public position on what conduct it found reasonable to outlaw, encourage, support, protect, or fund.⁶⁷ The Article I lawmaking procedure not only offers the opportunity for reasoned consideration and debate over the merits of proposed legislation, but also—and perhaps more importantly—provides voters with a basis for holding elected federal officials politically accountable for the decisions that they make and must stand behind when they run for re-election.⁶⁸ The bicameralism and presentment requirements therefore enable the electorate to decide whether Representatives, Senators, and the President should remain in office or be turned out every two, six, or four years.

Given the importance of these purposes to the Framers’ scheme, it would seem to follow that each member of Congress and the President must exercise his or her own lawmaking responsibilities, rather than shift them to someone else. Just as it would seem that the President cannot hand off to cabinet officials the power to veto a bill,⁶⁹ so, too, Congress cannot dele-

65. *Chadha*, 462 U.S. at 946.

66. As James Madison explained, “[i]n republican government, the legislative authority necessarily predominates. The remedy for this inconveniency is to divide the legislature into different branches; and to render them, by different modes of election and different principles of action, as little connected with each other as the nature of their common functions and their common dependence on the society will admit.” THE FEDERALIST NO. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

67. See Paul J. Larkin, Jr., *Crack Cocaine, Congressional Inaction, and Equal Protection*, 37 HARV. J.L. & PUB. POL’Y 241, 261 (2013).

68. See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); *id.* art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President).

69. While several provisions contemplate that the President can rely on lieutenants to help him carry out his duties, see *infra* notes 120–26 and accompanying text, the President’s veto power fits into a different category. The issue in an ordinary

gate its lawmaking responsibilities to one of its officers or staff.⁷⁰ Eighteenth-century political theorists such as John Locke and nineteenth-century Supreme Court case law endorse that point.⁷¹ Any other result would allow federal officers to diffuse authority and wriggle out of responsibility, thereby escaping accountability. For the same reason, it also would seem that each statute should independently and clearly identify the specific rule that the political branches deem necessary for the governance of society. That is, each statute should identify the primary conduct that is to be protected, subsidized, or forbidden, and, if Congress intends that law to be anything more than mere advice, the statute also should define the administrative, civil, or criminal penalties individuals face for breaking the law. The need to identify prohibited conduct and authorized sanctions is a critical element of what we know as the

delegation case is whether Congress has sufficiently defined and limited the discretion entrusted to a federal agency so that it can fairly be said that Congress has made the law and the agency is merely executing it. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 474–75 (2001). By contrast, the Constitution itself vests the veto power in the president, see U.S. CONST. art. I, § 7, cls. 2 & 3; *Chadha*, 462 U.S. at 944–51, so that the nation can hold *that specific officeholder* responsible.

70. Article I expressly contemplates that Congress may select certain officers. See U.S. CONST. art. I, § 2, cl. 5 (“The House of Representatives shall chuse their Speaker and other Officers”); *id.* § 3, cl. 4 (“The Vice President of the United States shall be President of the Senate, but shall have no Vote, unless they be equally divided.”); *id.* § 3, cl. 5 (“The Senate shall chuse their other Officers, and also a President pro tempore, in the Absence of the Vice President, or when he shall exercise the Office of the President of the United States.”). The Necessary and Proper Clause implicitly empowers Congress to hire staff. See *id.* § 8, cl. 18 (“The Congress shall have 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.”).

71. See *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692, 693–94 (1892) (“That Congress cannot delegate legislative power . . . is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution The true distinction . . . is between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring authority or discretion *as to its execution*, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.”) (quoting *Cincinnati, Wilmington & Zanesville, R.R. Co. v. Comm’rs of Clinton Cnty.*, 1 Ohio St. 77, 88–89 (1852) (emphasis added)); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 312 (R. Cox ed., 1982) (“The power of the *legislative*, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to make *laws*, and not to make *legislators*, the *legislative* can have no power to transfer their authority of making laws, and place it in other hands.”) (emphasis in original).

“rule of law” — the proposition that the law binds the actions of government officials and private parties alike, unlike the state of affairs found in ancient kingdoms or contemporary dictatorships, where the “rule of one man” governs legal relations.⁷²

The concern with precisely identifying such conduct and accompanying penalties is at its zenith when Congress attaches a criminal punishment to a legal rule. Several related doctrines — such as the void-for-vagueness doctrine — all become critically important at that point.⁷³ Those rules exist in order to give effect to the principle that the government must clearly define illegal conduct so that everyone has the opportunity to choose whether or not to obey its commands.⁷⁴

B. The Delegation of Legislative Authority to the Executive Branch: The Article II Appointments Clause

Reality is rarely ideal. Congress does not itself create every rule that has the same effect as a statute, nor does Congress define every relevant term in all laws. We often must look elsewhere to find the governing law or to learn what it means. When we do, a fundamental canon of construction of legal texts is that an undefined term should receive its ordinary dictionary meaning because that is the interpretation that a reasonable person would give to it.⁷⁵ But there are also occasions when Congress relies on someone other than Noah Webster for

72. See *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (stating that ours is “a government of laws, and not of men”).

73. See *infra* notes 208–212.

74. See, e.g., *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001) (identifying “core due process concepts of notice, foreseeability, and, in particular, the right to fair warning as those concepts bear on the constitutionality of attaching criminal penalties to what previously had been innocent conduct”); HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 68 (1977) (“People ought in general to be able to plan their conduct with some assurance that they can avoid entanglement with the criminal law; by the same token the enforcers and appliers of the law should not waste their time lurking in the bushes ready to trap the offender who is unaware that he is offending. It is precisely the fact that in its normal and characteristic operation the criminal law provides this opportunity and this protection to people in their everyday lives that makes it a tolerable institution in a free society. Take this away, and the criminal law ceases to be a guide to the well-intentioned and a restriction on the restraining power of the state.”).

75. See, e.g., *Bond v. United States*, 134 S. Ct. 2077, 2090 (2014); *Chapman v. United States*, 500 U.S. 453, 462 (1991); Paul J. Larkin, Jr., *Oversized Frauds, Undersized Fish, and Deconstruction of the Sarbanes-Oxley Act*, 103 GEO. L.J. ONLINE 17, 18 (2014).

the meaning of statutory terms, and in those cases the question arises as to how a law should be read.

Since Franklin Roosevelt was President, federal administrative agencies have been the principal recipients of Congress's power to define statutory terms and to promulgate implementing rules.⁷⁶ Examining federal agency governance in the twentieth and twenty-first centuries brings the rules of statutory construction and constitutional law into play.⁷⁷ This next section identifies instances in which Congress and the President grant someone else the power to create law, as well as some of the Article I and II issues that arise when the political branches ask someone else to do their job. First, however, it is important to identify precisely what lawmaking power is at stake in those scenarios, which requires definitions of "static" and "dynamic" delegation.

1. "Static" vs. "Dynamic" Delegation

There is an important difference between (1) a statute that incorporates an external source of law, such as the common law, that exists at the time that Congress legislates, and (2) a statute that vests in someone else the authority to define terms or create rules over time. The first approach is known as "static incorporation." It occurs, for example, when Congress incorporates the common law meaning of a term. Constitutional problems generally do not arise when Congress engages in static incorporation because the resulting law is not materially different from what the ordinary federal legislative process generates. Static incorporation of an existing state law is tantamount to the incorporation by reference of an existing act of Congress. Also, the federal legislative process operates identically in both instances. Each House of Congress must pass a bill, Congress must forward it to the President for his review, and the President must sign it into

76. See, e.g., Michael R. Harris, *Breaking the Grip of the Administrative Triad: Agency Policy Making Under a Necessity-Based Doctrine*, 86 TUL. L. REV. 273, 283–86 (2011).

77. Numerous books and articles address the issue of how to interpret legal documents, including statutes and constitutions. See, e.g., ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* (2012); Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 527 (1947); Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983). For a theory of how statutes are read in today's administrative world, see Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989).

law or veto it and return it to Congress for its veto override decision.⁷⁸ The static incorporation process relies on the judgment of the same parties constitutionally assigned to conduct federal lawmaking—Representatives, Senators, and the President—as to what the law should be. In sum, for Article I and II purposes the static incorporation of nonfederal law does not involve a delegation of federal lawmaking power.

By contrast, when Congress gives someone else the power to define federal law, Congress is delegating federal lawmaking authority to an “outsider,” someone not in one of those three categories of people elected to federal office. The delegation is enhanced when Congress allows an outsider not only to define the meaning of federal law on one occasion, but continuously to reconsider that definition and revise it over time as it deems necessary given changed conditions. That decision—to incorporate another body’s ongoing creation of law or, what is the same point just viewed from the other direction, to delegate to another polity the ongoing authority to create federal law—is called “dynamic incorporation.”⁷⁹ Dynamic incorporation raises serious prudential and constitutional issues not present when Congress itself creates federal law.⁸⁰ One reason why is that Article I vests “all legislative Powers” in the Congress,⁸¹ which on its face presumably could mean that only Congress can exercise the lawmaking power.⁸² Moreover, some types of

78. See Larkin, *supra* note 67, at 260. I put to one side the so-called “pocket veto” scenario. See *Wright v. United States*, 302 U.S. 583, 585–86 (1938); *Pocket Veto Case*, 279 U.S. 655, 658–60 (1929). That circumstance can occur, but it is not relevant to the issues in this article.

79. See Michael C. Dorf, *Dynamic Incorporation of Foreign Law*, 157 U. PA. L. REV. 103, 105 (2008) (“[D]ynamic incorporation does delegate lawmaking authority . . .”).

80. See *id.* at 115 (“Dynamic incorporation of foreign law poses a *prima facie* threat to the democracy of the incorporating polity because it takes decisions out of the hands of the people’s representatives in that polity and delegates them to persons and bodies that are accountable only to a different polity, if at all. Under various circumstances, such a delegation of power may be sensible as a matter of policy. It may even increase the democratic accountability of the political system as a whole. Nonetheless, where the polity that dynamically incorporates foreign law is a reasonably well-constituted democracy, the act authorizing dynamic incorporation undermines self-government within that polity so conceived.”). The author cites the United States as one such democracy. *Id.*

81. U.S. CONST. art. I, § 1.

82. See *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 472 (2001) (“Article I, § 1, of the Constitution vests ‘[a]ll legislative Powers herein granted . . . in a Congress of the

dynamic incorporation transfer federal lawmaking authority not only outside Congress but also beyond the federal government, and vest that power in parties that may not be politically responsible, directly or indirectly, to the federal electorate, as are the President and members of Congress.⁸³ The next two subsections discuss those issues.

2. *Delegating Federal Lawmaking Authority to Federal Agencies*

a. *The Conventional Theory*

The nineteenth century witnessed a transition from a predominantly local, agricultural economy to one that was national and industrial.⁸⁴ Rather than attempt to regulate the new economy all by itself, Congress enlisted the support of others. Congress turned to an old friend and made a new one. The old friend was the judiciary, which traditionally had regulated business conduct through the common law.⁸⁵ Congress passed

United States.’ This text permits no delegation of those powers”) (citation omitted; first ellipsis in original).

83. See U.S. CONST. art. I, § 2, cl. 1 (“The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.”); *id.* art. II, § 1, cl. 2 (“Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of [presidential] Electors, equal to the whole Number of Senators and Representatives to which the State may be entitled in the Congress: but no Senator or Representative, or Person holding an Office of Trust or Profit under the United States, shall be appointed an Elector.”); *id.* amend. XVII (“The electors [for Senators] in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.”). Under the Elections Clause, U.S. CONST. art. I, § 4, cl. 1, Congress may preempt state laws governing the time, place, and manner of holding federal elections, but not the qualifications for voting in them. See *Arizona v. Inter Tribal Council of Arizona, Inc.*, 133 S. Ct. 2247, 2258 (2013); THE FEDERALIST NO. 60, at 371 (Alexander Hamilton) (Clinton Rossiter ed., 1961); THE FEDERALIST NO. 52, at 323, 326 (James Madison) (Clinton Rossiter ed., 1961).

84. See, e.g., Richard R. John, *Recasting the Information Infrastructure for the Industrial Age*, in *A NATION TRANSFORMED BY INFORMATION: HOW INFORMATION HAS SHAPED THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 55, 63, 82–90 (Alfred D. Chandler, Jr. & James W. Cortada eds., 2003).

85. As Supreme Court Justice and Professor Stephen Breyer has explained: “The common law is in fact a regulatory system It depends on the creation and enforcement, by law, of a set of rights, notably those creating private property and enforceable contracts.” STEPHEN G. BREYER, ET AL., *ADMINISTRATIVE LAW AND REGULATORY POLICY: PROBLEMS, TEXT, AND CASES* 4 (7th ed. 2011). State tort law and state law dealing with state-created corporations deemed “franchises” were the principal devic-

the Sherman Antitrust Act of 1890,⁸⁶ supplemented later on by additional laws on that subject,⁸⁷ in order to enlist the federal courts as regulators by giving them the power to define unreasonable restraints of trade.⁸⁸ The new friend was what today is called the “fourth branch” of government: administrative agencies.⁸⁹ Agencies were a new approach to governance. Congress first pursued that option in 1887 when it created the Interstate Commerce Commission.⁹⁰ Since the New Deal and the Revolution of 1937, however, the number of agencies has multiplied like rabbits.⁹¹ Generally housed in the Executive Branch,⁹² fed-

es for regulating business conduct during the early nineteenth century. *See, e.g.*, HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW 1836-1937, at 30–32, 56–64, 125–26 (1991). For a discussion of the English common law doctrines regulating business conduct, *see, e.g.*, PHILLIP AREEDA, ET AL., ANTITRUST ANALYSIS: PROBLEMS, TEXT, AND CASES ¶ 128, at 32–34 (6th ed. 2004); HANS B. THORELLI, THE FEDERAL ANTITRUST POLICY: ORIGINATION OF AN AMERICAN TRADITION 12–35 (1954).

86. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (2012)). Anti-trust laws became an integral part of our free-market system. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 610 (1972) (“Anti-trust laws . . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”).

87. *See, e.g.*, Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified, as amended, at 15 U.S.C. §§ 12–27 (2012)); Federal Trade Commission Act, ch. 311, 38 Stat. 717 (codified, as amended, at 15 U.S.C. §§ 41–58 (2012)).

88. *See, e.g.*, HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION 7 (2005) (“[A]ntitrust is a form of regulation—a type of market intervention in an economy whose nucleus is private markets.”); Robert H. Bork, *Antitrust and Monopoly: The Goals of Antitrust Policy*, 57 AMER. ECON. REV. 242, 244 (1967).

89. Or, less kindly, “junior varsity” Congresses. *See* *Mistretta v. United States*, 488 U.S. 361, 427 (1989) (Scalia, J., dissenting) (referring to the U.S. Sentencing Commission as “a sort of junior-varsity Congress”). The traditional view is that the era of federal administrative regulation was born late in the nineteenth century. *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 439 (2d ed. 1985); *supra* note 83. Professor Jerry Mashaw maintains that the conventional view is mistaken because Congress created administrative agencies and empowered them to act in executive, legislative, and judicial capacities since the early days of the Republic. *See* JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION: THE LOST ONE HUNDRED YEARS OF AMERICAN ADMINISTRATIVE LAW 5–6 (2012). That conclusion supports the unorthodox approaches to delegation discussed below. *See infra* notes 109–119 and accompanying text.

90. *See* Interstate Commerce Act, ch. 104, 24 Stat. 379 (1887) (repealed).

91. *See, e.g.*, Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1232 (1994); Sunstein, *supra* note 77, at 408–09 (“The decade between 1930 and 1940 saw the creation of as many agencies—seventeen—as had been created in the entire period between the framing of the Constitution and the close of the nineteenth century.” (footnote omitted)). Congress created administrative agencies in

eral agencies are ubiquitous. There are regulatory régimes for a host of subjects that previously had been left to governance through contract or tort law, but now are supervised through some combination of statutes, regulations, and adjudications.⁹³

Under the conventional view of administrative and constitutional law, those delegations might appear *ultra vires*. After all, Article I vests “all legislative Powers” in the Congress,⁹⁴ Article II provides that “[t]he Executive power shall be vested in a President,”⁹⁵ and Article III states that “[t]he judicial Power” belongs to the Supreme Court and whatever lower federal courts Congress may create.⁹⁶ The implication of dividing legislative, executive, and judicial power among the three branches would seem to be that each one should exercise only the specific power it received.⁹⁷ With particular reference to the legislative power, the Supreme Court early on appeared to agree with the position that Article I prohibited just this type of delegation. In two cases decided in 1935, *Panama Refining Co. v. Ryan*⁹⁸

order to satisfy several, partially-competing goals: (1) the need to regulate the operation of a complex national economy in fields where the market cannot adequately perform that task due to natural monopolies, collective-action problems, externalities, and transaction costs; (2) the interest in enlisting and empowering experts in various technical or scientific disciplines to devise creative solutions to old or new problems; (3) the desire to ensure that those experts have both the opportunity to engage in research and dispassionate reflection on problems and the ability to respond quickly to changed conditions and new problems or the exacerbation of old ones; (4) the belief that modern-day responses to social problems should reflect the redistributive and noneconomic needs and interests of a contemporary pluralistic society; and (5) the inability or unwillingness to make the hard regulatory choices itself. See, e.g., BREYER, *supra* note 85, at 4–11; THEODORE J. LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* 94–96, 124–25 (2d ed. 2009). For a concise history of the birth and growth of the federal regulatory state, see, e.g., BREYER, *supra* note 85.

92. See *Mistretta*, 488 U.S. at 383–97 (upholding Congress’s designation of the U.S. Sentencing Commission as an agency in the judicial branch).

93. For instance, the Federal Trade Commission and the Federal Communications Commission have the authority to issue substantive rules, to undertake investigations, and to adjudicate disputes. These are powers that Articles I, II, and III envision being exercised by three separate branches of government. See, e.g., 15 U.S.C. §§ 45–46, 49 (2012); 47 U.S.C. § 303 (2012); *Nat’l Broad. Co. Inc., v. United States*, 319 U.S. 190, 215–16 (1943); Lawson, *supra* note 91, at 1248–49.

94. U.S. CONST. art. I, § 1.

95. U.S. CONST. art. II, § 1.

96. U.S. CONST. art. III, § 1.

97. See Lawson, *supra* note 91, at 1237–40.

98. 293 U.S. 388 (1935).

and *A.L.A. Schechter Poultry Corp. v. United States*,⁹⁹ the Court held unconstitutional two such congressional delegations of lawmaking power to the executive, giving rise to the so-called nondelegation doctrine. *Panama Refining* held unconstitutional a section of the National Industrial Recovery Act (NIRA)¹⁰⁰ that delegated to the President the power to forbid the distribution of so-called “hot oil”—oil produced in excess of a production quota—in interstate commerce. *Schechter Poultry* held unconstitutional a different NIRA provision, one that delegated to private parties the authority to define codes of “fair competition” among rivals, notwithstanding the settled antitrust rule making unlawful price fixing and other horizontal agreements to restrain trade. *Panama Refining* and *Schechter Poultry* signaled the Court’s willingness to police Congress’s delegations of lawmaking authority to the fourth branch. Since those decisions, the Court has reiterated the proposition that “the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity.”¹⁰¹

That principle also is a sensible one, the argument goes, as a matter of political theory.¹⁰² Forcing Congress to make difficult policy decisions may not serve the interests of individual Members if their choices turn out to be unpopular with the electorate, but prohibiting Congress from shirking that responsibility enables the public to hold Representatives and Senators accountable for their votes every two or six years. Cabining the lawmaking function to Congress also limits the number of statutes that Congress can enact, a result that the Framers intended. They designed the bicameralism and presentment requirements to make it difficult for Congress and the President to create federal law. The Framers believed that the new nation would be better

99. 295 U.S. 495 (1935).

100. Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933).

101. *Loving v. United States*, 517 U.S. 748, 758 (1996).

102. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 133–34 (1980); DANIEL A. FARBER & PHILIP P. FRICKE, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 81–82 (1991); LOWI, *supra* note 91, at 91–126; MARTIN H. REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 138–43 (1995); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* (1993); Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. LAW, 251, 265–66 (2010); Larkin, *supra* note 67, at 263.

served if local customs, private contracts, judicial common law decisionmaking, and statutes passed by state assemblies ordered our affairs than if federal dictates ruled our lives. Under that view of delegation, the Lacey Act stands on shaky ground.

As it turns out, however, soon after *Panama Refining* and *Schechter Poultry*, the Court abandoned any effort to cubbyhole the branches of the federal government. Since its 1935 decisions in *Panama Refining* and *Schechter Poultry*, the Court has upheld over a nondelegation challenge every act of Congress vesting lawmaking authority in a federal agency, including the power to promulgate rules or regulations.¹⁰³ Practicality defeated principle. In a welcome example of judicial candor, the Court has even confessed that its delegation decisions over the last eighty years “ha[ve] been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”¹⁰⁴ The Court has upheld those delegations as long as Congress has identified an “intelligible principle” for each agency to use in determining how to exercise its delegated but limited authority.¹⁰⁵ Some commentators have bemoaned the Court’s refusal to rein in congressional abdication of legislators’ voluntarily assumed responsibility to make the hard choices that today’s government demands.¹⁰⁶ But the majority of commentators have concluded that the nondelegation doctrine is effectively an “unlimited delegation doctrine.”¹⁰⁷ The

103. See, e.g., *Whitman v. Am. Trucking Ass’ns Inc.*, 531 U.S. 457 (2001); *Loving v. United States*, 517 U.S. 748 (1996); *Touby v. United States*, 500 U.S. 160 (1991); *Skinner v. Mid-America Pipeline Co.*, 490 U.S. 212 (1989); *Mistretta v. United States*, 488 U.S. 361 (1989); *Lichter v. United States*, 334 U.S. 742 (1948); *Fahey v. Mallonee*, 332 U.S. 245 (1947); *Am. Power & Light Co. v. SEC*, 329 U.S. 90 (1946); *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591 (1944); *Nat’l Broad. Co. v. United States*, 319 U.S. 190 (1943); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *New York Cent. Sec. Corp. v. United States*, 287 U.S. 12 (1932); *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394 (1928); *United States v. Grimaud*, 220 U.S. 506 (1911).

104. *Mistretta*, 488 U.S. at 372.

105. See *Whitman*, 531 U.S. at 472 (quoting *J.W. Hampton*, 276 U.S. at 409).

106. See, e.g., LOWI, *supra* note 91, at 92–126; SCHOENBROD, *supra* note 102; Lawson, *supra* note 91, at 1233–41.

107. See, e.g., Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL’Y 87, 87 (2010) (“If Academy Awards were given in constitutional jurispru-

doctrine survives today only as a little-used canon of construction invoked (albeit rarely) to avoid having to resolve a non-delegation challenge to legislation.¹⁰⁸

b. Two Unconventional Theories

In separate articles, Professors Eric Posner and Adrian Vermeule¹⁰⁹ and Professor Tom Merrill¹¹⁰ have offered two very different nondelegation theories. Rather than take the all-or-nothing approach that most scholars have adopted, they have set forth nuanced interpretations of Article I. Professors Posner and Vermeule argued that it is a mistake to treat nondelegation claims as implicating Article I concerns. Congress does not, le-

dence, nondelegation claims against regulatory statutes would win the prize for Most Sympathetic Judicial Rhetoric in a Hopeless Case.”); Lawson, *supra* note 91, at 1240–41. For the argument that the nondelegation doctrine was misguided from the outset, see Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 714–22 (1969). There are a few scholars who have grasped at a hope for a resurrection of the nondelegation doctrine and have offered ways for the Court to give it content. See, e.g., PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); LOWI, *supra* note 91, at 125–26; REDISH, *supra* note 102, at 136; SCHOENBROD, *supra* note 102; Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine’s Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297 (2003). Whatever the merits of that position may have been as a matter of first impression, given the law today a cynic might say that those scholars bring to mind the Japanese soldiers who refused to surrender at the end of World War II. See Becky Anderson, “Japan’s ‘hold-out soldier’ dies at 91,” CNN, Jan. 17, 2014, <http://www.cnn.com/video/data/2.0/video/world/2014/01/17/japan-soldier-hiroo-onoda-dies.cnn.html> [<http://perma.cc/UAY5-EWX4>] (reporting the death of a Japanese soldier who refused to surrender in the Philippines for more than thirty years after Japan itself surrendered).

108. See *Mistretta*, 488 U.S. at 373 n.7 (“In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.”); see also, e.g., *Indust. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (narrowly construing a statute giving the Occupational Safety and Health Administration discretion to regulate toxic substances); *Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 340–41 (1974) (ruling that a Federal Communications Commission levy on certain television producers is a “fee,” not a “tax,” to avoid nondelegation problems). For discussions of this development and different views on whether nondelegation as a canon of construction is a worthwhile use of that principle, see, for example, John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 247–60 (2000).

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

110. See Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004).

gally and technically speaking, delegate “lawmaking authority” to federal agencies. Instead, Congress empowers executive agencies to interpret statutes as a necessary incident of their responsibility to implement the law.¹¹¹ It therefore is a mistake to treat an agency’s exercise of delegated power as an exercise of legislative power. Properly defined, the legislative power is the power to vote on bills and present them to the President for his signature or veto. That power cannot be delegated, because the Constitution contemplates that only elected Representatives and Senators can vote on a bill.¹¹² Once the bill becomes law, however, the executive has the power to enforce it, so any authority that Congress grants to a federal agency to issue rules is a power to implement a law, not to create it in the first instance. An agency cannot act beyond the authority that Congress grants it, and the federal courts have the power to keep an agency within its allotted boundaries.¹¹³

Professor Merrill’s theory does not go as far. Focusing on the text of the Vesting Clause,¹¹⁴ his theory has three components. First, the “legislative Powers” granted to Congress include the power to enact statutes and other forms of law having the same effect, such as regulations. Second, “[a]ll” is descriptive, not prescriptive, and therefore does not forbid Congress from sharing

111. That is precisely how the Supreme Court described delegation in *INS v. Chadha*, 462 U.S. 919, 953 n.16 (1983), noting that administrative agency rulemaking is not subject to the Presentment and Pocket Veto Clauses, U.S. CONST. art. I, § 7, cls. 2 & 3, because the agency is simply exercising its enforcement authority.

112. See Posner & Vermeule, *supra* note 109, at 1726, 1756; see also *Mistretta*, 488 U.S. at 425 (Scalia, J., dissenting) (“[L]egislative powers have never been thought delegable” in the sense that “Senators and Members of the House may not send delegates to consider and vote upon bills in their place.”); Larkin, *supra* note 67, at 262 n.101 (Representatives cannot delegate their authority to vote to the Speaker of the House).

113. See, e.g., 5 U.S.C. § 706(2)(c) (2012) (a “reviewing court shall . . . hold unlawful and set aside agency action, findings, and conclusions found to be . . . in excess of statutory jurisdiction, authority, or limitations, or short of statutory right”); *Gonzales v. Oregon*, 546 U.S. 243, 275 (2006) (ruling that the Controlled Substances Act, 21 U.S.C. § 801 *et seq.* (2006), does not authorize the Attorney General to prohibit physicians from prescribing otherwise-approved drugs for use in connection with a state law permitting physician-assisted suicide); *Lincoln v. Vigil*, 508 U.S. 182, 193 (1993) (“[A]n agency is not free simply to disregard statutory responsibilities: Congress may always circumscribe agency discretion to allocate resources by putting restrictions in the operative statutes”).

114. See U.S. CONST. art. I, § I, cl. 1 (“All legislative Powers herein granted are vested in a Congress . . .”).

those powers with the executive or the judiciary. Third, the powers “herein granted” refers to the powers given to Congress only by Article I, not by the Constitution in its entirety, which means that the Article II and III branches can adopt regulations in order to carry out the responsibilities that those provisions impose on nonlegislative officers.¹¹⁵ Under that approach, federal agency policymaking and rulemaking, although perhaps not literally contemplated by Article I, can be reconciled with the Framers’ vision, and the decisions rejecting delegation challenges to federal agency rulemaking all came out the right way.

That result also contributes to the public welfare.¹¹⁶ Congress largely consists of generalists whose principal concern is being re-elected.¹¹⁷ Agencies are staffed by subject matter experts protected by the civil service laws, which enables them to apply their expertise without concern for the political fallout of their decisions. The “notice and comment” requirement imposed by the Administrative Procedure Act¹¹⁸ ensures that affected parties have the opportunity to review and criticize a proposed regulation, while agencies have the obligation to consider and respond to objections. At the same time, the modern regulatory state preserves political accountability because the Office of Information and Regulatory Affairs in the White House Office of Management and Budget is responsible for reviewing every significant regulatory action an agency proposes.¹¹⁹ American society today demands that the federal government solve far more problems than the Framers could have envisioned, and members of Congress and their staffs are far too small in number to handle that demand. Finally, whatever the fear may be that agencies will be “captured” by the industries they are responsible for regulating is more than offset by the risk that the same industries will exert undue influence on elected officials and political appointees in the administration.

115. See Merrill, *supra* note 110, at 2120–59.

116. See, e.g., *Mistretta*, 488 U.S. at 372; BRUCE A. ACKERMAN & WILLIAM T. HASLER, *CLEAN COAL/DIRTY AIR* 54–58 (1981); Merrill, *supra* note 110, at 2151–58.

117. See DAVID MAYHEW, *CONGRESS: THE ELECTORAL CONNECTION* 13 (1974).

118. 5 U.S.C. § 553 (2012).

119. See Exec. Order No. 12,866, 58 Fed. Reg. 5911 (Sept. 30, 1993), *reprinted as amended* in 5 U.S.C. § 601 (2012).

c. The Common Denominator

The common denominator between the Posner-Vermeule and Merrill theories is the importance of the Article II process for appointing officials who are empowered to execute whatever statutes Congress enacts and whatever powers Congress has delegated to them. For purpose of federal lawmaking, the Article II Appointments Clause complements the Article I Bicameralism and Presentment Clauses. The Constitution contemplates that Congress may create executive departments and give the President the power necessary to run them.¹²⁰ The Constitution also assumes that the President may use lieutenants to enforce the law—the contrary assumption would require the President to perform the impossible¹²¹—most of whom he or she (or another appointee) can select,¹²² many of whom must be approved by the Senate to hold office,¹²³ most of whom he or she can remove from their positions.¹²⁴ After all, Article I grants Congress the

120. See U.S. CONST. art. II, § 2, cl. 1 (the Opinion Clause); *id.* cl. 2 (the Appointments Clause).

121. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146 (2010) (“In light of [t]he impossibility that one man should be able to perform all the great business of the State,’ the Constitution provides for executive officers to ‘assist the supreme Magistrate in discharging the duties of his trust.’”) (quoting 30 WRITINGS OF GEORGE WASHINGTON 334 (J. Fitzpatrick ed., 1939)).

122. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other 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.”).

123. See *id.*

124. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3151–53; *Bowsher v. Synar*, 478 U.S. 714 (1986); *Myers v. United States*, 272 U.S. 52 (1926) (all ruling that the Framers gave the President the power to remove federal officials performing executive functions). Some agencies comprise what has been called a “fourth branch” of the federal government: independent agencies—that is, agencies managed by officials who cannot be removed by the President other than for cause. The Supreme Court has upheld, over an Appointments Clause challenge, legislation that restricted the ability of the President to remove an officer except for good cause. See, e.g., *Morrison v. Olson*, 487 U.S. 654 (1988) (upholding a for-cause restriction on the removal of an Independent Counsel); *Wiener v. United States*, 357 U.S. 349 (1958) (allowing a claim for wrongful removal of a War Claims Commission by the President); *Humphrey’s Ex’r v. United States*, 295 U.S. 602 (1935) (upholding a for-cause restriction on the removal of Federal Trade Commission commissioners); *United States v. Perkins*, 116 U.S. 483, 485 (1886) (upholding a restriction on the removal authority of an inferior officer).

“power . . . to establish Post Offices and post Roads,”¹²⁵ but it does not require the President to deliver the mail himself.¹²⁶

The Appointments Clause of Article II is not merely a civil service code. It is a critical element in governance, regulating the selection of all administrative officials who exercise delegated federal authority. The “manipulation of official appointments” by the Crown was a major grievance of the Framers, and they saw the appointment power as “the most insidious and powerful weapon of eighteenth-century despotism.”¹²⁷ To prevent that cudgel from reappearing under the Constitution, the Framers “carefully husband[ed] the appointment power to limit its diffusion” to officials who would be subject to “the will of the people.”¹²⁸ At the same time, the Framers made sure that the people would be able to hold the President accountable for decisions he made to assign implementation authority to his appointees—or alternatively, to hold Congress accountable for letting someone else do that job.¹²⁹ Finally, the requirement that a specific individual be appointed consistently with Article II to head a department ensures that there will always be a person with authority to make a final agency determination that can be challenged in an Article III court.¹³⁰

125. U.S. CONST. art. I, § 8, cl. 7.

126. See, e.g., *Wolsey v. Chapman*, 101 U.S. 755, 770–71 (1879); *Williams v. United States*, 42 U.S. (1 How.) 290, 297 (1843) (“The President’s duty in general requires his superintendence of the administration; yet this duty cannot require of him to become the administrative officer of every department and bureau, or to perform in person the numerous details incident to services which, nevertheless, he is, in a correct sense, by the Constitution and laws required and expected to perform.”); *Wilcox v. Jackson*, 38 U.S. 498, 513 (1839) (“Now although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.”).

127. WOOD, *supra* note 58, at 79, 143.

128. *Freytag v. Comm’r of Internal Revenue*, 501 U.S. 868, 883–84 (1991).

129. See, e.g., *Free Enter. Fund*, 130 S. Ct. at 3156 (“One can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts. Our Constitution was adopted to enable the people to govern themselves, through their elected leaders. The growth of the Executive Branch, which now wields vast power and touches almost every aspect of daily life, heightens the concern that it may slip from the Executive’s control, and thus from that of the people.”).

130. The likely vehicle would be a lawsuit brought under the APA. See, e.g., *Sackett v. EPA*, 132 S. Ct. 1367, 1371–72 (2012).

The Appointments Clause applies to any party who is an “Officer of the United States,”¹³¹ a term that includes anyone who exercises the power of the federal government.¹³² To ensure that such officers are properly chosen (and presumably properly vetted), the Appointments Clause channels the appointment power into three lanes.¹³³ The President, with the advice and consent of the Senate, can appoint so-called “superior officers,” such as the “Heads of Departments.” The President also can appoint so-called “inferior officers” in the same manner, but Congress can authorize the President to delegate this appointment power to one of his top lieutenants—the “Heads of Departments”—or Congress can grant that power to “the Courts of Law.”¹³⁴ Article II regulates the appointment process in order to ensure the parties are properly chosen before being given authority, to ensure that they can be removed if they abuse that authority or fail to exercise it well, and to ensure that someone can be held accountable for the appointment or failure to remove incompetent or unfaithful personnel.¹³⁵

By specifying the parties who may appoint agency officers, the Appointments Clause guarantees that only parties who have been properly appointed and vetted can exercise federal

131. See *supra* note 122.

132. See *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“[A]ny appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States’ and must, therefore, be appointed in the manner prescribed by [the Appointments Clause].”); see also *Edmond v. United States*, 520 U.S. 651, 662 (1997); *Weiss v. United States*, 510 U.S. 163, 168–70 (1994).

133. See *Freytag*, 501 U.S. at 880 (“The Appointments Clause prevents Congress from dispensing power too freely; it limits the universe of eligible recipients of the power to appoint.”); *Pub. Citizen v. U.S. Dep’t of Justice*, 491 U.S. 440, 483–84 & n.4 (1989) (Kennedy, J., concurring) (quoting THE FEDERALIST NO. 76, at 455–56 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

134. See U.S. CONST. art. II, § 2, cl. 2; see also *Edmond*, 520 U.S. at 661–66; *Freytag*, 501 U.S. at 882–83; *Morrison v. Olson*, 487 U.S. 654 (1988); *Go-Bart Import. Co. v. United States*, 282 U.S. 344, 352–53 (1931); *Burnap v. United States*, 252 U.S. 512, 516–17 (1920); *United States v. Germaine*, 99 U.S. 508, 511–12 (1879) (discussing the meaning of “Departments” and “Heads of Departments,” and the difference between “superior” and “inferior” officers).

135. See, e.g., *Printz v. United States*, 521 U.S. 898, 922–23 (1997); *Ryder v. United States*, 515 U.S. 177, 182 (1995); Paul J. Larkin, Jr. & Joseph Luppino-Esposito, *The Violence Against Women Act, Federal Criminal Jurisdiction, and Indian Tribal Courts*, 27 B.Y.U.J. OF PUB. L. 1, 17–20 (2012).

power.¹³⁶ In addition, the clause ensures that any official exercising federal power can be removed for misconduct, incompetence, or for other reasons.¹³⁷ The President appoints and removes federal officers, so the public can hold him accountable for the actions of his subordinates.¹³⁸

3. *Delegating Federal Lawmaking Authority to State Officers*

Occasionally, Congress may decide that it is preferable to define a term by reference to state common or statutory law, perhaps because the states have the primary authority over a particular field, such as property or marriage.¹³⁹ In those instances, Congress may defer to whatever law a state adopts on a subject by incorporating state law into federal law, however or whenever a state may define it. The result is that whatever rules a state adopts by its legislature, executive, or judiciary also will serve as federal rules.¹⁴⁰ A classic example is the Federal Assimilative Crimes Act. It adopts for federal enclaves whatever criminal offenses and penalties the surrounding state has authorized for prosecutions brought in its own courts.¹⁴¹ Another

136. See, e.g., *Freytag*, 501 U.S. at 880.

137. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3146–47 (2010). Statutes limit the President’s ability to remove officers at independent agencies, but even those acts permit for-cause removals. See EPSTEIN, *supra* note 60, at 275.

138. See U.S. CONST. amend. XXII.

139. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013) (“[R]egulation of domestic relations is an area that has long been regarded as a virtually exclusive province of the States”) (citation omitted) (internal quotations omitted). Some old Supreme Court decisions state that Congress cannot delegate federal lawmaking authority to the states. See *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164 (1920) (collecting cases). Neither Congress nor the Court seem to treat those cases as good law today.

140. Delegating federal lawmaking authority to a state, particularly a state court, is materially different from using a term that has an established meaning at common law. In the case of the latter, the rule of thumb is that the term should receive its common law meaning. See, e.g., *United States v. Shabani*, 513 U.S. 10, 13–14 (1994) (“conspiracy”); *United States v. Turley*, 352 U.S. 407, 411 (1957) (“stolen”). The common law meaning, however, may not always be the same one that Blackstone would have given it centuries ago; it may be the American common law meaning that was current when the statute became law. See, e.g., *Taylor v. United States*, 495 U.S. 575, 581–82 (1990) (“burglary”); *Bell v. United States*, 462 U.S. 356 (1983) (“larceny”); *Perrin v. United States*, 444 U.S. 37, 41–42 (1979) (“bribery”).

141. See 18 U.S.C. § 13 (2012) (“Whoever within or upon any of the places now existing or hereafter reserved or acquired as provided in [18 U.S.C. § 7 (2012)] of this

illustration is the Federal Tort Claims Act.¹⁴² That statute makes the federal government liable in damages for the torts of its employees in the same manner that a private party would be liable under state law.¹⁴³

Delegating lawmaking authority to the states is materially different from vesting that power in a federal agency. State voters elect the governor, who then appoints, and presumably can remove, senior state officials.¹⁴⁴ The President has no legal authority over either decision.¹⁴⁵ Indeed, the President is elected by a majority vote of the Electoral College, but the Electors of any one state could have cast their ballots for someone else.¹⁴⁶ Congress also has no control over state budgetary or taxing power.¹⁴⁷ Moreover, it is difficult to sue a state in federal or state court, even when the claim is that the state has violated federal law.¹⁴⁸

title, or on, above, or below any portion of the territorial sea of the United States not within the jurisdiction of any State, Commonwealth, territory, possession, or district is guilty of any act or omission which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State, Territory, Possession, or District in which such place is situated, by the laws thereof in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.”).

142. See 28 U.S.C. § 1346(b)(1) (2012) (The United States shall be liable for personal or property injuries “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.”); *id.* § 2674 (“The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.”).

143. See, e.g., *Molzof v. United States*, 502 U.S. 301, 305 (1992) (collecting cases).

144. See, e.g., VA. CONST. art. V, §§ 1–2 (creating the office of governor and requiring election to it); *id.* § 10 (granting the governor the right to appoint the heads of executive departments and agencies who “shall serve at the pleasure of the Governor”).

145. See *supra* note 83.

146. See U.S. CONST. amend. XII (establishing the Electoral College process for presidential elections).

147. Cf. U.S. CONST. art. I, § 7, cl. 1 (“All Bills for raising Revenue shall originate in the House of Representatives; but the Senate may propose or concur with Amendments as on other Bills.”).

148. See, e.g., U.S. CONST. amend. XI (“The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”); *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 67 (2000) (ruling that Congress, when exercising its enforcement powers under Section 5 of

Nonetheless, the proposition that states can exercise delegated federal lawmaking authority can be reconciled with the Framers' plan.¹⁴⁹ The Constitution created the federal government, but not the states.¹⁵⁰ The Colonies declared their independence during the American Revolution, they became independent sovereigns by virtue of the Treaty of Paris of 1783 ending that war, and they became states under the Articles of Confederation.¹⁵¹ Thus, the states predate the Constitution and draw their authority from their own charters, not the federal one.¹⁵² The ratification of a supermajority of states was necessary for the original Constitution to take effect¹⁵³ and remains necessary to enact amendments.¹⁵⁴ Although the Constitution

the Fourteenth Amendment, cannot abrogate a state's Eleventh Amendment immunity for claims of age discrimination); *Alden v. Maine*, 527 U.S. 706, 712 (1999) (ruling that Congress, when exercising its power under the Commerce Clause, U.S. CONST. art. I, § 8, cl. 3, cannot abrogate a state's immunity from suit in state court). *But see Ex parte Young*, 209 U.S. 123, 159–60 (1908) (ruling that the Eleventh Amendment does not bar an action against state officials claiming that they violated the federal constitution).

149. The Supreme Court has so held, although the Court's laconic opinion does not offer much of a defense of such a delegation. *See United States v. Sharpnack*, 355 U.S. 286, 286 (1958) (upholding the constitutionality of the Assimilative Crimes Act of 1948, 18 U.S.C. § 13 (1948) (amended 2012), which incorporates for federal enclaves crimes and punishments defined by state law).

150. *See* U.S. CONST. pmb1.

151. *See* Treaty of Paris, U.S.-Gr. Brit., Sept. 3, 1783, 48 C.T.S. 487; EPSTEIN, *supra* note 60, at 3; WOOD, *supra* note 58, at 131–33.

152. *See* *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 192–93 (1819) (“[I]t must be recollected that, previous to the formation of the new constitution, we were divided into independent States, united for some purposes, but, in most respects, sovereign. These States could exercise almost every legislative power, and, among others, that of passing bankrupt[cy] laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the states. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.”).

153. *See* U.S. CONST. art. VII (“The Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the Same.”).

154. *See* U.S. CONST. art. V (an amendment goes into effect only “when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress”).

places a few fields out of bounds for state governments¹⁵⁵ and forbids the states from denying citizens the opportunity to vote for certain specified reasons,¹⁵⁶ the Constitution does not regulate the state electoral or lawmaking processes.¹⁵⁷ The Constitution does not create state governments or their branches; it does not identify who may hold state office; and it does not establish or allocate state legislative, executive, or judicial authority. In fact, the history, text, and structure of the Constitution, as well as “the plan” of the Constitutional Convention,¹⁵⁸ implicitly prohibit the federal government from dictating to the states how the latter may establish and operate their own governments¹⁵⁹ (as long as they are republican in form¹⁶⁰), thereby recognizing that the states enjoyed a separate and independent sovereign status with a prerogative over

155. See U.S. CONST. art. I, § 10, cl. 1 (“No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.”). The Article VI Supremacy Clause also provides that federal law supersedes state law when the two conflict. See *id.* art. VI, cl. 2; *Arizona v. United States*, 132 S. Ct. 2492, 2500–01 (2012).

156. See U.S. CONST. amend. XIV (prohibiting a state from denying a party the equal protection of the law); *id.* amend. XV (prohibiting a state from denying the right to vote on the basis of race); *id.* amend. XIX (prohibiting a state from denying a person the right to vote on account of sex); *id.* amend. XXIV (prohibiting a state from denying the right to vote on the basis of non-payment of a poll tax); *id.* amend. XXVI (prohibiting a state from denying a person, eighteen years of age or older, the right to vote on the basis of age).

157. Federal separation of powers principles do not limit a state’s authority to structure its own government. See, e.g., *Sweezy v. New Hampshire*, 354 U.S. 234, 255 (1957) (plurality opinion); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Dreyer v. Illinois*, 187 U.S. 71, 84 (1902).

158. See *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 801 (1995) (“The ‘plan of the convention’ as illuminated by the historical materials, our opinions, and the text of the Tenth Amendment draws a basic distinction between the powers of the newly created Federal Government and the powers retained by the pre-existing sovereign States.”).

159. See *Printz v. United States*, 521 U.S. 898, 935 (1997) (holding that Congress may not conscript state officials to enforce federal law); *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 76 (1996) (ruling that Congress cannot abrogate a state’s Eleventh Amendment immunity by invoking its Article I powers); *New York v. United States*, 505 U.S. 144, 188 (1992) (holding that Congress may not direct the states to adopt a regulatory program); *Coyle v. Smith*, 221 U.S. 559 (1911) (ruling that Congress cannot select for a state the site of its capital).

160. See U.S. CONST. art. IV, § 4 (“The United States shall guarantee to every State in this Union a Republican Form of Government . . .”).

many areas of public and private law, authority that was not limited until the Reconstruction Era Amendments came into existence.¹⁶¹ Finally, with a few relatively small-scale exceptions,¹⁶² the Constitution does not require Congress to pass any legislation at all.¹⁶³ “[T]he Constitution assumes that the default position is the absence of federal intrusion into the lives of the public” and that “private contractual ordering, judicial common law decisionmaking, or state legislation will accomplish societal regulation.”¹⁶⁴

The bottom line is this: State officers are not the parties identified in Articles I and II responsible for enacting laws—Representatives, Senators, and the President. State officials also are neither the “principal Officer[s] in each of the executive Departments” mentioned in Article II nor the subordinate federal officials responsible for seeing that “the laws are faithfully executed.” But the Constitution as a whole expressly recognizes the pre-existing, independent sovereignty of the states, it presumes the fact and legitimacy of the rule that state law will serve as the primary vehicle for regulating private conduct, and it impliedly presupposes that state governments, in a manner akin to the federal government, will use state officers, whether executive personnel or courts, to implement the law, even federal law as need be, which by oath state officers are sworn to uphold.¹⁶⁵ The combination of those propositions makes it reasonable to con-

161. See *Fitzpatrick v. Bitzer*, 427 U.S. 445, 451–56 (1976) (holding that Congress may abrogate a state’s Eleventh Amendment immunity when legislating pursuant to the authority granted Congress by Section 5 of the Fourteenth Amendment); *South Carolina v. Katzenbach*, 383 U.S. 301, 324–26 (1966) (holding that Congress may limit state sovereignty over voting by virtue of its enforcement authority under Section 2 of the Fifteenth Amendment); *Ex parte Virginia*, 100 U.S. 339, 344–48 (1879) (noting that the Fourteenth Amendment limits state sovereignty).

162. The only examples of required congressional legislation are the duties to authorize a decennial census, to enumerate the number of representatives, to maintain a journal of proceedings, and to pay the President and federal judges. See U.S. CONST. art. I, § 2, cl. 3; *id.* § 5, cl. 3; *id.* art. II, § 1, cl. 7; *id.* art. III, § 1.

163. See *Larkin*, *supra* note 67, at 262.

164. *Id.* at 263 (italics omitted).

165. See U.S. CONST. art. VI, cl. 3 (“The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.”).

clude that giving states authority to define and implement federal law is not so far beyond “the plan” of the Constitutional Convention as to render that delegation unconstitutional.

III. THE CONSTITUTIONAL ISSUES RAISED BY THE LACEY ACT’S DELEGATION OF FEDERAL LAWMAKING AUTHORITY

The federal lawmaking power involves an interplay of the provisions in Articles I and II. There is no law for an executive branch official to enforce until Congress and the President combine to enact one, and there is no one other than the President to enforce the laws so enacted until the President appoints them. Whether one treats federal “law” as being made by elected or appointed officials, both categories of people must work together for it to come into being.¹⁶⁶ The question, then, is, how does the lawmaking function contemplated by the Lacey Act comport with those requirements? Not so well it turns out.

The delegation accomplished by the Lacey Act fits into neither of the categories discussed above. Foreign nations do not elect Senators and Congressmen to Congress, nor do they choose electors for President. Instead, they send “Ambassadors and other public Ministers” to America.¹⁶⁷ Foreign nations do not pass laws for governance of this nation. Instead, with the cooperation of the President, they make treaties.¹⁶⁸ Foreign nations, unlike

166. The same principle applies if one wants to include the federal courts in the lawmaking process on the grounds that the courts make law interstitially by interpreting statutes in order to resolve disputes. See *S. Pac. Co. v. Jensen*, 244 U.S. 205, 221 (1917) (Holmes, J., dissenting) (courts make law, but only by “molar to molecular motions”).

167. See U.S. CONST. art. II, § 3 (“[The President] . . . shall receive Ambassadors and other public Ministers . . .”).

168. See U.S. CONST. art. II, § 2, cl. 2 (“[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur.”). The trend over the last century is for the nation to enter into non-self-executing treaties. See, e.g., Curtis A. Bradley, *International Delegations, the Structural Constitution, and Non-Self-Execution*, 55 STAN. L. REV. 1557, 1588–91 (2003) (non-self-executing treaties “do not create enforceable federal law” in the United States until implemented by Congress). That is particularly true where the treaty purports to create a federal crime. See *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979); Bradley, *supra*, at 1590 (“For somewhat different reasons (relating to notice and the Supreme Court’s rejection in the early 1800s of a federal common law of crimes), it has generally been assumed that treaties calling for the criminalization

states, do not require their officials to swear allegiance to our Constitution—and, even if they did, the oath would have no importance for purposes of federal law. Accordingly, as far as our Constitution is concerned, foreign officials stand in the same position as private parties. In fact, because they (presumably) swear allegiance to their own constitutions, foreign officials actually occupy a *worse* position. Thus, there is a serious question whether Congress may delegate *any* domestic lawmaking authority to foreign government officials. Several defendants have challenged the constitutionality of the act on just that ground.¹⁶⁹

The federal government's response to that claim has been straightforward. Congress has made the relevant policy judgments itself and therefore has done all that Article I requires. Congress has decided that this country will respect the laws of foreign countries governing the management of flora and fauna within their borders. Congress has chosen to manifest its deference by enacting a statute making it a federal offense to import a product (for example, timber) obtained in violation of a foreign nation's rules, even if those products arrive in this nation in a processed form (for example, furniture). Article I requires no more, as the federal circuit courts have uniformly ruled.¹⁷⁰ The only issue open for dispute in any particular case is not the policy question of how domestic import law should be crafted, but rather the purely factual question of whether a defendant violated a foreign law. That factual issue, however, is not materially different from any of the other factual questions that our criminal justice system

of conduct are non-self-executing—that is, they do not themselves create criminal liability within the United States.”).

169. See *infra* note 170.

170. See *United States v. Rioseco*, 845 F.2d 299, 302 (11th Cir. 1988) (“Congress has made it a United States crime to take, to sell, or to transport wildlife taken in violation of any foreign law relating to wildlife. Congress, itself, has set out the penalties for violation of these Lacey Act provisions. Thus, Congress has delegated no power, but has itself set out its policies and has implemented them.”) (citations omitted); *cf.* *United States v. Molt*, 599 F.2d 1217, 1219 n.1 (3d Cir. 1979) (ruling that the Lacey Act treats the violation of a foreign law as “simply a fact entering into the description of the contraband article”; “[t]he Act does not delegate legislative power to foreign governments, but simply limits the exclusion from the stream of foreign commerce to wildlife unlawfully taken abroad. The illegal taking is simply a fact entering into the description of the contraband article”); *United States v. 594,464 Pounds of Salmon*, 871 F.2d 824, 830 (9th Cir. 1989) (ruling that a foreign law violation is not an element of the offense, but is simply a matter for the government to consider in its exercise of prosecutorial discretion).

directs the jury to resolve. The Lacey Act looks different today than it did when Congress passed the original version of the statute in 1900 because it makes a larger scope of conduct a federal crime, but the purpose of the statute is the same—to declare that you violate a different sovereign’s law at your peril.¹⁷¹

From a distance, that response looks formidable. But up close it falls apart. On the one hand, if Congress cannot delegate legislative authority without providing the recipient and the courts some “intelligible principle”¹⁷² to guide and by which to review its proper use, then the Lacey Act violates whatever remains of the Article I nondelegation doctrine. The reason is that the Act articulates no principle whatsoever, intelligible or otherwise, for foreign officials to use in determining how to exercise their delegated authority. On the other hand, if Professors Posner, Vermeule, and Merrill are right that Congress can delegate lawmaking authority elsewhere, then the Article II Appointment Clause stands front and center.¹⁷³ The threshold question in every case involving delegated congressional authority is whether the responsible official may exercise the power of the office that he or she holds, and compliance with the Appointments Clause is a necessary element of any affirmative answer.¹⁷⁴ That creates a fatal problem for the Lacey Act because foreign government officials are not appointed consistently with that clause.

A. Article I Problems With the Lacey Act

1. The “Intelligible Principle” Requirement

In every Lacey Act prosecution, the government must prove that a defendant acted “in violation . . . of any foreign law,”¹⁷⁵ which makes the meaning and reach of a foreign nation’s laws an essential element of the government’s proof. Yet, the Act does not identify a category of subjects from which a foreign nation must pick in selecting predicate laws, nor does it specify a list of factors that a foreign official must weigh in making that

171. See *supra* note 40.

172. See, e.g., *J.W. Hampton v. United States*, 276 U.S. 394, 409 (1928).

173. See Posner & Vermeule, *supra* note 109; Merrill, *supra* note 110.

174. See *supra* note 132.

175. See *supra* note 40.

determination. The Act does not instruct foreign governments how to legislate, what to protect, or what their “laws” must be. Indeed, the Lacey Act does not contain even such a minimum standard as the “public convenience and necessity”¹⁷⁶ or the “safety, health, and welfare of the public”¹⁷⁷ against which a federal court can evaluate a foreign nation’s law. Perhaps Congress did not want to play the role of the “Ugly American” by dictating to foreign nations what their laws should be to avoid any appearance of superiority, chauvinism, or condescension on our part. So Congress let every foreign nation make that choice for itself without any limitation or guidance. The text of the act makes clear that “any” foreign “law” will do.¹⁷⁸ But the result is that the Lacey Act articulates *no category, no factors, and no principle* at all, intelligible or otherwise.

To be sure, Congress has made the policy judgment that it should be a violation of our domestic law to violate someone else’s domestic law, but giving foreign governments fill-in-the-blank authority for one of our domestic laws is tantamount to making a categorical exception to the Article I Bicameralism and Presentment rules. The text of the Constitution contains no such exception; the “plan of the Convention” does not presume or envision a non-textual exception for cases like this one; and the Supreme Court’s decisions do not justify creating one. Even if a plausible argument could be made for implying another exception to the lawmaking requirements of Article I, allowing foreign government officials to define crimes under domestic American law would lie beyond any reasonable case that could be made for it. What would the Framers have said if someone had proposed just such an exception? They likely would have politely replied, “Thank you, but we just fought a war to obtain the right to rule ourselves, and we’d like to try that instead.”¹⁷⁹ How, then, could such an exception be justified today?

Good question. Consider some of the problems posed by vesting absolute lawmaking power to define federal criminal law in the hands of foreign officials who may be used to governing in a

176. *See id.*

177. *See id.*

178. *See id.*

179. I leave to the reader’s imagination the impolite replies that the Framers might have uttered.

foreign system for people who may live in a culture with vastly different legal and social expectations.

*a. Laws Imposing Criminal Liability
Must Be Readily Available to the Public*

The Constitution requires that the government notify the public what is and is not a crime.¹⁸⁰ Aside from the requirement that a criminal law exist, perhaps the most elementary notice requirement is that a criminal statute be readily available to the public. A hidden criminal law, like the laws of Caligula¹⁸¹ or the “double secret probation” imposed on the Delta Tau Chi House,¹⁸² offers no greater notice of what is prohibited than a law that is applied retroactively or that does not exist at all.¹⁸³

Congress does not ordinarily take any special steps to ensure that residents know what offenses are listed in the penal code. Publication in the United States Code is sufficient to satisfy due process.¹⁸⁴ Even formal publication is an imperfect means of achieving actual notice of the criminal law,¹⁸⁵ but we generally

180. See U.S. CONST. amend. V.

181. See *Screws v. United States*, 325 U.S. 91, 96 (1945) (plurality opinion) (“To enforce such a [vague] statute would be like sanctioning the practice of Caligula who ‘published the law, but it was written in a very small hand, and posted up in a corner, so that no one could make a copy of it.’”); 1 WILLIAM BLACKSTONE, COMMENTARIES *46 (noting that Caligula “wrote his laws in a very small character, and hung them up upon high pillars, the more effectually to ensnare the people.”).

182. See NATIONAL LAMPOON’S ANIMAL HOUSE (Universal Pictures 1978).

183. See 5 JEREMY BENTHAM, WORKS 547 (1843) (“We hear of tyrants, and those cruel ones: but, whatever we may have felt, we have never heard of any tyrant in such sort cruel, as to punish men for disobedience to laws or orders which he kept them from the knowledge of.”); Livingston Hall & Selig J. Seligman, *Mistake of Law and Mens Rea*, 8 U. CHI. L. REV. 641, 650 n.39 (1940) (“[W]here the law was not available to the community, the principle of ‘nulla poena sine lege’ comes into play . . .”).

184. See *United States v. R.L.C.*, 503 U.S. 291, 309 (1992) (Scalia, J., concurring in part and concurring in the judgment, joined by Kennedy & Thomas, II.) (“It may well be true that in most cases the proposition that the words of the United States Code or the Statutes at Large give adequate notice to the citizen is something of a fiction, . . . albeit one required in any system of law . . .”); John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 207 (1985) (“Publication of a statute’s text always suffices; the government need make no further effort to apprise the people of the content of the law.”).

185. See Jeffries, *supra* note 184, at 207 (“In the context of civil litigation, where notice is taken seriously, publication is a last resort; more effective means must be employed wherever possible. It may be objected that no more effective means is

accept that codification is sufficient by virtue of the belief that everyone is conclusively presumed to know the criminal law.¹⁸⁶ The problem, however, is that this presumption is no longer always a sensible one. That proposition was reasonable at common law, when there were only nine felonies, and each one reflected the contemporary moral code.¹⁸⁷ Today, however, there are thousands of crimes, and many do not involve the same type of harmful, dangerous, or morally blameworthy conduct that society can reasonably expect everyone to know. The result is that, today, the common law no-mistake rule is—to be kind—a fiction.¹⁸⁸

Whatever may be the validity of that presumption for purposes of domestic American criminal law, it is wholly unrealistic to assume that Americans know foreign law.¹⁸⁹ Foreign codes may

possible where the intended recipient of the information is the entire populace or some broad segment thereof, rather than an identifiable individual or entity. But this argument at most explains why publication should sometimes suffice; it does not explain why no further obligation is ever considered. Nor does it explain why publication in some official document, no matter how inaccessible, is all that is required.”) (footnotes omitted).

186. See Meese & Larkin, *supra* note 54, at 726–27 n.11–15 (collecting authorities).

187. See, e.g., LAFAVE, *supra* note 19, § 1.2(f); JOHN SALMOND, JURISPRUDENCE 427 (8th ed. 1930) (“The common law is in great part nothing more than common honesty and common sense. Therefore although a man may be ignorant that he is breaking the law, he knows very well in most cases that he is breaking the rule of right.”); see also THEODORE F. T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 442–54 (5th ed. 1956) (discussing common law felonies); Hall & Seligman, *supra* note 183, at 644 (“[T]he early criminal law appears to have been well integrated with the mores of the time, out of which it arose as ‘custom.’”).

188. I have discussed elsewhere why that proposition was reasonable at common law but is unreasonable and dishonest today. See Larkin, *supra* note 19, at 778–79; Paul J. Larkin, Jr., *A Mistake of Law Defense as a Remedy for Overcriminalization*, 28 A.B.A. J. CRIM. JUST. 10 (Spring 2013); Meese & Larkin, *supra* note 54.

189. See John O. McGinnis, *The Comparative Disadvantage of Customary International Law*, 30 HARV. J.L. & PUB. POL’Y 7, 11 (2006) (“[S]ocial science unsurprisingly suggests that average Americans have a poorer understanding of what happens in Geneva and other foreign places than of what happens in Washington, D.C.”); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 557–58 (2000) (footnotes omitted) (“[I]n the domestic context, citizens often remain rationally ignorant about regulatory developments. Information about agency action is difficult to obtain, and citizens have other projects to pursue. Average citizens would find the workings of an international body even more remote and opaque and would have even fewer opportunities for oversight.”). Proof of that proposition can be seen in the decision of the U.S. Court of Appeals for the Fifth Circuit in *Iracheta v. Holder*, 730 F.3d 419 (2013). In reviewing a removal order issued by the Department of Homeland Security against Iracheta, the Fifth Circuit noted that for thirty-five years the federal government had relied on a nonexistent provision of the

not always reflect American law or morals, so there is no justification for presuming that domestic residents will know foreign laws by heart. That is particularly true for regulatory crimes. It is reasonable to presume that everyone knows that it is illegal to murder, rape, or rob in any country. But it is unreasonable to presume that everyone knows the difference, even under domestic law, between the lawful storage of “recyclable materials” and the unlawful storage of “hazardous waste.”¹⁹⁰ If so, it is altogether unreasonable to presume that everyone knows what that difference is for purposes of the laws of every other country.

Finding foreign law may also be difficult. Foreign nations may not make all of their laws public, whether in a printed code accessible in a domestic library or via the Internet.¹⁹¹ Foreign governments also may feel no obligation to keep the codification of their laws current, and, if they enact criminal statutes at the same rate as Congress, any codification can become incomplete rather quickly.¹⁹²

Having access to an up-to-date copy of every foreign nation’s statutes, moreover, may not be sufficient. Congress often empowers agencies to define crimes and terms in criminal statutes via regulations.¹⁹³ Other nations may grant their departments similar rulemaking power, but their agencies may not publish

Mexican Constitution. *Id.* at 423–24 (“In Saldana’s case and in others, DHS has relied on the proposition that Article 314 of the Constitution of Mexico provides that children born out of wedlock may be legitimated solely by the subsequent marriage of their parents. . . . At oral argument, however, the government conceded that Article 314 of the Constitution of Mexico does not exist and never did.”) (citations omitted).

190. See Paul J. Larkin, Jr., *Strict Liability Offenses, Incarceration, and the Cruel and Unusual Punishments Clause*, 37 HARV. J.L. & PUB. POL’Y 1065, 1088–89 (2014).

191. See Richard A. Posner, *The Supreme Court, 2004 Term—Foreword: A Political Court*, 119 HARV. L. REV. 31, 86 (2005) (“[T]he judicial systems of the United States are relatively uniform and their product readily accessible, while the judicial systems of the world are immensely varied and most of their decisions inaccessible as a practical matter to our mostly monolingual judges and law clerks.”).

192. See, e.g., Brian W. Walsh & Tiffany M. Joslyn, *Without Intent: How Congress is Eroding the Criminal Intent Requirement in Federal Law*, HERITAGE FOUND. ix-x (2010), https://s3.amazonaws.com/thf_media/2010/pdf/WithoutIntent_lo-res.pdf [<http://perma.cc/6K3Y-HZLD>] (discussing the number of criminal statutes enacted during the 109th Congress).

193. See, e.g., *United States v. Grimaud*, 220 U.S. 506, 516–17 (1911) (Congress may authorize an administrative agency to promulgate regulations whose violation is a federal offense); Larkin, *supra* note 19, at 724 n.30 (regulations may flesh out statutory schemes).

regulations in their version of the Federal Register or Code of Federal Regulations (assuming that they have one at all). But if notice is to be complete, foreign regulations that define terms in a statute must be as available as the statute itself.

There is more. Federal government officials responsible for implementing domestic statutory programs often construe relevant acts of Congress and agency regulations in publicly issued “guidance documents” or “compliance manuals,” as well as in internal memoranda.¹⁹⁴ Interpretations that have not been promulgated as regulations do not have the same legal status as agency rules, of course, but they still may have considerable legal effect. An agency’s construction of its own regulations is generally deemed controlling on the courts unless that interpretation is unconstitutional or contrary to the plain text of the rule itself.¹⁹⁵ An agency’s interpretive memoranda that are not publicly available are tantamount to a form of “secret” or “underground” law.¹⁹⁶ If foreign officials have the power to offer binding interpretations of their laws and rules, those interpretations also must be available to the public in order for notice to be complete.¹⁹⁷ Nothing in the Lacey Act, however, guides a foreign government how it must enact statutes, promulgate

194. See John D. Graham & Cory R. Liu, *Regulatory and Quasi-Regulatory Activity Without OMB and Cost-Benefit Review*, 37 HARV. J.L. & PUB. POL’Y 425, 426–30 (2014); Stuart Shapiro, *Agency Oversight as “Whac-a-Mole”: The Challenge of Restricting Agency Use of Nonlegislative Rules*, 37 HARV. J.L. & PUB. POL’Y 523, 527–28 (2014). Two of the foreign laws at issue in the Gibson Guitar case—“Departmental Memorandum 001/06/MINENVEF/Mi” and “Madagascar Interministerial Order 16.030/2006”—may have been just such documents. See *supra* note 51.

195. See *Gonzales v. Oregon*, 546 U.S. 243, 255–58 (2006); *Auer v. Robbins*, 519 U.S. 452, 461–62 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 417–19 (1945).

196. See Kathleen F. Brickey, *Environmental Crime at the Crossroads: The Intersection of Environmental and Criminal Law Theory*, 71 TUL. L. REV. 487, 502–03 (1996); Meese & Larkin, *supra* note 54, at 743 n.100.

197. For example, in the Gibson Guitar case, the federal government noted that in 2008 Madagascar compiled an inventory of harvested ebony and rosewood and granted what was termed “exceptional authority” to “specific forest operators to export specific quantities of ebony logs and rosewood pieces and logs.” GIBSON GUITAR DPA, *supra* note 51, at 7 (citing Interministerial Order 003/2009). An “R.T.” had authority to export “pieces of rosewood,” but not “ebony logs.” *Id.* “R.T.” was a “forestry operator” who sold wood to a “T.N. GMBH, a company based in Hamburg, Germany,” which, in turn, sold the wood to Gibson. *Id.* at 6. How Gibson was expected to know any limitation placed on “R.T.” is far from clear.

regulations, or interpret its laws in a manner that satisfies the requirement that they be available to the American public.¹⁹⁸

Finally, since the New Deal the Supreme Court has often treated agencies as quasi-courts even with respect to their interpretation and application of acts of Congress. In 1929 and 1932, respectively, the Court held in *Ex parte Bakelite Corp.*¹⁹⁹ and *Crowell v. Benson*²⁰⁰ that Congress may delegate to an agency the authority to adjudicate claims arising under a federal statute²⁰¹ even though the agency decisionmaker's factual findings were not subject to de novo review in federal court,²⁰² and even when the agency acted as prosecutor and decisionmak-

198. Erwin Griswold's complaint about the inability to find New Deal-era federal regulations could just as easily be true for foreign nations today:

[W]hat do we find as to the form of that most important group of legislative pronouncements, the administrative rules and regulations? It seems scarcely adequate to say that what we find is chaos. If a pamphlet is discovered which purports to contain the rules and regulations in question, there is no practicable means of telling whether the entire regulation or the article in question is still in force, or, as is so often the case, has been modified, amended, superseded, or withdrawn. There is no feasible way of determining whether or not there has been any subsequent rule or order which might affect the problem. The rules and regulations are most often published in separate paper pamphlets. Many of them, including most of the Executive Orders of the President, are printed on a single sheet of paper, fragile and easily lost. An attempt to compile a complete collection of these administrative rules would be an almost insuperable task for the private lawyer. It seems likely that there is no law library in this country, public or private, which has them all. Even if a complete collection were once achieved, there would be no practicable way of keeping it up to date, and the task of finding with requisite accuracy the applicable material on a question in hand would still often be a virtual impossibility. The officers of the government itself frequently do not know the applicable regulations. We have recently seen the spectacle of an indictment being brought and an appeal taken by the government to the Supreme Court before it was found that the regulation on which the proceeding was based did not exist.

Erwin Griswold, *Government in Ignorance of the Law — A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 204 (1934) (footnotes omitted).

199. 279 U.S. 438, 440–41, 451–52 (1929).

200. 285 U.S. 22, 45–51 (1932).

201. *Bakelite* involved a proceeding under the customs laws. 279 U.S. at 446. *Crowell* involved a federal workers' compensation act for longshoremen. 285 U.S. at 36.

202. See *Crowell*, 285 U.S. at 45–54, 63–65. The Court did reserve the question whether Congress could permit agencies to issue a final ruling on factual questions related to an agency's jurisdiction or to a constitutional claim. See *id.* at 54–60.

er.²⁰³ The decisions in *Bakelite* and *Crowell* are still good law. With a few exceptions involving claims arising under state law,²⁰⁴ the Court has upheld Congress's decisions to grant agencies adjudicative authority.²⁰⁵ Moreover, the Supreme Court has even held that an agency's interpretation of a statute it is entrusted to administer is entitled to deference from the courts. Beginning with the Court's 1984 decision in *Chevron U.S.A. Inc. v. NRDC*,²⁰⁶ the rule has been that whenever Congress vests an agency with authority to enforce a particular federal program, unless Congress itself has resolved the meaning of a relevant statutory provision, Congress is presumed to have permitted the agency to interpret the statute in order to make it work. The courts must defer to the agency's reasonable interpretation of the program it is responsible for implementing.²⁰⁷ The result is that, under federal law, agencies can make law in adjudicative proceedings when construing a statute, regulation, or nonlegislative rule. Under the Lacey Act, any foreign government may do the same even if the government official's interpretation cannot readily be found.

203. The Supreme Court has permitted federal agencies, such as the Federal Trade Commission, to initiate enforcement actions against private parties despite the fact that the agency is also the decisionmaker. Even if judicial review is ultimately available, private parties must slog through whatever process the agency has adopted before it reaches a final judgment challengeable in court. *See, e.g.,* *FTC v. Standard Oil Co.*, 449 U.S. 232, 244–45 (1980) (refusing to permit judicial review of an agency's filing of an administrative complaint on the ground that the complaint is not final agency action). The effect is to grant federal agencies not only the same enforcement discretion that the Executive Branch has long enjoyed, *see, e.g.,* *Confiscation Cases*, 74 U.S. 454, 457 (1868), and the power to adopt substantive rules and policies with the same force and effect as an act of Congress, *see, e.g.,* *Chrysler Corp. v. Brown*, 441 U.S. 281, 295 (1979) (describing agency regulations as having “the force and effect of law”), but also the same interpretive authority traditionally enjoyed by courts, *see, e.g.,* *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001) (describing the authority that federal agencies have to construe statutes and regulations).

204. *See, e.g.,* *Stern v. Marshall*, 131 S. Ct. 2594, 2608–20 (2011) (holding unconstitutional under Article III a federal statute granting bankruptcy court the authority to adjudicate state law counterclaims); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87 (1982) (state law contract issues).

205. *See, e.g.,* *Comm. Futures Trading Comm'n v. Schor*, 478 U.S. 833, 857 (1986).

206. 467 U.S. 837 (1984).

207. *See id.* at 842–45.

b. *Laws Imposing Criminal Liability
Must Be Written in English*

Being able to find a foreign statute, regulation, nonlegislative rule, or agency decision is just the first step. A law exposing someone to criminal liability must be written in terms that satisfy two related requirements: (1) it must enable “a person of ordinary intelligence” to readily understand what it means and (2) such a person must be able to do so without legal training or advice.²⁰⁸ The second requirement is no less important than the first. A criminal statute must be understandable by “ordinary people”²⁰⁹ or by “a person of ordinary intelligence,”²¹⁰ not simply by lawyers, law professors, judges, or experts in foreign or international law.²¹¹ A law is unconstitutionally vague if it “fails to give a person of ordinary intelligence”—not an import-export expert or a linguist—“fair notice that his contemplated conduct is forbidden by the statute.”²¹²

To satisfy that requirement, Congress writes federal laws in English. English was “the same language” spoken by the “people” at the founding,²¹³ it is the language used by the Constitution, and it remains the mother tongue in the United States today. Foreign countries similarly use whatever language is native to their own lands. Sometimes that will be English, but not always. Variety abounds.

That is perfectly reasonable when the issue before a legislature is deciding what language to use when legislating for domestic law enforcement purposes. Each one will use whatever language best notifies its residents of what the law demands. But it would be perfectly unreasonable for any legislature to expect that residents or travelers will be fluent in every world

208. See *United States v. Harriss*, 347 U.S. 612, 617 (1954) (“The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.”); Larkin, *supra* note 19, at 779 n.275.

209. See, e.g., *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”).

210. See, e.g., *United States v. Williams*, 553 U.S. 285, 304 (2008) (“a person of ordinary intelligence”).

211. See Larkin, *supra* note 75, at 18.

212. *Harriss*, 347 U.S. at 617.

213. See THE FEDERALIST NO. 2, at 32 (John Jay) (Clinton Rossiter ed., 1961).

language. It would be absurd for American criminal law to require someone in this country to know German, Hungarian, Chinese, Vietnamese, Pashtu, and the scores of other languages and dialects used around the world on pain of domestic criminal liability for violating a law written in one of those languages. Anglo-American criminal law never has required parties in this country to know *any* let alone *all* of those languages to avoid criminal liability for engaging in facially legitimate conduct. It may or may not be reasonable for a state to compel English to be used as the only language for all domestic legal purposes.²¹⁴ But since English is the language predominantly used in this nation and criminal laws must be written in terms understandable to the average person, it is unreasonable for a legislature to subject parties to criminal liability for failing to comply with legal requirements written in a foreign language. If English language terms such as “annoying” are too vague to satisfy due process requirements,²¹⁵ they are no more understandable when written in Urdu as “شانیر” or in computer code as a series of “0s” and “1s.”²¹⁶

c. Laws Imposing Criminal Liability Must Be Readily Understandable by the Average Person

An additional requirement is that a foreign law must be identifiable as a “law.” Yet, foreign nations may define their “law” to embrace edicts with no parallel or counterpart in our legal system. “Law” in the United States refers to constitutions, statutes, ordinances, regulations, judicial decisions, and executive branch interpretations of one or more rules.²¹⁷ Different parties adopt each different type of law. The public has the ultimate power to revise the constitution, federal or state, which

214. See *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (rejecting a federal statutory challenge to a state policy to offer drivers’ licenses examinations only in English).

215. See *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) (holding “annoying” unconstitutionally vague).

216. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863, 871 (1930) (“A statute made in Latin at the present time is no statute, although the intention of the legislature can be as well or as ill made out from Latin as from English.”).

217. See, e.g., OHIO STATE BAR ASSOCIATION, *THE LAW & YOU: A LEGAL HANDBOOK FOR OHIO CONSUMERS AND JOURNALISTS* 1 (14th ed. 2012).

charters those governments.²¹⁸ Legislatures enact statutes. Executive officials promulgate regulations and, formally or informally, interpret statutes and regulations.²¹⁹ Finally, courts interpret all of the above when necessary to resolve a dispute²²⁰ and can hold one or more of them invalid if necessary.²²¹ There also is a clear ordinal relationship in this country for the weight given to the various types of domestic laws. The Constitution enjoys the preeminent role, followed by federal statutes and treaties, agency regulations, (sometimes) agency policy statements, and state counterparts of the above rules, followed by municipal versions.²²²

Foreign nations may approach the lawmaking function in a different manner. They may have fewer, more, or different ways of creating law, or they may give different weights to the types of law that their authorized entities can produce. They may treat the violation of a national custom as a crime even if no other land criminalizes that conduct. Their courts may resolve disputes, but their decisions may not have precedential value.²²³ That possibility greatly complicates the problem that someone would have in knowing what may and may not be done overseas. It makes necessary familiarity with the text and interpretations of foreign laws, the legal and political organization that a

218. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (“This original and supreme will [the Constitution] organizes the government, and assigns, to different departments, their respective powers.”).

219. See, e.g., *Decker v. Nw. Envl. Def. Ctr.*, 113 S. Ct. 1326, 1337 (2013) (discussing an agency’s interpretation of its own regulations); *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (discussing the legal effect of an agency’s interpretation of a statute); *United States v. Mead Corp.*, 533 U.S. 218, 227–29 (2001) (comparing the two doctrines).

220. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 177. In some instances, Article III officials can issue rules that can resemble an executive branch regulation or an interpretive opinion. See, e.g., *Stinson v. United States*, 508 U.S. 36, 41 (1993) (U.S. Sentencing Comm’n Policy Statements); *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (U.S. Sentencing Comm’n Sentencing Guidelines).

221. See, e.g., *Marbury*, 5 U.S. (1 Cranch) at 180 (“[T]he particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that *courts*, as well as other departments, are bound by that instrument.”) (emphasis in original).

222. See U.S. CONST. art. VI, cl. 2.

223. See *Dorf*, *supra* note 79, at 159 (“civil law jurisdictions have long functioned without a formal notion of precedent”).

foreign nation uses to promulgate or interpret its own law, and the customs that fill out its rules of conduct.²²⁴ The result could be an inordinate amount of complexity, far beyond what any person can be assumed to know.²²⁵

*d. Laws Imposing Criminal Liability
Must Be Fixed and Precise*

A further complication arises because of the subject of the Lacey Act: the environment. Our Constitution is silent on environmental issues because that subject was not a concern when our nation was founded.²²⁶ The colonial economy was based on agriculture or trade. Chlorofluorocarbons and polychlorinated biphenyls were not on the horizon. The Industrial Revolution changed all that. Pollution is an unfortunate, albeit unavoidable, consequence of modern manufacturing, and the law has developed in response.²²⁷ Numerous federal statutes and agency regulations address pollution emitted into the air, water, or land.²²⁸ A goodly number of foreign nations, however, have complicated the notice problem by addressing the environment in their own constitutions. As of 2006, the constitutions of sixty-three foreign

224. For a comprehensive analysis of constitutions adopted across the world, see, for example, David S. Law & Mila Versteeg, *The Declining Influence of the United States Constitution*, 87 N.Y.U. L. REV. 762 (2012).

225. See ELIAS, *supra* note 43, at 5 (foreign nations may have “complex systems for legal timber extraction [that] motivate working around them,” and timber companies “operate in countries that often have conflicting and inconsistent laws”); Saltzman, *supra* note 17, at 6 (“Another distinctive characteristic of the timber market is the complicated set of foreign laws to which it is subject. Laws governing timber and logging often include forest management schemes that can be difficult for foreign companies to monitor. Indonesia, for example, has over nine hundred laws, regulations, and decrees that govern timber exploitation, transportation, and trade. The difficulty of determining one’s legal duties suggests that a prosecutor charging a due care violation, rather than focusing narrowly on the defendant company’s noncompliance with the foreign law at issue, should assess whether it was responsive to available information about ‘legality standards’ issued by the government in the country of origin and conservation ‘hot spots.’”).

226. See, e.g., Robert H. Bork & Daniel E. Troy, *Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce*, 25 HARV. J.L. & PUB. POL’Y 849, 889 (2002).

227. See Richard J. Lazarus, *Assimilating Environmental Protection into Legal Rules and the Problem with Environmental Crime*, 27 LOY. L.A. L. REV. 867, 882 (1994) (“[P]ollution is not unlawful per se: In many cases, some pollution is acceptable.”).

228. See, e.g., THE ENVIRONMENTAL LAW HANDBOOK (Thomas F. P. Sullivan ed., 2011) (canvassing the federal environmental laws).

nations guaranteed a right to a healthy environment.²²⁹ Twenty-nine constitutions have provisions safeguarding the right to enjoy the benefit of the country's natural resources, which could embrace national parks, monuments, and the like.²³⁰ Those provisions raise a host of potentially difficult interpretive issues.²³¹

The first issue involves the reach of foreign constitutions. All but one provision in our Constitution applies only to actions by the government, at the federal, state, or local level. The Thirteenth Amendment's ban on slavery and involuntary servitude is the one exception: it applies to private conduct as well.²³² Each of the remaining provisions requires "state action" before it is triggered.²³³ Other nations, however, may have no such state action requirement. They may use their constitutions in the same manner that we use statutes and regulations.²³⁴ The result is that the Lacey Act might incorporate prohibitions on conduct that would not be unlawful if done in this nation, because only private parties are involved.

How the national constitution applies to the government in foreign nations also may differ from what Americans are accustomed to seeing. The United States has a federal system. The Constitution structures the national government, but not the states, which can create different frameworks.²³⁵ The Bill of Rights does not directly apply to the states, but the Supreme

229. See Law & Versteeg, *supra* note 224, at 773–74. tbl 1.

230. See *id.* The source does not indicate what, if any, overlap there is between countries with those rights.

231. A threshold issue could be what counts as a "constitution." Most foreign nations have a written charter, but a few do not. See A.E. Dick Howard, *A Traveler from an Antique Land: The Modern Renaissance of Comparative Constitutionalism*, 50 VA. J. INT'L L. 3, 12 (2009). England, for instance, has no written constitution and follows the principle of parliamentary supremacy. The result is that no English court can hold an act of Parliament unconstitutional, a position that would invoke outrage in many quarters of this nation, especially the judiciary. See ANNEMIEKE VAN VERSEVELD, *MISTAKE OF LAW: EXCUSING PERPETRATORS OF INTERNATIONAL CRIMES* 19–20 (2012).

232. See George Rutherglen, *State Action, Private Action, and the Thirteenth Amendment*, 94 VA. L. REV. 1367, 1367–68 (2008).

233. See *United States v. Morrison*, 529 U.S. 598, 621–22 (2000) (holding that the Constitution requires governmental action for its provisions to come into play).

234. Several countries also have constitutions that create positive rights, such as the right to education and a healthy environment. See Mila Versteeg, *Unpopular Constitutionalism*, 89 IND. L.J. 1133, 1147–48 & n.75 (2014); Law & Versteeg, *supra* note 224 at 773–74, 856–58 (list of all such rights).

235. See *supra* note 157.

Court has held that the Fourteenth Amendment Due Process Clause incorporates most of the guarantees in those first ten amendments.²³⁶ For most practical purposes, therefore, the public can reasonably conclude that the Constitution protects them against government overreaching, regardless of whether a federal, state, or local official is responsible. Foreign nations, however, may structure their national government in a manner that is quite unlike our tripartite national system and equally unfamiliar to an average person. In fact, few other countries have a federal system like our own.²³⁷ Foreign countries are free to select two, four, or more branches of government; in the case of a crown or dictatorship, just one branch. If the country is ruled by the military, a handful of generals may hold all of the power. Most foreign nations do not have a president and bicameral legislature like Congress. Most nations use a parliamentary form of government, which effectively combines the two branches into one that performs all three functions.²³⁸ That distribution can make it difficult to determine the weight to give to the decisions each branch makes. Moreover, a foreign nation can apply different rules to different government units.

236. See, e.g., *McDonald v. Chicago*, 130 S. Ct. 3020, 3034–35 & nn.12–13 (2010) (collecting cases so holding).

237. See Law & Versteeg, *supra* note 224, at 785–86 (“Federalism held considerable appeal to constitution makers in the early nineteenth century, and nowhere more so than in Latin America, where it was embraced by Argentina, Brazil, Chile, Uruguay, Venezuela, and Mexico, among others. Even at the peak of its popularity in the early twentieth century, however, only 22% of the world’s nations employed some form of federalism. Since that time, federalism has diminished in popularity. Following a significant decline in the inter-war period, the proportion of countries with a federal system recovered somewhat to about 18% in the immediate aftermath of World War II but has since stabilized at a mere 12%.”) (footnotes omitted).

238. See *id.* at 791–92 (“A similar fate has befallen another famous American constitutional innovation, that of presidentialism. Like federalism, presidentialism enjoyed early popularity in Latin America. Many of these early Latin American experiments with presidentialism degenerated into dictatorial rule, however, and these failures helped to give presidentialism itself a bad name and to discourage other nations from adopting similar systems . . . [T]he parliamentary model has consistently been the most popular of the three and is at present the choice of roughly half of the world’s democracies . . . [A]lthough presidentialism has enjoyed a slight resurgence since its nadir in the 1970s, it remains less widespread now than it was in the immediate aftermath of World War II. What has gained popularity over time, mainly at the expense of parliamentarism, is the mixed or semi-presidential model, which was widely adopted among the former Soviet bloc countries that emerged from communism in the 1990s.”) (footnotes omitted).

Some units may be free to engage conduct forbidden to others, making it difficult to know precisely what actions various officials may forbid or condone.

In the United States, our government is “a government of laws, and not of men,”²³⁹ and “[i]t is emphatically the province and duty of the judicial department to say what the law is.”²⁴⁰ Foreign nations may have their courts play a very different role. Americans take for granted that, if charged with a crime or civil violation, they can challenge the constitutionality of the relevant law in the court where they must stand trial.²⁴¹ Defendants prosecuted in other countries may have no such right.²⁴² Most, but not all, foreign constitutions authorize judicial review of legislation, although few use the particular form found in our Constitution.²⁴³ Some countries will have one entity that can speak authoritatively about the constitutionality of its own laws; others may not.²⁴⁴ Some foreign governments

239. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

240. *Id.* at 177.

241. See Randy E. Barnett, *The Separation of People and State*, 32 HARV. J.L. & PUB. POL'Y 451, 452–53 (2009) (noting that “[t]he written limits on the powers of government” imposed by our Constitution invite “the legal enforcement of these limits by an independent judiciary”) (emphasis not included).

242. See Law & Versteeg, *supra* note 224, at 795 (“A further distinction is routinely drawn between concrete review, which characterizes the American model, and abstract review, which typifies the European model. In a system of concrete review, courts decide constitutional questions in the course of ordinary litigation, as part of what Americans would call a case or controversy, whereas in a system of abstract review, the constitutionality of a law can be decided in the absence of a concrete, adversarial dispute and, indeed, before the law has even gone into effect.”) (footnotes omitted).

243. See *id.* at 766 (“Today, almost 90% of all countries possess written constitutional documents backed by some kind of judicial enforcement. As a result, what Alexis de Tocqueville once described as an American peculiarity is now a basic feature of almost every state.”) (footnotes omitted).

244. See *id.* at 794–95 (“The particular form of judicial review that has proven most popular, however, is not the form that was pioneered by the United States. Under the American model, the power of judicial review is vested in courts of general jurisdiction, which rule upon the constitutionality of government action as the need arises in the course of ordinary litigation. Under the European model, by contrast, the power to decide constitutional questions is exercised exclusively by a specialized constitutional court that stands apart from the regular judiciary.”). Americans also believe that the government cannot use against them illegally seized evidence or their own compelled testimony. Defendants prosecuted elsewhere know that this is not true. As far as remedies go, foreign nations may be far less solicitous of the rights of suspects than this nation. The Fourth Amendment exclusionary rule, for

may assign to different bodies authority over the same subject matter; others may grant one department the power to promulgate laws, to interpret them, and to enforce them.²⁴⁵ Some nations may incorporate international norms into their domestic law; others may not.²⁴⁶ Different branches or components within foreign governments may change their interpretations of their own laws over time, perhaps nullifying the effect of an earlier position, or perhaps not.

The problem of interpreting a foreign constitution is not limited to separation of powers and federalism issues. There are a host of other provisions one might expect in a constitution. Certainty and specificity are necessary for certain structural constitutional features—such as prerequisites to hold office²⁴⁷ and the length of an official's term²⁴⁸—so they will be relatively clear. Others will not. Some provisions enshrine guarantees with a well-understood meaning. The Sixth Amendment right to a trial²⁴⁹ and the ban on bills of attainder²⁵⁰ are examples. Yet,

example, is an American invention. America is the only nation that suppresses reliable evidence the police have unlawfully obtained. See *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 343–44 (2006).

245. In the Gibson Guitar case, three separate Malagasy ministries were involved in Interministerial Order 16.030/2006: the Ministries of the Environment, Water, and Forests, of the Economy, Finance, and Budget, and of Industrialization, Trade and Private Sector Development. See *GIBSON GUITAR DPA*, *supra* note 51, App. A, at 6.

246. See Law & Versteeg, *supra* note 224, at 840–41 (“[S]ome countries may be more susceptible to the influence of international models than others. For example, a country that revises its constitution frequently might be expected to have a constitution that is more in sync with the latest human rights treaties. Likewise, there are several reasons why a country that has actually ratified a treaty might be more inclined to incorporate the provisions of that treaty into its constitution than a country that has not ratified the treaty. (footnotes omitted).

247. See U.S. CONST. art. I §§ 2–3.

248. See U.S. CONST. art. I, § 2, cl. 1 (House members hold office for two years); U.S. CONST. art. I, § 3, cl. 1 (Senators hold office for six years); *id.* art. II, § 1, cl. 1 (the President holds office for four years); *id.* amend. XXII, § 1 (limiting the number of years that a person may hold office as President).

249. See U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .”). The trial process was both more informal in some respects and more rigid in others than the trials seen today. See WILLIAM SHARPE MCKECHNIE, *MAGNA CARTA: A COMMENTARY ON THE GREAT CHARTER OF KING JOHN WITH AN HISTORICAL INTRODUCTION* 82–91 (2d ed. 1914).

250. See U.S. CONST. art. I, § 9, cl. 3 (“No Bill of Attainder or ex post facto Law shall be passed.”). Bills of attainder were acts of Parliament that identified a specific person or group and retroactively imposed various “pains and penalties” on them,

even those provisions may evolve over time as society comes to place additional demands on the government before it can punish someone.²⁵¹ Other provisions may resemble the Fourth Amendment, whose principles are sufficiently flexible that they can apply to settings unimagined when it was adopted.²⁵² Some provisions are aspirational, like the ones in the Preamble to our Constitution, which identify goals toward which the nation will forever strive—a “more perfect Union,” “Justice,” “domestic Tranquility,” the “general Welfare,” and the “Blessings of Liberty.”²⁵³ Other features may have been so deeply absorbed into a foreign nation’s culture that they have become, for all practical purposes, obsolete. In our Constitution, the best example would be the Third Amendment, which forbids the quartering of soldiers in a person’s home in peacetime without his or her consent.²⁵⁴ That practice has been so universally and deeply recognized as offensive that neither the federal nor state governments have made any effort to violate it, leaving no trail of cases to define its contours.

It therefore may be impossible to know how to fully interpret a provision in a particular foreign constitution simply by reading its text. That is certainly true in this country. Constitutional interpretation may demand a knowledge of the meaning of its terms and related concepts contemporaneous with the document’s enactment, the history underlying a particular provision, the problem that a feature was designed to solve or avoid, the value choices that different provisions represent, related areas of law, and the relevant precedents.²⁵⁵ Yet, the enterprise is still a

including death, imprisonment, banishment, and confiscation of their property. *See, e.g.,* *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 473–74 (1977).

251. The conduct of a trial is quite different today than it would have appeared to a judge at the Old Bailey. *See* Meese & Larkin, *supra* note 54, at 730–33.

252. *See, e.g.,* *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (ruling that the use of a thermal imaging device to monitor heat radiation from a home is a “search” for Fourth Amendment purposes).

253. *See supra* note 10.

254. *See* U.S. CONST. amend. III (“No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.”).

255. *See, e.g.,* *California v. Hodari D.*, 499 U.S. 621, 624 (1991) (relying on nineteenth century dictionaries and judicial decisions to construe the Fourth Amendment term “seizure”). *See generally* Richard H. Fallon, Jr., *A Constructivist Coherence*

difficult one even when armed with that knowledge. After all, the First Amendment declares that “Congress shall make no law,” but everyone, lawyer or not, knows that it also limits what a state or local government can do,²⁵⁶ even when that does not involve passage of a “law.”²⁵⁷ The Fourth Amendment requires that “searches” and “seizures” be “reasonable” and that “warrants,” which can be issued only upon “probable cause,” must “particularly describ[e]” the place to be searched and persons or items to be seized.²⁵⁸ The average person might believe that those everyday terms can be readily understood without a law degree. In fact, it takes Professor Wayne LaFave, an expert on the subject of criminal procedure, six volumes to explain search and seizure law.²⁵⁹ That does not begin to address the problem of determining whether and how to pursue an “originalist” or “living constitution” approach to constitutional interpretation, or determine whether a precedent is or is not still “good law.”²⁶⁰ The hurdles that trained and experienced lawyers, professors, and judges must overcome when interpreting our Constitution would be even more difficult when the constitution grows out of

Theory on Constitutional Interpretation, 100 HARV. L. REV. 1189 (1987) (discussing the typology of different arguments made in constitutional interpretation).

256. See, e.g., *Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940) (ruling that the First Amendment Free Exercise Clause applies to the states); *De Jonge v. Oregon*, 299 U.S. 353, 354 (1937) (same, First Amendment Free Assembly Clause); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (same, First Amendment Free Speech and Free Press Clauses).

257. See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 596–98 (1972) (public school’s refusal to rehire a teacher due to the teacher’s exercise of his free speech rights); *Sherbert v. Verner*, 374 U.S. 398, 404–05 (1963) (state’s refusal to provide unemployment compensation benefits to a person fired for refusing to work on the Sabbath day of her faith); *Speiser v. Randall*, 357 U.S. 513, 518–19 (1958) (tax exemption to an organization for speech protected by the Free Speech Clause).

258. See U.S. CONST. amend IV (“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”).

259. See generally 1–6 WAYNE R. LAFAVE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* (4th ed. 2004).

260. For a small selection of the literature on that debate in this nation, see, for example, ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990); STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION* (2005); ORIGINALISM: A QUARTER-CENTURY OF DEBATE (Steven G. Calabresi ed., 2007); Symposium: *Originalism 2.0*, 34 HARV. J.L. & PUB. POL’Y 5 (2010).

a different legal, political, economic, and social background. Finally, add in this fact: Our Constitution, while amended on more than two dozen occasions, has remained in effect for more than 230 years. By contrast, foreign nations change their constitutions on average every nineteen years.²⁶¹ That adds an additional complexity into constitutional interpretation as it forces one to decide what effect, if any, an earlier version, earlier precedents, and the like might still have on the new charter.

Of course, some other nations have constitutions that resemble ours.²⁶² But it would be a mistake to assume that foreign nations read provisions the same way that we construe ours, or even that foreign countries treat their charters with the same reverence that we show to ours. We believe that a constitution should not only structure the government, but also should express the nation's historic principles and enduring values.²⁶³ Some provisions in foreign constitutions, however, may not even accurately reflect the consensus or majority view of the nation involved today.²⁶⁴ In fact, on occasion some constitutional provisions may be entirely unpopular with the public, even though they remain in the nation's fundamental law.²⁶⁵

261. See Thomas Ginsburg et al., *The Lifespan of Written Constitutions*, THE RECORD ONLINE (2009), <http://www.law.uchicago.edu/alumni/magazine/lifespan> [<http://perma.cc/QC9L-3F43>].

262. Of course, some foreign constitutions go further than ours by guaranteeing rights that have no counterparts in our own charter. See, e.g., GREVE, *supra* note 11, at 25 ("The [U.S.] Constitution is curiously silent about matters that are often regulated in great detail in modern constitutions."); Law & Versteeg, *supra* note 224, 773–74, 856–58 (identifying (inter alia) rights to work, education, life, to unionize or strike, a healthy environment, protection of one's reputation or honor, and consumer rights).

263. See Richard H. Fallon, Jr., *Executive Power and the Political Constitution*, 2007 UTAH L. REV. 1, 4–5 (2007) ("Although we often think of the government as a charter of governmental powers . . . [a]t a deeper level . . . the Constitution binds together people . . . united by their understanding of themselves as fellow citizens with a shared political history and a common future.").

264. For example, nearly two-thirds of all nations have a constitutional provision dealing with protection of the environment, but in some nations the public is unwilling to pay for that protection. See Versteeg, *supra* note 234, at 1151, 1156. That dissonance creates a problem in determining which of those two propositions states the prevailing value in such a nation.

265. See *id.* at 1135–36 ("Constitutional values are often at odds with popular values. When South Africa's 1996 post-apartheid constitution was written, 88% of all South Africans considered homosexuality to be morally unacceptable, but the new constitution nonetheless guaranteed equal protection regardless of sexual orienta-

In some countries many constitutional rights exist only on paper because the government does not respect them, and there is no independent mechanism to enforce them. The result is that those constitutions are nothing more than what James Madison labeled “parchment barriers.”²⁶⁶ The 1977 Constitution of the former Soviet Union is a classic example. It had an enviable list of guarantees, including “freedom of speech, of the press, and of assembly, meetings, street processions and demonstrations,” “the right to work,” to “health protection,” to “housing,” to “maintenance” in old age, sickness, or disability, to “education,” to “cultural benefits,” even to “rest and leisure.”²⁶⁷ The reality, however, was that the Central Committee did not let any of those rights get in the way of what was best for the Communist Party,²⁶⁸ and the courts were powerless to protect anyone against the government.²⁶⁹ When that is true, there is no reason to take

tion. By contrast, the Netherlands, where only 22% of the population opposes homosexuality, has never protected gay rights in its constitution. In Morocco, a recent opinion poll revealed that 95% of the population would not go on a legal strike under any circumstance, even though its constitution proclaims that the right to strike is one of the nation’s highest values. By contrast, 99% of the British population was willing to go on strike, but the right to strike lacks constitutional status in British law. In the Dominican Republic, 86% of the population wanted a stronger protection of the natural environment—even at the expense of higher taxes—but the constitutional document is silent on environmental protection. By contrast, a right to a healthy environment is enshrined in the Lithuanian Constitution, even though no more than 24% of Lithuanians were willing to pay for increased environmental protection.” (footnotes omitted).

266. THE FEDERALIST NO. 48, at 308 (James Madison) (Clinton Rossiter ed., 1961).

267. See CONSTITUTION (FUNDAMENTAL LAW) OF THE UNION OF SOVIET SOCIALIST REPUBLICS, ch. 7, arts. 39–59 (Novosti Press Agency trans. 1985), <http://www.departments.bucknell.edu/russian/const/1977toc.html> [<http://perma.cc/9MKR-QSMT>].

268. An old Russian joke explained the value of those rights well:

“Q: What is the difference between the Constitutions of the U.S.A. and U.S.S.R.? Both guarantee freedom of speech.

A: Yes, but the Constitution of the U.S.A. also guarantees freedom after the speech.”

David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CAL. L. REV. 863, 879 n.72 (2013).

269. See WALTER F. MURPHY, CONSTITUTIONAL DEMOCRACY: CREATING AND MAINTAINING A JUST POLITICAL ORDER 14 (2007) (describing the Soviet Constitution under Josef Stalin as a “fig leaf[f]” designed to “impress foreigners”); Howard, *supra* note 231, at 13 (“The Soviet Union’s Constitution of 1936 glowed with promises to its people, but everyone knew that the document was a Potemkin Village, its provisions meaning whatever the Party chose for them to mean.”).

any such constitution seriously. They are, in truth, “sham constitutions,” provisions that lack any meaning, that function only as propaganda tools, that serve as modern-day Potemkin Villages, because the government has no intention of respecting them.²⁷⁰

A characteristic feature of American society is the importance attributed to and respect shown for the “rule of law” and for the courts that enforce it. Americans respect our Constitution and esteem the courts because the latter can invoke the former to safeguard the public against the political branches. Some foreign nations cannot or do not supply that protection, even though their constitutions guarantee rights that have no counterpart in ours, which can leave their citizens at the mercy of whatever party, group, or individual holds power.²⁷¹ Before World War II, judicial review was the exception, not the rule, in foreign nations.²⁷² Today, judicial review is widespread but is not always robust. For example, sometimes, a foreign court’s judgment of unconstitutionality does not invalidate a statute; it merely requires the legislature to respond to the problem.²⁷³

270. Law & Versteeg, *supra* note 268, at 863. The phenomenon of sham constitutions did not die out with the demise of the former Soviet Union. Consider the North Korean constitution. Like our own fundamental law, the North Korean constitution protects freedom of speech, the press, assembly, association, demonstration, even private property. See SOCIALIST CONSTITUTION OF THE DEMOCRATIC PEOPLE’S REPUBLIC OF KOREA arts. 24 & 67 (2012). Yet, as international law scholars and fans of television news all know, those guarantees “combine fantasy with farce.” Law & Versteeg, *supra* note 268, at 867, 866–67 (“The constitution of Eritrea, for example, enshrines the right to freedom of thought, conscience and belief, the freedom of speech and expression, and the freedom to practice any religion and to manifest such practice. But the government of Eritrea is, in practice, one of the most repressive regimes on earth. In Equatorial Guinea, arbitrary arrests, executions, and rampant torture by government security forces make a mockery of constitutional guarantees of freedom of expression, the right to speak, and respect for every person’s life, integrity and physical and moral dignity.”) (footnotes omitted) (internal quotations omitted).

271. See, e.g., Barnett, *supra* note 241, at 452 (“The novelty of a written constitution has now been widely imitated around the world, but not necessarily imitated is the accompanying American ideology of faithful adherence to a document that both empowers and limits a government. Perhaps this is why the people of other countries do not revere their constitutions as Americans traditionally have.”); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CAL. L. REV. 1163, 1219–20 (2011) (evidence establishes an inverse relationship between the quantity of the rights guaranteed by many foreign constitutions and their respect for human rights); McGinnis, *supra* note 189, at 9 (“[U]ndemocratic, even totalitarian, nations wield influence on international law.”).

272. See Howard, *supra* note 231, at 21.

273. See *id.* at 22–23.

Americans overwhelmingly come to learn and honor the law, not via formal training in law school or from practice as an attorney, but through informal sources and methods: family, friends, neighbors, schools, church, and work life. Residents acquire a layman's understanding of this nation's law as part of learning its values. In the process, what the average person digests quite naturally are the principles, mores, and values of *this* nation, not another. A resident of this nation learns American culture, American values, and American law. A resident of Iran learns very different lessons. To Americans, the term "football" brings to mind the Super Bowl; for Europeans, it is the World Cup. That is not an assertion of what some parties have lampooned as "American Exceptionalism"; it is merely a statement of fact.²⁷⁴ Disregarding that fact is unreasonable. Holding some criminally liable because accepting that fact as true makes us feel illiberal or uncomfortable is not just irrational—it is immoral.²⁷⁵

In sum, the lawmaking institutions and practices, as well as widely shared legal and political first principles that have ex-

274. Compare CHARLES MURRAY, AMERICAN EXCEPTIONALISM: AN EXPERIMENT IN HISTORY 5 (2013) (discussing the concept approvingly), with, e.g., Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1526 (2003) (preferring foreign models of constitutionalism).

275. Consider what some supporters of the Lacey Act have offered in its defense. The Union of Concerned Scientists (UCS) has argued that "[i]llegal logging and the associated trade of illegally sourced products is a clandestine industry" attributable to "[w]eak governance and poor policies," "government collusion and corruption, . . . a general lack of support for legal community forest use," "government instability, inadequate enforcement, and lack of resources, [and] local and regional conflicts." ELIAS, *supra* note 43, at 1, 4. In other words, the foreign nations from whence imported wood originates have inadequate resources to police lumbering in their own lands; they are incompetent and corrupt, making it a waste of time to devote resources to a problem in their own countries; and, in any event, they do not give a hoot about timber, logging, or forests. Think about that proposition for a minute—here is the underlying message: Americans are being—and should be—forced to bear the burden of the world's illegal activities. Deforestation may be a global problem, and the world is populated with scallywags, but the United States alone should punish its own citizens for conduct occurring beyond our shores that is illegal, not under American law, but under some other nation's law, regardless of the reasonableness of their actions. Even the UCS paper recognizes the unique burden that the Lacey Act places on Americans, because the paper states that "[t]he [2008] Lacey Act Amendments marked the world's *first-ever law* prohibiting trade of illegally logged wood products." *Id.* (emphasis added). In other words, no other nation has a law like the Lacey Act, but, by God, America will show them that we know better. In other contexts, the proposition that "America Knows Best" would be condemned as jingoistic and racist. Here, it is deemed a virtue.

isted in this nation throughout its history, may find no parallel in a foreign country.²⁷⁶ In fact, the trend appears to be to reject our constitution as a model,²⁷⁷ even among countries that have been a traditional ally or that share our common law heritage.²⁷⁸ Yet, that reality, far from being an indictment of our governmental structure,²⁷⁹ is simply a recognition that each nation may go its own way. Expecting the residents of each nation to be familiar with the laws of every other one, however, is a fool's errand. Punishing criminally someone who flunks that test is illegitimate.²⁸⁰

2. The "Private Nondelegation Doctrine"

Most scholars would argue that the argument made above is beside the point because the nondelegation doctrine is dead.²⁸¹ *Panama Refining* and *Schechter Poultry* displayed a willingness to enforce the Article I Vesting Clause, but the Court aban-

276. Cf. Posner, *supra* note 191, at 86–87 (“Another objection to our nascent judicial cosmopolitanism is that foreign decisions emerge from complex social, political, cultural, and historical backgrounds of which Supreme Court Justices, like other American judges and lawyers, are largely ignorant To cite foreign decisions as precedents is indeed to flirt with the idea of a universal natural law, or, what amounts to almost the same thing, to suppose fantastically that the world’s judges constitute a single, elite community of wisdom and conscience.”).

277. See Law & Versteeg, *supra* note 224, at 781 (“Whatever the ongoing appeal of American constitutional jurisprudence happens to be, the U.S. Constitution itself appears to have lost at least some of its attraction as a model for constitution writers in other countries. If the components of the rights index are used as the yardstick, the world’s constitutions have on average become less similar to the U.S. Constitution over the last sixty years.”) (footnotes omitted).

278. See *id.* at 797 (“[T]he American example is being rejected to an even greater extent by America’s allies than by the global community at large.”) (footnotes omitted).

279. On the contrary, “[t]he United States Constitution must, on any neutral evaluation, count as the greatest triumph of political statecraft in the history of the world.” EPSTEIN, *supra* note 60, at 3.

280. See Posner, *supra* note 191, at 88–89 (“Judges in foreign countries do not have the slightest democratic legitimacy in a U.S. context. The votes of foreign electorates, the judicial confirmation procedures (if any) in foreign nations, are not events in our democracy. To cite foreign decisions in order to establish an international consensus that should have weight with U.S. courts is like subjecting legislation enacted by Congress to review by the United Nations General Assembly.”).

281. See, e.g., Posner & Vermeule, *supra* note 109, at 1721. The doctrine is alive and well, however, in the state courts as a matter of state constitutional law. See Alexander Volokh, *The New Private-Regulation Skepticism: Due Process, Nondelegation, and Antitrust Challenges*, 37 HARV. J.L. & PUB. POL’Y 931, 963–70 (2014).

done that inclination shortly after it surfaced. In fact, 1935 was “the nondelegation doctrine’s only good year” since 1787.²⁸² Perhaps the Court meant what it said in *Mistretta* that it abandoned the doctrine because it recognized that Congress could not govern a twentieth-century nation without a large administrative supporting cast.²⁸³ Perhaps the Court came to realize that Congress could not lift the nation out of the Great Depression and reboot a failed classical liberal economy without leaving the details for others to manage. Perhaps the Court feared doing anything other than trusting the Executive Branch to operate the economy might disrupt the effort to win World War II. Perhaps the Court felt that *Panama Refining* and *Schechter Poultry* were too closely associated with discredited decisions like *Lochner*²⁸⁴ or with the Court’s embarrassing “switch in time that saved nine”²⁸⁵ to rely on tainted precedent.²⁸⁶ Or perhaps the Court could not find a judicially manageable standard to use when evaluating Congress’s delegations that would enable the Court to decide in a non-arbitrary manner when Congress has gone “too far.” Any one of those explanations would explain why the Court has steadfastly refused to reinvigorate the nondelegation doctrine for nearly eighty years. But what has come to be clear is that the decisions in *Panama Refining* and *Schechter Poultry* are no longer “good law.”²⁸⁷

There is an intuitive sense to the proposition, however, that there should be *some* limit on how far Congress may either empower others to act independently or pass them the buck. Maybe that is why some conservative members of the academy, like the legendary Hachikō, still loyally wait for the return

282. Cass R. Sunstein, *Is the Clean Air Act Unconstitutional?*, 98 MICH. L. REV. 303, 332 (1999).

283. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

284. See *Lochner v. New York*, 198 U.S. 45 (1905).

285. See EPSTEIN, *supra* note 60, at 100.

286. See, e.g., *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963) (“Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation.”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 488 (1955) (“The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.”).

287. See Posner & Vermeule, *supra* note 109.

of *Panama Refining*, *Schechter Poultry*, and *Carter Coal*, or why the Court has always distinguished those cases, rather than overruled them. Whatever the reason may be, those decisions may not have flat-lined just yet.

In fact, there is a little used aspect of the Due Process Clause that serves much the same role as those decisions. In the first half of the twentieth century, the Supreme Court decided several cases in which the Court held that the Due Process Clause forbids the federal and state governments from delegating uncontrolled substantive lawmaking authority to a private party. The cases establishing this proposition can be labeled the private nondelegation doctrine. The difference between the traditional nondelegation doctrine of *Panama Refining* and the private nondelegation doctrine is the absence in the latter of any direct legal or political restraint on or control of the use of government authority by a private party entirely outside of the traditional governmental process. That difference is important because it may mean that criticisms levied against the former may not apply to the latter.²⁸⁸

a. *The Supreme Court's Early Private Nondelegation Doctrine Decisions: Eubank, Thomas Cusack, Roberge, Schechter Poultry, and Carter Coal*

The first decisions involved municipal land use ordinances. The lead case is *Eubank v. City of Richmond*.²⁸⁹ Richmond passed an ordinance, enforceable by a fine, authorizing parties who owned two-thirds of the property on any street to establish a building line barring further house construction past the line and requiring existing structures to be modified to conform to

288. The private nondelegation doctrine has been around for more than a century, but there has been a recent resurgence of interest in it by litigants, the courts, and the academy. See, e.g., *Ass'n of Am. R.R. v. DOT*, 721 F.3d 666, 670–71 (D.C. Cir. 2013); *Biener v. Calio*, 361 F.3d 206, 215–17 (3d Cir. 2004); *Silverman v. Barry*, 727 F.2d 1121, 1126 (D.C. Cir. 1984); Michael Froomkin, *Wrong Turn in Cyberspace: Using ICANN to Route Around the APA and the Constitution*, 50 DUKE L.J. 17, 155 (2000); David M. Lawrence, *Private Exercise of Governmental Power*, 61 IND. L.J. 647 (1986); Note, *The Vagaries of Vagueness: Rethinking the CFAA as a Problem of Private Nondelegation*, 127 HARV. L. REV. 751 (2013). The Supreme Court recently granted review in the *Association of American Railroads* case, so the Supreme Court may revisit this area soon. *Ass'n of Am. R.R. v. DOT*, 721 F.3d 666 (D.C. Cir. 2013), cert. granted, 134 S. Ct. 2865 (2014) (No. 13-1080).

289. 226 U.S. 137 (1912).

that line.²⁹⁰ The Supreme Court ruled that the ordinance violated the Due Process Clause because it created no standard for the property owners to use, permitting them to act for their self-interest or even arbitrarily.²⁹¹ The next case, *Thomas Cusack Co. v. Chicago*,²⁹² involved the opposite problem. Chicago adopted a municipal ordinance prohibiting the erection and maintenance of commercial billboards in primarily residential neighborhoods unless a majority of the owners of the frontage property gave their written consent.²⁹³ Relying on *Eubank*,²⁹⁴ an outdoor advertising company claimed that the Chicago ordinance was unconstitutional. The Court, however, rejected as “palpably frivolous” the company’s argument that the ordinance unconstitutionally delegated governmental power to private parties, explaining that the company “cannot be injured, but obviously may be benefited by this provision, for without it the prohibition of the erection of such billboards in such residence sections is absolute.”²⁹⁵ The last case in the trilogy is *Washington ex rel. Seattle Title Trust Co. v. Roberge*.²⁹⁶ In *Roberge*, a trustee of a home for the elderly poor sought to obtain a permit to enlarge the facility to allow additional parties to reside there.²⁹⁷ A Seattle zoning ordinance limited buildings in the relevant vicinity to single-family homes, public and certain private schools, churches, parks, and the like, but empowered the city to grant a zoning variance if at least one-half of the nearby property owners consented.²⁹⁸ The city building superintendent denied the permit because the adjacent property owners had not consented to the variance, and the trustee sued.²⁹⁹ Relying on *Eubank*, the Court held that, while zoning ordinances are generally valid, the Seattle ordinance was unconstitutional as applied in those circumstances because it ena-

290. *Id.* at 141 (quoting Richmond ordinance).

291. *Id.* at 143–44.

292. 242 U.S. 526 (1917).

293. *Id.* at 527–28 (quoting Chicago ordinance).

294. 226 U.S. 137 (1912).

295. *Thomas Cusack Co.*, 242 U.S. at 530.

296. 278 U.S. 116 (1928).

297. *Id.* at 16.

298. *Id.* at 118–20 & n. 1 (quoting Seattle ordinance).

299. *Id.*

bled the nearby property owners to deny a variance for their own capricious reasons.³⁰⁰

The other two private nondelegation cases involved federal statutes. *A.L.A. Schechter Poultry Corp. v. United States*³⁰¹ involved a delegation challenge to the National Industrial Recovery Act (NIRA).³⁰² At issue in *Schechter Poultry* was a provision that delegated to trade or industrial groups the authority to define “unfair methods of competition” that later were to be approved by the President.³⁰³ “This was no small operation,” as Professor Richard Epstein has noted.³⁰⁴ “In the eighteen months

300. *Id.* at 121–22.

301. 295 U.S. 495 (1935).

302. Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933).

303. Title I, § 3(a) of the NIRA provided as follows:

Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry or subdivision thereof, represented by the applicant or applicants, if the President finds (1) that such associations or groups impose no inequitable restrictions on admission to membership therein and are truly representative of such trades or industries or subdivisions thereof, and (2) that such code or codes are not designed to promote monopolies or to eliminate or oppress small enterprises and will not operate to discriminate against them, and will tend to effectuate the policy of this title: *Provided*, That such code or codes shall not permit monopolies or monopolistic practices: *Provided further*, That where such code or codes affect the services and welfare of persons engaged in other steps of the economic process, nothing in this section shall deprive such persons of the right to be heard prior to approval by the President of such code or codes. The President may, as a condition of his approval of any such code, impose such conditions (including requirements for the making of reports and the keeping of accounts) for the protection of consumers, competitors, employees, and others, and in furtherance of the public interest, and may provide such exceptions to and exemptions from the provisions of such code, as the President in his discretion deems necessary to effectuate the policy herein declared.

Title I, § 3(b) of the NIRA provided in part as follows:

After the President shall have approved any such code, the provisions of such code shall be the standards of fair competition for such trade or industry or subdivision thereof. Any violation of such standards in any transaction in or affecting interstate or foreign commerce shall be deemed an unfair method of competition in commerce within the meaning of the Federal Trade Commission Act, as amended [chapter 2 of this title]

304. EPSTEIN, *supra* note 60, at 270.

between August 1933 and February 1935, the frenzied activities of the Roosevelt administration generated some 546 codes, 185 supplemental codes, 685 amendments, and over 11,000 administrative orders."³⁰⁵ The scale of the difference between the delegations in *Eubank* and *Roberge*, on the one hand, and *Schechter Poultry*, on the other, was enormous.

Untroubled by the breadth of a judgment holding the NIRA unconstitutional, the Supreme Court held that Congress's delegation went too far.³⁰⁶ The Court noted that the question was "whether Congress in authorizing 'codes of fair competition' has itself established the standards of legal obligation, thus performing its essential legislative function, or, by the failure to enact such standards, has attempted to transfer that function to others."³⁰⁷ The Court found that the term methods of "unfair competition" had only the narrow meaning at common law of "palming off of one's goods as those of a rival trader"³⁰⁸ and that the term had not acquired a clear and stable understanding in contemporary usage.³⁰⁹ The statement of purposes set forth elsewhere in the NIRA did not limit the scope of the delegation, the Court reasoned, because the NIRA empowered private parties to define that term for their own benefit by protecting themselves against competition by rivals.³¹⁰ Finally, the Court found of no moment the NIRA requirement that the President approve an unfair competition code before it could take effect.³¹¹ The

305. *Id.* (footnote omitted).

306. *Id.* at 530.

307. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 530 (1935).

308. *Id.* at 531.

309. *Id.* at 532–33.

310. *Id.* at 537 ("But would it be seriously contended that Congress could delegate its legislative authority to trade or industrial associations or groups so as to empower them to enact the laws they deem to be wise and beneficent for the rehabilitation and expansion of their trade or industries? Could trade or industrial associations or groups be constituted legislative bodies for that purpose because such associations or groups are familiar with the problems of their enterprises? And, could an effort of that sort be made valid by such a preface of generalities as to permissible aims as we find in section 1 of title 1? The answer is obvious. Such a delegation of legislative power is unknown to our law and is utterly inconsistent with the constitutional prerogatives and duties of Congress.").

311. *Id.* at 537–42. Of course, perhaps the Court gave no weight to that presidential approval requirement because, given the massive number of codes, amendments, and the like, the Court did not believe that the President had actually reviewed them. The *Schechter Poultry* opinion does not express that disbelief, of

Court implicitly assumed that the President would approve or reject each individual code presented to him, but found that the NIRA did not supply him with an intelligible principle to use when making those decisions.³¹² In the Court's view, the NIRA did not cabin the President's discretion because it left him free to "roam at will" to "approve or disapprove" a cartel's proposals "as he may see fit"³¹³ over "a host of different trades and industries, thus extending the President's discretion to all the varieties of laws which he may deem beneficial in dealing with the vast array of commercial and industrial activities throughout the country."³¹⁴ Congress's "unprecedented" delegation of authority, the Court concluded, exceeded Article I limitations.³¹⁵

The other federal case was *Carter v. Carter Coal Co.*³¹⁶ *Carter Coal* involved a delegation challenge to a federal law, the Bituminous Coal Conservation Act of 1935.³¹⁷ Among other things, the Act authorized the district board in local coal districts to adopt a code that included agreed-upon minimum and maximum prices for coal that would become law.³¹⁸ The act also allowed an agreement between producers of more than two-thirds of the annual tonnage of coal and a majority of mine workers to set industry-wide wage and maximum working hour agreements.³¹⁹ Shareholders of coal producers outside of the agreements brought suit against the federal government, maintaining that the Act unconstitutionally delegated congressional power to private parties.³²⁰ Relying on *Eubank*, *Roberge*, and *Schechter Poultry*, the Supreme Court ruled that the Bituminous Coal Conservation Act unconstitutionally delegated federal governmental power.³²¹ Describing that Act as "legislative delegation in its most obnoxious form," the Court held that it arbitrarily interfered with a coal producer's property rights

course, but that may be merely because the Justices thought it impolite to call President Roosevelt a liar.

312. *Id.* at 538.

313. *Id.*

314. *Id.* at 539.

315. *Id.* at 541.

316. 298 U.S. 238 (1936).

317. Ch. 824, 49 Stat. 991 (1935).

318. *Carter Coal*, 298 U.S. at 282–83.

319. *Id.* at 283–84.

320. *Id.* at 238–39.

321. *Id.* at 311.

by vesting governmental power in the hands of a party interested in the outcome of a business transaction.³²² *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal* therefore stand for the proposition that it is impermissible to vest governmental authority in private parties who are neither legally nor politically accountable to other government officials or to the electorate.

b. *The Supreme Court's Later Private Nondelegation Doctrine Decisions: Currin, Rock Royal Coop., New Motor Vehicle Board, and Midkiff*

The Supreme Court has revisited the private nondelegation doctrine on more recent occasions. In each case—*Currin v. Wallace*,³²³ *United States v. Rock Royal Co-operative, Inc.*,³²⁴ *New Motor Vehicle Board v. Orrin W. Fox Co.*,³²⁵ and *Hawaii Housing Authority v. Midkiff*³²⁶—the Supreme Court upheld the vesting of state authority in private parties. The laws at issue in each of those cases, however, left final decisionmaking authority in the hands of a state official. *Currin* upheld a federal law allowing the Secretary of Agriculture to withhold tobacco standards unless two-thirds of tobacco growers voted in its favor.³²⁷ Relying on *Thomas Cusack*, the Court concluded that the statute did not delegate lawmaking authority to a private party because the Secretary could impose the standard only if private parties approved it.³²⁸ The statute therefore gave private parties a right to veto action by the government. *Rock Royal* involved a similar federal law dealing with an agricultural marketing order for milk producers.³²⁹ The Court upheld the delegation by simply citing *Currin*.³³⁰ *New Motor* rejected a due process delegation challenge to a state law directing a state agency to decide whether to delay the opening of a new motor vehicle franchise establishment or location when an

322. *Id.*

323. 306 U.S. 1 (1939).

324. 307 U.S. 533 (1939).

325. 439 U.S. 96 (1978).

326. 467 U.S. 229 (1984).

327. *Currin*, 306 U.S. at 15–16.

328. *Id.*

329. *Rock Royal Coop.*, 307 U.S. at 576.

330. *Id.* at 577–78 & n.64 (citing *Currin*).

existing dealer objected.³³¹ *Midkiff* rejected the argument that due process prohibits a state from allowing private parties to initiate the eminent domain condemnation process.³³²

Those cases are materially different from their predecessors. In the first two cases, there was no delegation of government authority over private parties; the statutes granted private parties the ability to halt the *government's* exercise of authority. In the latter two cases, there was not even that degree of delegation. A private party could initiate an inquiry or action by the government, but a government official had the final say whether to act. The Lacey Act, by contrast, leaves it entirely up to a foreign nation to decide what it will deem a "law."³³³ Accordingly, the *Currin*, *Rock Royal*, *New Motor*, and *Midkiff* decisions do not undercut the Court's earlier decisions and also do not justify the delegation that the Lacey Act accomplishes.³³⁴

c. *The Private Nondelegation Doctrine Today*

The Supreme Court rulings in *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal* reveal that Article I is not the only limitation on how far Congress can delegate federal lawmaking authority. Each of those cases relied on the Fifth or Fourteenth Amendment Due Process Clauses, not on the Bicameralism and Presentment Clauses of Article I. A problem with those cases, however, is that the Court did not explain *why* the Due Process Clause prohibits such delegations. The Court's decisions seem to assume that the conclusion is obvious because the result of such a delegation is to leave a property owner at the mercy of a party with an interest in the outcome of a regulatory decision. The Court's failure to ground its decisions in the text or history of the Due Process Clause, however, leaves them open to criticism as being nothing more than an anachronistic and unjustified interference in a legislature's decision about how to order society akin to the *Lochner* series of substantive due process rulings that the Court abandoned during the New Deal.

331. *New Motor*, 439 U.S. at 108–09.

332. *Midkiff*, 467 U.S. at 243 n.6.

333. See 16 U.S.C. §§ 3371–3378 (2012).

334. See also *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677–78 (1976) (distinguishing *Eubank* and *Roberge* without criticizing them or suggesting that they no longer are good law).

Some scholars have attempted to avoid that conclusion by arguing that the Supreme Court's private nondelegation decisions are consistent with the Court's interpretation of procedural due process requirements in analogous contemporary settings. Beginning with the Court's 1927 decision in *Tumey v. Ohio*,³³⁵ the Court has consistently ruled that the Due Process Clause invalidates a regulatory scheme in which the government is funded by the decisions of public officials in the government's favor.³³⁶ In a similar line of decisions beginning in 1969 with *Sniadach v. Family Fin. Corp.*,³³⁷ the Court has held that the government cannot delegate decisionmaking authority to private parties who have a personal financial stake in the outcome of that judgment.³³⁸ The unifying principle in those two lines of cases is that the Due Process Clause prohibits the legislature from granting substantial decisionmaking authority to a person with "a direct, personal, pecuniary interest" in the outcome.³³⁹ Some scholars have argued that the *Eubank* line of precedents should be read merely as predecessors to the Court's later decisions in *Tumey*, *Sniadach*, and their progeny and that the collected body of decisions does no more than forbid the government from delegating decisionmaking authority

335. 273 U.S. 510 (1927).

336. See *Connally v. Georgia*, 429 U.S. 245, 247–51 (1977) (ruling that it violates due process for a statute to compensate a magistrate only when he or she issued a search warrant); *Ward v. Village of Monroeville*, 409 U.S. 57, 57–60 (1972) (same, for law treating traffic court fines as funds that the village could use); *Tumey*, 273 U.S. at 514–20 (holding unconstitutional a law resting a judge's salary on the number of convictions); cf. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821–25 (1986) (ruling that it violates due process for a state supreme court judge to participate in a case where the decision could directly affect a pending case in which he was a party).

337. 395 U.S. 337 (1969).

338. See *Sniadach*, 395 U.S. at 338–39 (holding unconstitutional a statute authorizing wage garnishment without a preseizure hearing); see also *N. Ga. Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 606–07 (1975) (holding unconstitutional a statute giving a private party a right to prejudgment wage garnishment without notice or a hearing); *Gibson v. Berryhill*, 411 U.S. 564, 568–70 (1973) (ruling that it violates due process for the state to entrust optometrists with the authority to exclude rivals from that profession); *Fuentes v. Shevin*, 407 U.S. 67, 84–93 (1972) (holding unconstitutional a statute giving a private party a right to prejudgment replevin of property held by another without notice or a hearing).

339. *Tumey*, 273 U.S. at 523; see THE FEDERALIST NO. 10, at 74 (James Madison) (Clinton Rossiter ed., 1961) ("No man is allowed to be a judge in his own cause because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.").

to financially self-interested parties, government or private.³⁴⁰ As Professor Alexander Volokh recently concluded, “[t]he best reading of these cases thus suggests that the basic *Eubank* due process rule against delegating mandatory authority to private parties without protection against self-interested decisionmaking continues to this day.”³⁴¹

It turns out, however, that there is an additional, and more fundamental, principle operating in cases like *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal*, one that can be appreciated only by considering the constitutional history of the Due Process Clause. Considered in full, the historical provenance of the Fifth Amendment Due Process Clause supports a rule forbidding the government from privatizing such discrete lawmaking functions whether or not the decisionmaker profits financially—which is just the type of delegation that the Lacey Act performs.

3. *The Role of Due Process as “the Law of the Land”*

The Due Process Clause traces its lineage to Magna Carta,³⁴² also known today as the Great Charter.³⁴³ Forced on a politically weakened king at Runnymede in 1215 by rebellious barons and the church, Magna Carta was ultimately a peace treaty designed to end a civil war, rather than a statement of principles like our Declaration of Independence designed to justify a rebellion.³⁴⁴

340. See Volokh, *supra* note 281, at 950.

341. *Id.* at 950.

342. See *Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272, 276 (1855) (“The words, ‘due process of law,’ were undoubtedly intended to convey the same meaning as the words, ‘by the law of the land,’ in *Magna Charta*. Lord Coke, in his commentary on those words, (2 Inst. 50.) says they mean due process of law. The constitutions which had been adopted by the several States before the formation of the federal constitution, following the language of the great charter more closely, generally contained the words, ‘but by the judgment of his peers, or the law of the land.’ The ordinance of congress of July 13, 1787, for the government of the territory of the United States northwest of the river Ohio, used the same words.); A.E. DICK HOWARD, *THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA* 14–15, 23, 300 & n.6 (1968) (collecting state court cases to that effect) (hereafter HOWARD, *THE ROAD FROM RUNNYMEDE*).

343. See 2 EDWARD COKE, *INSTITUTES OF THE LAWS OF ENGLAND* 4 (1798) (the charter is called “great” not because of its length, but “in respect of the great importance, and weightiness of the matter”).

344. MCKECHNIE, *supra* note 249, at 382 (“While democratic enthusiasts in France and America have often sought to found their liberties on a lofty but unstable basis of philosophical theory embodied in Declarations of Rights; Englishmen have occu-

Originally thought to be a failure, because the civil war resumed shortly afterwards,³⁴⁵ Magna Carta over time has become one of the foundational documents of Anglo-American legal history.³⁴⁶ Later English law has treated Magna Carta as “the Bible of the English Constitution.”³⁴⁷ It represented the possibility that a written document could make notable revisions to the law, could cabin executive power, and could grant rights to the community, not merely to individuals.³⁴⁸ In all three respects, Magna Carta foreshadowed our Constitution and Bill of Rights.³⁴⁹

Article 39 is the best-known feature of Magna Carta.³⁵⁰ Seeking to restore the customary rights of Englishmen and prevent the crown from arbitrarily detaining and punishing someone not first adjudged guilty of a crime, a not uncommon occurrence un-

ped lower but surer ground, aiming at practical remedies for actual wrongs, rather than enunciating theoretical platitudes with no realities to correspond.”); *see id.* at 121–22 (“The object of the barons was to protect themselves and their friends against the King, not to set forth a scientific system of jurisprudence.”).

345. King John found Chapter 61 of Magna Carta particularly irritating because it established a council of barons that could overrule actions taken by the king in violation of the charter’s guarantees. John entreated the papacy for support, and Pope Innocent III sided with John because the pope saw the council of barons as a rival challenger to papal authority over the crown. A new war quickly broke out, known as the First Baron’s War. “Denounced by the pope, rejected by the king, discarded by the rebels, by the end of 1215 Magna Carta was surely dead.” DANNY DANZIGER & JOHN GILLINGHAM, 1215: THE YEAR OF MAGNA CARTA 262–63 (2003). The First Baron’s War ended in 1216, however, with John’s death. As a peace offering, John’s son and successor Henry III reissued a shortened, revised version of Magna Carta known as the Charter of Liberties of 1216. The new charter quelled further conflict, and Henry III remained on the throne. *See id.* at 253–61; JAMES WHEATON, THE HISTORY OF THE MAGNA CARTA 8–9, 52–53 (2011).

346. *See* Larkin, *supra* note 67, at 268–69.

347. *See* DANZIGER & GILLINGHAM, *supra* note 345, at 268 (“In 1770 William Pitt the Elder called it ‘the Bible of the English Constitution’ . . . In 1956 the English judge, Lord Denning, described it as ‘the greatest constitutional document of all times—the foundation of the freedom of the individual against the arbitrary authority of the despot.’”).

348. *See* J.C. HOLT, MAGNA CARTA 55 (2d ed. 1992).

349. The Supremacy Clause of Article VI of the Constitution incorporates the principle that a document can serve as a nation’s fundamental law. *See* U.S. CONST. art. VI, cl. 2. The Bill of Rights symbolizes the proposition that the law should protect every person, not only the individual recipients of a royal decree. *See* Larkin, *supra* note 67, at 267.

350. *See* DANZIGER & GILLINGHAM, *supra* note 345, at xiii (“The eloquence of those sentences [Chapter 39 and 40 of Magna Carta], the nobility and idealism they express, has elevated this piece of legislation to eternal iconic status.”).

der King John,³⁵¹ Article 39 provided that “[n]o free man shall be taken or imprisoned or disseised or outlawed or exiled or in any way ruined, nor will we go or send against him, except by the lawful judgment of his peers or by the law of the land.”³⁵² Article 39 “was a plain, popular statement of the most elementary rights.”³⁵³ As one scholar has noted, “[t]he main point in this [document], the chief grievance to be redressed, was the King’s practice of attacking his barons with forces of mercenaries, seizing their persons, their families and property, and otherwise ill-treating them, without first convicting them of some offence in his *curia*.”³⁵⁴ The guarantee that the crown could administer punishment only in accordance with “the law of the land” meant, according to Coke, that “no man [could] be taken or imprisoned, but *per legem terrae*, that is, by the common law, statute law, or custome of England.”³⁵⁵ Expressed in today’s language, Article 39 protected “life (including limb and health), personal liberty (using the phrase in its more literal and limited sense to signify freedom of the person or body, *not* all individual rights), and property.”³⁵⁶ In the fourteenth century, an act of Parliament changed the phrase “*per legem terrae*” or “the law of the land” to “due Process of the Law,”³⁵⁷ but the revision did not alter its meaning.³⁵⁸

351. MCKECHNIE, *supra* note 249, at 377 & n.1.

352. HOLT, *supra* note 348, at 461.

353. Charles E. Shattuck, *The True Meaning of the Term “Liberty” in Those Clauses in the Federal and State Constitutions Which Protect “Life, Liberty, and Property,”* 4 HARV. L. REV. 365, 373 (1891).

354. C.H. McIlwain, *Due Process of Law in Magna Carta*, 14 COLUM. L. REV. 27, 41 (1914).

355. 2 COKE, *supra* note 343, at 45.

356. Shattuck, *supra* note 353, at 373 (footnote omitted).

357. McIlwain, *supra* note 354, at 49 (“The men of 1368 were not far wrong in calling it [*viz.*, “the law of the land”] *l’ancien leye de la terre*, and the Parliament of 1350 do not depart from the ancient meaning of *per legem terrae* when they paraphrase it *par voie de la lei*, nor the Parliament of 1354 in making it ‘*par due proces de lei*,’ whence it has come, no doubt, largely through the influence of Coke’s writings, into our federal and state constitutions as ‘due process of law.’”) (footnotes omitted).

358. A.E. DICK HOWARD, *MAGNA CARTA: TEXT AND COMMENTARY 14–15* (Rev. ed. 1998) (“In Magna Carta’s ‘law of the land’ we can find the early origins of the concept of ‘due process of law,’ one of the cornerstones of our jurisprudence . . . [A]s early as 1354 the words ‘due process’ were used in an English statute interpreting Magna Carta, and by the end of the fourteenth century ‘due process of law’ and ‘law of the land’ were interchangeable.”).

Article 39 has come to represent two canonical principles in Anglo-American law: (1) the ideal that all government officials, even the king, are subject to the “rule of law”—the proposition that every government and ruler are subject to governance by antecedent legal rules from which government draws its authority and legitimacy, not the other way around;³⁵⁹ and (2) the principle that each person is entitled to enjoy certain “inalienable rights”—fundamental legal guarantees that no government, high or low, may take from him or her.³⁶⁰ Every contemporary constitution that guarantees those rights owes a debt to Article 39.

The American colonists carried the English common law with them to the New World.³⁶¹ As part of their heritage, Magna Carta played a critical role in the constitutional law of the young nation. The Framers were familiar with its well-settled meaning.³⁶² The phrase “the law of the land” or “due process of law” can be found in statutes passed by colonial assemblies, in resolutions enacted by the Continental Congress, in the Declaration of Independence, and, later, in state constitutions.³⁶³ The Framers, who were familiar with Blackstone’s interpretation of the com-

359. See 1 BLACKSTONE, *supra* note 181, at *141 (“the law is in England the supreme arbiter of every man’s life, liberty, and property”); 1 FREDERICK POLLOCK & FREDERIC W. MAITLAND, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, at 173 (2d ed. 1911).

360. See Larkin, *supra* note 67, at 268–69.

361. Eleven of the thirteen colonies enacted so-called “receiving statutes,” which incorporated the common law as state law. One state—New Jersey—adopted the common law through its state constitution. The last state—Connecticut—adopted the common law by judicial decision. Here, as in England, the common law served as the default rule of law until a legislature replaced it with a statute. See Anthony J. Bellia, Jr. & Bradford R. Clark, *The Federal Common Law of Nations*, 109 COLUM. L. REV. 1, 29 (2009). See also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860*, at 8 (1977); WILLIAM E. NELSON, *AMERICANIZATION OF THE COMMON LAW: THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760–1830*, at 18–20 (1975).

362. The Framers were familiar with Coke. See, e.g., HOWARD, *MAGNA CARTA*, *supra* note 358, at 22–23. Coke had extolled the virtues of the charter in his *Institutes of the Lawes of England*, a highly influential four-volume common law treatise published between 1628 and 1644. See DANZIGER & GILLINGHAM, *supra* note 345, at 272.

363. See, e.g., HOWARD, *THE ROAD FROM RUNNYMEDE*, *supra* note 342, at xi, 15–16, 19, 211–15, app. B at 397 (listing charters); Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 YALE L.J. 1672, 1705 (2012); Ryan C. Williams, *The One and Only Substantive Due Process Clause*, 120 YALE L.J. 408, 435–40 & nn.106–30 (2010).

mon law,³⁶⁴ would have understood the term “due process of law,” or the older term “the law of the land,” as incorporating English law, not the law of France or other foreign nations. The Fifth and Fourteenth Amendments to our Constitution later incorporated that phrase,³⁶⁵ and they have played a major role in the development of American constitutional law to this day.³⁶⁶

The constitutional history of the Due Process Clause reveals that the clause serves as an additional regulation of federal lawmaking power. The limitation, however, is not a restriction like the one that the Supreme Court has created in modern cases like *Griswold*, *Wade*, and *Lawrence*.³⁶⁷ Those cases treat the Due Process Clause as a substantive restraint on legislation. Recognizing that every legislative judgment involves a tradeoff, those decisions place particular subjects out of bounds or make clear that the government may regulate a private decision only in pursuit of a compelling governmental interest. For the last fifty years the academy has engaged in a vigorous debate over the issue whether those decisions cor-

364. See, e.g., *Alden v. Maine*, 527 U.S. 706, 715 (1999) (noting that Blackstone’s *Commentaries* “constituted the preeminent authority on English law for the founding generation”); *Schick v. United States*, 195 U.S. 65, 69 (1904) (“Blackstone’s *Commentaries* are accepted as the most satisfactory exposition of the common law of England. At the time of the adoption of the Federal Constitution, it had been published about twenty years, and it has been said that more copies of the work had been sold in this country than in England; so that undoubtedly, the framers of the Constitution were familiar with it.”).

365. James Madison was the principal author of the Fifth Amendment. Why he chose the phrase “due process of law,” rather than “the law of the land,” has been lost to history. See Williams, *supra* note 363, at 445. Some scholars speculate that Madison used “due process of law” to avoid implying that Congress could escape that clause because federal legislation would be deemed “the supreme Law of the Land” pursuant to the Article VI Supremacy Clause. See Chapman & McConnell, *supra* note 363, at 1723–24.

366. The Supreme Court has held that the Fourteenth Amendment Due Process Clause incorporates numerous provisions in the Bill of Rights that, textually speaking, apply only against the federal government. See, e.g., *McDonald v. Chicago*, 561 U.S. 742 (2010) (ruling that the Fourteenth Amendment Due Process Clause incorporates the Second Amendment right “to keep and bear Arms”); *id.* at 758–64 (discussing precedents incorporating other Bill of Rights guarantees). The Supreme Court also has ruled that the Fifth Amendment Due Process Clause incorporates equal protection principles that, textually speaking, apply only against the states—a so-called “reverse incorporation.” See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2695 (2013); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954).

367. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

rectly interpret the Due Process Clause.³⁶⁸ Whatever the ultimate resolution of that debate may be, the Due Process Clause need not be read as a substantive restraint on legislative choice between competing interests to recognize that it restrains how the government may make law. The history shows that one mechanism Congress is forbidden to use is to turn the lawmaking function over to private parties.

The election and term limit provisions imposed by Articles I and II, along with the Twelfth and Seventeenth Amendments, create procedures for the periodic election to the offices of Representatives, Senators, and Presidents.³⁶⁹ The Bicameralism and Presentment requirements of Article I, Section 7, regulate how those officeholders may make “Law,”³⁷⁰ and the legislative powers granted to Congress in the next section, Article I, Section 8, identify the particular subjects that those laws may govern.³⁷¹ The Article II Take Care Clause directs the President to ensure that the “Law” is faithfully executed,³⁷² while the companion Article II Appointments Clause ensures that only parties properly appointed to their posts may enforce the law.³⁷³ The Article III Judicial Power Clause grants the Supreme Court and lower federal courts the power “to say what the law is.”³⁷⁴ Read together those Articles define the “Republican Form of Government” that the Framers created for the nation and that Article IV guarantees each state.³⁷⁵

The Due Process Clause buttresses that guarantee. By requiring that all three branches act only pursuant to law, the Fifth Amendment Due Process Clause ensures that the actors in each department cannot evade the Framers’ carefully constructed regulatory scheme by delegating their federal lawmaking power to unaccountable private parties, individuals beyond the direct

368. See *supra* note 260 (partial list of authorities).

369. See *supra* notes 61–62.

370. See U.S. CONST. art. I, § 7, cls. 2 & 3.

371. See U.S. CONST. art. I, § 8 (listing the “power[s]” that Congress may use law to regulate).

372. See U.S. CONST. art. II, § 3.

373. See U.S. CONST. art. II, § 2.

374. See U.S. CONST. art. III, cl. 1; *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

375. See *supra* note 160.

legal and political control of superior federal officials and the electorate. That is, the due process requirement that federal government officials act pursuant to “the law of the land” when the life, liberty, or property interests of the public are at stake prohibits the officeholders in any of those branches from delegating lawmaking authority to private parties who are neither legally nor politically accountable to the public or to the individuals whose conduct they may regulate. That is the bedrock due process guarantee, one so fundamental that we take it for granted. The principle that government officials are governed by “the rule of law” is so deeply ingrained into the nation’s culture, psyche, and legal systems that we forget just how important it is. The Barons at Runnymede had no Parliament to which they could turn for protection against King John. They had only their own troops and the common law, representing the accepted, common understanding of Englishmen regarding the permissible operation of the crown and its institutions, as enforced by the courts. In order to avoid a continuing need to rely on the former, they forced the king to agree to be governed by the latter. The requirement that the crown act pursuant to “the law of the land” was a protection against the king going outside the law to accomplish his will through brute force.³⁷⁶

Congress and the President, of course, may help private parties change the law. Congress has the authority to regulate “[t]he Times, Places and Manner” of congressional elections to ensure that the electorate has that opportunity.³⁷⁷ The limited terms that Representatives, Senators, and Presidents hold ensure that the public can make its voice heard during the federal elections held every two, four, and six years. Between elections,

376. See John Harrison, *Substantive Due Process and the Constitutional Text*, 83 VA. L. REV. 493, 497 (1997) (“In their procedural aspect, the Due Process Clauses are understood first of all to require that when the courts or the executive act to deprive anyone of life, liberty, or property, they do so in accordance with established law. Judges and executive officers may not simply make up some method of proceeding and sentence someone to prison on that basis. This requirement that deprivation follow the rule of law is so fundamental that it is often forgotten, but there is good reason to believe that some version of it is the historical root meaning of due process.”) (footnote omitted); McIlwain, *supra* note 354, at 30.

377. U.S. CONST. art. I, § 4, cl. 1 (“The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”).

the public has the right to “petition the Government for a redress of grievances.”³⁷⁸ To make that right effective, Congress may grant private parties an opportunity to initiate the working of the government through the officials holding office in one of the three branches. But Congress may not displace the legal and political protections that a government organized and operated under the rule of law guarantees the public by handing over the so-called “levers of government” to private individuals. Vesting in private parties governmental authority over a matter otherwise designated as a subject fit only for governmental responsibility eliminates the protections that the rule of law offers everyone as part of the political and social compact that the Framers offered to the nation in 1787.

That rule has a different focus than the one that has grown up in the Supreme Court’s traditional nondelegation doctrine cases. Since *Panama Refining*, the issue in those cases is whether Congress has given an executive or judicial branch official sufficient guidance how to implement a statute so that those officers cannot be said to be making up the law from scratch, which only Congress may do given Article I. By contrast, the issue in private nondelegation doctrine cases is whether there is any direct legal or political constraint on how a purely private party can exercise the governmental power that only a legislature may create and that traditionally only the executive or the courts may implement. Two critical factors distinguish the latter doctrine from the former. The first one is that the individuals who exercise governmental power are *private parties*, not *government officials*, who exercise the legal powers that the political process has granted to a particular government *office*, not to a particular *person*. The second difference, which follows from the first, is that there is no direct *legal or political* constraint on how that private party may exercise delegated decisionmaking authority. Magna Carta’s “law of the land” guaranteed the first protection, and the Constitution’s “Republican form of Government” supplied the second one.

Of course, there always will be an *indirect* political constraint open to anyone injured by such a delegation. An injured party always can seek redress through the political process by trying

378. U.S. CONST. amend. I.

to persuade whatever legislature that delegated the relevant authority to reverse its decision. Oftentimes, that is all the Constitution demands. There are numerous instances in which the Due Process Clause leaves a private party with no other option than to persuade the legislature to change its mind and repeal a particular substantive rule of law.³⁷⁹ But while that indirect protection is sufficient when public officials exercise government power, the indirect protection of casting a ballot at the next election is inadequate to protect a person against private invasions of his rights. Granting a private party power that the Constitution vests only in parties who hold the offices created or contemplated by Articles I, II, and III is the exact opposite of what the Framers had in mind. If followed across the board, that practice would allow federal officials to turn the operation of government over to private parties and go home. That result would not be to return federal power to the states. At a macro level, it would be to abandon responsibilities that the Constitution envisioned only a centralized government could execute to ensure that the new nation could survive and prosper. At a micro level, it would be to leave to the King's delegate the same arbitrary power that Magna Carta sought to prohibit the King from exercising through the rule of law. The "plan of the Convention" was to create a new central government with the responsibility to manage the affairs of the nation for the benefit of the entire public with regard to particular functions—protecting the nation from invasion, ensuring free commercial intercourse among the states and with foreign governments, and so forth—that only a national government could adequately handle. The states were responsible for everything else, and they had incorporated the common law into their own legal principles. The result was to protect the public against the government directly taking their lives, liberties, and property through the use of government officials or indirectly accomplishing the same end by letting private parties handle that job. The rule of law would safeguard the

379. In *Bi-Metallic Inv. Co. v. State Bd. Of Equalization*, 239 U.S. 441, 444–45 (1915), the Supreme Court ruled that the Due Process Clause does not grant the public the right to be heard by the legislature before it enacts a law adversely affecting their property rights. As Justice Holmes wrote in that case: "Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule." *Id.* at 445.

public against the government's choice of either option. Using private parties to escape the carefully crafted limitations that due process imposes on government officials is just a cynical way to defy the Framers' signal accomplishment of establishing a government under law.

That rule also distinguishes cases such as *Eubank* and *Carter Coal* from the Court's procedural due process decisions in cases such as *Tumey* and *Sniadach*. The latter series of cases held a public or private delegation unconstitutional because the statutes vested decisionmaking authority in a party with a direct personal financial interest in the outcome of the case. Given the certainty that human nature would lead the decisionmaker to decide the matter in his or her favor, the Court concluded that the statute tilted the adjudicative process toward one side and that its job was "to keep the balance true."³⁸⁰ But that is not the only flaw in a private delegation. Delegation to an unbiased party of unimpeachable integrity—say, a former Supreme Court Justice who has resigned from office—would still be objectionable because granting a legally unaccountable private party governmental power would perform an end run around the federal lawmaking process.

The Supreme Court's decision in *Printz v. United States*³⁸¹ is instructive in that regard. At issue in *Printz* was the constitutionality of the Brady Handgun Violence Prevention Act,³⁸² which required state and local law enforcement officers to conduct background checks on handgun purchasers. The Court held that requirement, which it described as the "[f]ederal commandeering of state governments,"³⁸³ unconstitutional on two grounds. The first one was that states are separate juridical entities within our constitutional system, and Congress cannot "impress into its service—and at no cost to itself—the police officers of the 50 States."³⁸⁴ The other ground was that, by commandeering state and local law enforcement officers into federal service, the Brady Act disturbed "the separation and equilibrium of powers within the three branches of the Federal Government itself," because it took away from the

380. *Snyder v. Massachusetts*, 291 U.S. 97, 122 (1934).

381. 521 U.S. 898 (1997).

382. Pub. L. No. 103-159, 107 Stat. 1536 (1993).

383. *Printz v. United States*, 521 U.S. 898, 922 (1997).

384. *Id.*

President the ability to supervise the administration of federal law by placing it in the hands of people whom he did not appoint and could not remove.³⁸⁵

Printz helps illuminate the proper analysis of the issues arising under the Lacey Act. While the Act may not coerce foreign parties into acting as federal administrative officials, the Act certainly does take away the President's ability to decide who will implement the statute because the President does not appoint anyone to select which foreign laws form an essential element of a Lacey Act offense. The holding of *Printz* forbids Congress from evading constitutional restrictions on the federal lawmaking process by granting authority to state officials. The logic of *Printz* also prohibits Congress from trying to accomplish the same end by using foreign private parties.

The history of Magna Carta therefore provides a firm ground for the Court's decisions in *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal*, one that takes them out of the category of *Lochner*-era precedents. In those four cases the Court did not disregard the considered judgment of elected representatives that a specific economic arrangement of property rights was necessary for the benefit of the public, even if a minority would bear most of the cost. In each case the Court was faced with a decision made by the political branches, not to balance the interests of the few and the many, and not to let a particular component of the government accomplish the necessary regulation, but to hand over the rights of the minority to the self-interest of the majority by *withdrawing* the protection of the law. The ordinances and statutes in those cases are better described as abandonment than delegation. The assemblies did not lateral the ball to an agency; they gave it to one of two groups of competing private parties and let them fight it out. In each case either a local assembly or the national legislature chose to substitute the rule of a few for the rule of law in a manner contrary to the long-accepted Anglo-American understanding of government. In essence, the legislative bodies abandoned the rule of law in favor of the law of the jungle. That is hardly what the barons had in mind at Runnymede.

385. *Id.*

Indeed, the ordinances and statutes in *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal* effectively stood on its head the “Republican Form of Government” created for the nation by Articles I, II, and III and guaranteed to the states by Article IV. Ordinarily, the people choose their representatives and delegate to them the authority to make decisions in their place. Cases like *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal*, however, involve “legislative delegation in its most obnoxious form.”³⁸⁶ The government devolved its power to resolve an issue to a specific group of parties with a particular interest in the outcome of that decision. By washing their hands of the matter, the government officials in *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal* sought to eliminate private property owners’ ability to seek protection from the law against the personal interest of other newly-empowered private parties—who, since people are not angels, are more than happy to take the law into their own hands—while avoiding any political responsibility for the ultimate decisions of those newly created pseudo-government officers. The title for such a law might as well be “We are giving a group of self-interested private parties the legal authority to make this decision, so do not blame us for what they choose to do.”³⁸⁷ When it delegates standardless government authority to private parties who are neither legally nor judicially accountable for their actions, however, the government empowers a small number of private parties to replicate the same type of arbitrary government conduct that Magna Carta sought to restrain.

The history of Magna Carta discloses that the clause was designed to rein in the potentially capricious exercise of government power by demanding that the government act pursuant to the rule of law, rather than the private judgment of individuals. The latter practice is what *Eubank* and its offspring seek to prohibit regardless of whether the decisionmaker has a personal interest in the outcome of a decision. The Due Process Clause does not require the government to act as a separate, independent, bureaucratic, legal polity to order society. The gov-

386. *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936).

387. Somewhere Pontius Pilate was smiling when the Richmond city council passed the ordinance in *Eubank*.

ernment writ large may rely on private contractual ordering and common law judicial decisionmaking to regulate interpersonal conduct, and the government may leave to the public through the referendum process the power to adopt substantive rules for governance.³⁸⁸ What the government may not do, however, is to pick and choose what individual issues or decisions it will put outside of the social compact governed by law and leave to politically and legally unaccountable parties for resolution. Handing government power over to foreign government officials whose self-interests could be utterly antithetical to those of this nation would appear to be the archetypical example of just that type of unconstitutional private delegation.

4. *The Relevance of “the Law of the Land” to the Lacey Act*

The principle of “the Law of the Land” and the history of Magna Carta are relevant to the Lacey Act in three ways.

First, by using the phrase “the law of the land,” Magna Carta incorporated English common law as the set of background principles against which the legality of the government’s actions must be measured. “*Lex terrae*, in 1215, means what Matthew Paris called ‘the pious and just laws of King Edward.’ It is the ancient custom of the realm, ‘the law of the land’ in a real sense.”³⁸⁹ In the words of seventeenth century English constitutional historian Sir Roger Twysden:

388. See *City of Eastlake v. Forest City Enters., Inc.*, 426 U.S. 668, 677 (1976) (rejecting due process challenge based on *Eubank* to a public referendum).

389. McIlwain, *supra* note 354, at 49 (footnote omitted). As McIlwain explained:

Chapter 39 is a promise to English feudatories mainly. They also are guaranteed a *legale iudicium parium* [law by the judgment of peers]. The law by which the *pares* are to make their findings is to be the *lex Angliae*. This, in feudal language, will be the law of the fief. But the fief will be the whole realm. The judgment will be found by the feudal *pares curiae*; but in this case the court will be the *curia regis*, and the law will be the *lex terrae*.

Though this law is a feudal law, and the law of the fief, and applied in feudal manner by the peers of the fief, there is no reason why it may not also be the law of the land. The duty of the peers was to find the law, not to make it. It is entirely possible that the law so found will consist in large part of customary rules running back beyond the Conquest for their origin.

It may very well be the *Laga Edwardi* which Henry I promised to restore, *cus illis emendationibus* [with amendments] which his father had made in it, the same which [William] the Conqueror himself declared should continue in force, ‘*in terriis et in omnibus rebus*,’ while these

The subject of England is a people hath beene ever jealous of their freedome, and their lott is to live under a law of mercy that favours liberty. In our historians wee find it mentioned under severall names: Henry the First calls them the auntient liberties of the subject; elsewhere they are termed “antiquas libertates regni,” “rectum iudicium terrae,” “lex terrae,” “jus regni,” etc. In the Acts and Rolles of Parliament they are called “la franchise de la terre,” “le droit du royaume,” “the law of the land,” etc. by all which various appellations are meant nothing else but those immunities either to his person or his goods; and the grownd that hee doth so is, that they are allowed him by the law of the land, which the king alone can not at his owne will alter, and therefore can not take them from him, they being as auntient as the kingdome itselfe, which the king is to protect.³⁹⁰

Blackstone understood Magna Carta in that fashion. In his *Commentaries*, Blackstone described “municipal law” as the rule “prescribed by the supreme power in a state.”³⁹¹ Municipal law was synonymous with “the law of the land.”³⁹² That law could be the *lex scripta*—that is, the law written by Parliament³⁹³—or the *lex non scripta*—that is, the common law,³⁹⁴ also known as

‘emendations’ will be the *aliae libertates* referred to along with the *leges regis Edwardi* by the barons at the temple in 1215.”

McIlwain, *supra* note 354, at 50–51 (footnotes omitted); see also *Regina v. Paty*, (1704) 92 Eng. Rep. 232, 234 (QB) (the *lex terrae* “takes in all the other laws, which are in force in this realm”).

390. ROGER TWYSDEN, *CERTAIN CONSIDERATIONS UPON THE GOVERNMENT OF ENGLAND* 82 (1849). Some have argued that the *lex terrae* should be read more narrowly to refer merely to a judgment of one’s peers by the “time-honoured” tests: battle, compurgation, or ordeal, MCKECHNIE, *supra* note 249, at 379, or to simply whatever procedures positive law required, see *Walker v. Sauvinet*, 92 U.S. 90, 93 (1875). Others believe that the phrase is broader and also incorporates the “tone and substance” of the common law. MCKECHNIE, *supra* note 249, at 380. For purposes of this Article, it is irrelevant whether the barons intended to allow common law courts to invalidate legislation on substantive grounds. In 1215 the *lex terrae* and Magna Carta Article 39 would not have permitted the crown to imprison a subject unless he first had been convicted of a crime, which requires a pre-existing substantive rule of law. See *supra* notes 352 & 359 and accompanying text.

391. See 1 BLACKSTONE, *supra* note 181, at *44, *69.

392. See *id.*

393. See *id.* at *85 (defining the written laws as “statutes, acts, or edicts, made by the king’s majesty, by and with the advice and consent of the lords, spiritual and temporal, and commons in parliament assembled”).

394. See *id.* at *63, *67–68.

“the customary law of the land,”³⁹⁵ which included the law of crimes,³⁹⁶ which was created by the courts.³⁹⁷ The common law fit into one of three categories, with the most important one being “[g]eneral customs.”³⁹⁸ They were “the universal rule of the whole kingdom, . . . the common law, in its stricter and more usual signification,” including “the several species of the temporal offences, with the manner and degree of punishment[.]”³⁹⁹

That principle is significant because neither law of nations nor any particular foreign nation’s domestic law formed a material part of the common law of crimes.⁴⁰⁰

395. Bellia & Clark, *supra* note 361, at 12.

396. See *id.*

397. See 1 BLACKSTONE, *supra* note 181, at *63–64 (“[T]he monuments and evidences of our legal customs are contained in the records of the several courts of justice in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity. However, I therefore style these parts of our law *leges non scriptae*, because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power, and the force of laws, by long and immemorial usage, and by their universal reception throughout the kingdom.”); *id.* at *69 (“the judges in the several courts of justice . . . are the depositaries of the laws; the living oracles”); Bellia & Clark, *supra* note 361, at 13 (“The duty to determine the content of the law of the land rested with the judges of the several courts at Westminster. They professed to determine this law from prior judicial records or, where no judicial decision established the point, from established custom. Judges and other legal writers routinely referred to this common law as ‘the law of the land.’”) (footnotes omitted); *id.* at 13 n.40 (collecting cases). Parliament could displace the common law, and over time it often did (although the common law remained influential). See, e.g., 1 BLACKSTONE, *supra* note 181, at *89 (“Where the common law and a statute differ, the common law gives place to the statute[.]”); Bellia & Clark, *supra* note 361, at 11.

398. 1 BLACKSTONE, *supra* note 181, at *67.

399. *Id.* The other categories were “[p]articular customs,” which, “for the most part, affect the inhabitants of particular districts,” and “[c]ertain particular laws,” which, “by custom, are adopted and used by some particular courts, of pretty general and extensive jurisdiction.” *Id.*

400. There is a technical difference between “the law of nations” and the law of a foreign nation. The former, which includes international law, and multilateral treaties, is both “particularistic” and “part of the legal architecture of the world we live in.” Neuman, *supra* note 27, at 178. The latter principally refers to “the domestic legal systems of foreign states, including their national constitutions, statutes, and other domestic norms.” *Id.* (footnote omitted). The difference is important because, as noted below, even if the English courts believed that the law of nations could be incorporated into the common law, that proposition would by no means require the common law to embrace the domestic criminal laws of either any particular foreign country, of all of them, or of any denomination common to all.

"[T]he common law of England did not originally apply beyond the shores of the realm. At common law, criminal courts had jurisdiction only over things done within their own counties, and the counties of the realm ended on the foreshore, where the dry land meets the current state of the tide. The common law had no conception of territorial waters or of crimes committed abroad. These are all the creation of legislation."⁴⁰¹

Beginning in the thirteenth century, the common law markedly diverged from the continental legal system.⁴⁰² Because "the Common Law had become part and parcel of [England's] political constitution, an element of her national conscience and the foundation of her social order," it is unlikely that the English or colonial American courts would have looked to the law of nations to define domestic crimes.⁴⁰³ There also would have been no reason

401. HIRST, *supra* note 19, at 5.

402. See J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 13–14 (2007) (describing Glanvill's treatise on the laws and customs of England as setting forth "the fixed customs of the king's court as constituting *jus et consuetudo regni*, the law and custom of the realm . . . Just as Gratian, a generation earlier at Bologna, had produced from the confusion of ecclesiastical laws a coherent system of Canon law deriving ultimate authority from the Pope, so Glanvill and his fellow councilors under Henry II produced a coherent system of English law deriving ultimate authority from the king.") (footnote omitted); *id.* at 29 ("English law flourished in isolation from Europe, and even . . . from parts of Britain and the British Isles."); R.C. VAN CAENEGEM, THE BIRTH OF THE ENGLISH COMMON LAW 92–98, 104–05 (2d ed. 1988).

403. As Professor van Caenegem has explained:

[I]n the 1180s the Common Law was already set on its course and Glanvill's treatise, towards the end of the decade, would greatly strengthen it. In other words, when at the turn of the twelfth century Romano-canonical learning began to conquer the practice of Europe's ecclesiastical courts and, in the course of the thirteenth century, to influence its lay courts and writers on customary law, it was too late for the Common Law to be affected in any substantial way. Even Bracton who was ready to borrow what he could, could not alter the nature of the 'Laws and Customs of England'. The Common law was set in its own techniques, practices, ideas and institutions, had created its own framework and had produced a technical terminology of considerable sophistication and precision that was to last for centuries and constitute a barrier to civilian influence. It was adequate for the needs and so rooted in the social reality of the time that any attempt to change it would have met with the famous 'nolumus leges Angliae murari', with which in the Statute of Merton of 1236 the barons opposed the clergy's request to change English marriage laws.

to refer to the law of nations to define the common law of crimes when the Framers went to Philadelphia. "At the time of the adoption of the U.S. Constitution, the law of nations, conceived most broadly, 'comprised the law merchant, maritime law, and the law of conflicts of laws, as well as the law governing the relations between states.'"⁴⁰⁴ Criminal law was not one of those subjects.

To be sure, in *The Paquete Habana*⁴⁰⁵ the Supreme Court wrote that "[i]nternational law is part of our law,"⁴⁰⁶ a dictum that been cited to support the proposition that domestic American law incorporates "customary international law."⁴⁰⁷ But that dictum came in an opinion written in 1900, not 1787, and does not reflect the state of the law at the time the Constitution became law. International law developed over the course of the nineteenth century, but even its modified form did not create an international criminal law.⁴⁰⁸ Moreover, Professors Anthony Bellia and Brad Clark have explained that, in order to ensure that England would "be a part of the civilized world,"⁴⁰⁹ common law courts believed that they possessed the authority to incorporate into English law the commercial law of nations and the law governing the relations between states.⁴¹⁰ The common law courts, however, did not uncritically incorporate international law into

VAN CAENEGEM, *supra* note 402, at 92.

404. See Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 822 (1997) (quoting Stewart Jay, *The Status of the Law of Nations in Early American Law*, 42 VAND. L. REV. 819, 821–22 (1989)).

405. 175 U.S. 677 (1900).

406. *Id.* at 700.

407. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS, *supra* note 27, § 102(2) (1986) ("Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.").

408. See Bradley & Goldsmith, *supra* note 404, at 822 ("For a number of reasons, the scope and structure of the law of nations changed in the nineteenth century. Domestic law absorbed the private-law elements of the law of nations, and the law of nations came to govern primarily relations among nation-states. Reflecting this new orientation, the law of nations became known as 'international law' and that portion of it based on customary practice 'customary international law.'" (footnotes omitted)).

409. See 4 BLACKSTONE, *supra* note 181, at *67.

410. Bellia & Clark, *supra* note 361, at 20–26; see 1 BLACKSTONE, *supra* note 181, at *75 (referring to "a particular system of customs used only among one set of the king's subjects, called the custom of merchants or *lex mercatoria*: which, however different from the common law, is allowed for the benefit of trade.").

domestic law.⁴¹¹ Moreover, “the most established principles of the law of nations” applied to “nations’ territorial sovereignty, equal rights on the high seas, treaty rights, and representatives operating in other nations,”⁴¹² not to the definition of crimes, which was domestic and landlocked. As the result, regardless of its form, the bench during the early days of this nation would not have believed that international law was an element of “the law of the land” when it came to the criminal law.

Second, the federal courts do not enjoy the same common law authority that the English and colonial courts possessed.⁴¹³ That is particularly true in the case of the criminal law. In 1812, in one of its most important cases dealing with the substantive federal criminal law, *United States v. Hudson & Goodwin*,⁴¹⁴ the Supreme Court squarely rejected the argument that the federal courts had the authority to develop a federal common law of crimes.

The Judiciary Act of 1789 gave the federal courts exclusive jurisdiction over “all crimes cognizable under the authority of the

411. See ARTHUR HOGUE, ORIGINS OF THE COMMON LAW 25–26 (1966) (“There is no difficulty in establishing the fact that English wool sold readily over much of Europe; that in the thirteenth century Italian merchants came to England from Florence and Genoa; that French merchants came from Bordeaux to compete with Flemings from Bruges, Rhinelanders from Cologne, and Hansards from Lübeck. It is much more difficult, however, to establish that foreign merchants prevailed in securing recognition of legal doctrines new to the common law.”). Professors Bellia and Clark recognize as much. See Bellia & Clark, *supra* note 361, at 20–26. Maritime law was a part of the law of nations, but the admiralty courts had jurisdiction over that subject, not the common law courts. See *id.* at 22–24.

412. Bellia & Clark, *supra* note 361, at 30.

413. Beginning with the Supreme Court’s 1842 decision in *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), the federal courts could develop a general limited federal common law. After the Court’s later decision in *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938), however, the federal courts lost that power. Today, there is no general federal common law, although the federal courts may craft one in limited circumstances when necessary to protect uniquely federal interests. See, e.g., *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (“[A]bsent some congressional authorization to formulate substantive rules of decision, federal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases.”) (footnotes omitted); *Textile Workers Union of Am. v. Lincoln Mills*, 353 U.S. 448, 457 (1957) (ruling that the federal courts may develop a federal common law of labor-management relations). As explained in the text, however, the federal courts cannot exercise any such power to create federal common law crimes.

414. 11 U.S. (7 Cranch) 32 (1812).

United States.”⁴¹⁵ Early in the nation’s history, Great Britain and France were at war, and President George Washington issued a Neutrality Proclamation in order to keep the new republic from becoming embroiled in that foreign conflict.⁴¹⁶ The question immediately arose whether a violation of that proclamation was a crime under the law of nations and whether the Judiciary Act of 1789 gave the federal courts jurisdiction to prosecute an offender for a violation of that body of law.⁴¹⁷ The argument in favor of that interpretation, advanced by parties such as Alexander Hamilton, one of the authors of *The Federalist Papers*, and John Jay, the first Chief Justice of the United States, was that the English common law had incorporated aspects of the law of nations, and the colonies, and later the states, had incorporated the English common law. On the other side were parties such as James Madison, the principal drafter of the Constitution, and Attorney General Edmund Randolph, who argued that only Congress could create federal crimes because doing so was a lawmaking function that only Congress could exercise.

The issue finally reached the Supreme Court in the *Hudson & Goodwin* case. The government prosecuted Barzillai Hudson and George Goodwin, publishers of the Connecticut Courant, a Hartford newspaper, for seditious libel for reprinting an article from The Utica Patriot accusing Congress, acting at the behest of President Jefferson, of secretly appropriating two million dollars to give to Napoleon as a bribe. The trial judges disagreed as to whether they had jurisdiction over that crime and certified the issue to the Supreme Court. Stating that the legal issue had “been long since settled in public opinion,”⁴¹⁸ the

415. Act of Sept. 24, 1789, ch. 20, § 9, 1 Stat. 73, 76–77 (defining district court jurisdiction); *id.* § 11, 1 Stat. at 78–79 (defining circuit court jurisdiction).

416. See George Washington, *Proclamation of Neutrality* (Apr. 22, 1793), reprinted in 10 THE WRITINGS OF GEORGE WASHINGTON 535–36 (Jared Sparks ed., 1836).

417. See Bellia & Clark, *supra* note 361, at 47–55; Prakash, *supra* note 27, at 69.

418. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 32 (1812). Justice Johnson, the author of that opinion, must have written that statement tongue-in-cheek or felt some reason to deny the still contentious nature of the dispute. See Garv D. Rowe, Note, *The Sound of Silence: United States v. Hudson & Goodwin. The Jeffersonian Ascendancy, and the Abolition of Common Law Crimes*, 101 YALE L.J. 919, 920–21 (1992) (“For without acknowledging it, the *Hudson* Court disapproved at least eight circuit court cases, brushed off the views of all but one Justice who sat on the Court prior to 1804, and departed from what was arguably the original under-

Court unanimously ruled that the federal courts cannot exercise a common-law-like power to create substantive federal crimes.⁴¹⁹ “The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”⁴²⁰ The Supreme Court’s *Hudson & Goodwin* decision bars the federal courts from developing a federal common law of crimes that would incorporate foreign law and therefore should also preclude Congress from giving foreign nations a power that Congress may not entrust to the federal courts.

Third, Congress, of course, may displace the common law when legislating pursuant to one of its delegated powers. That is the essence of the legislative power that Article I granted to Congress and parallels the authority that Parliament enjoys to displace the common law. A federal agency or a state may do likewise when acting within the scope of delegated federal authority. But unless one of those entities exercises its power to create a “Law,” there will occasionally be a gap where no statutory or regulatory provision governs a particular issue. In that instance, when statutory law and regulations are silent on a subject, federal or state common law may fill in the blanks, or the matter could be seen as being left to private contractual ordering. But in no instance would it be reasonable to deem foreign law as playing any governing role because by no stretch of the imagination could foreign law be deemed “*the law of the land*” as Magna Carta used that term. That “law” was a small set of principles, rooted in natural law and contemporary mores, which governed English society in the thirteenth century and would evolve over time, while the “land” was England and nowhere else. If so, the constitutional history of the Due Process Clauses supports the proposition that only domestic federal or state law may supply the default rule in cases where Congress and a state have been silent. Foreign law cannot play that gap-filling role.

The Supreme Court’s decisions in *Eubank*, *Roberge*, *Schechter Poultry*, and *Carter Coal* apply the foregoing principles, just in a slightly different context. They deal not with the crown or the

standing of those who framed the Constitution and penned the Judiciary Act of 1789.”).

419. *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 33–34 (1812).

420. *Id.* at 34.

government acting as if it is not subject to law, but with the scenario in which the one or the other has exempted particular private parties from all legal requirements. *Eubank* and its offspring stand for the proposition that the government can deny someone due process by *exempting* certain individuals from restraints imposed by the rule of law or, what is the same thing, by *turning over* “the law of the land” to the judgment of particular private parties. The reason is that private parties can act in derogation of “the law of the land” in the same manner that government officers do when they *abuse* the law by ignoring or violating its dictates. Indeed, the parallel between using contemporary private parties to supplant government officials is similar to King John’s use of mercenary troops to deprive his barons of their common law rights without the judgment of a court—a practice that was the principal objection the barons raised against the king’s exercise of power and that Magna Carta sought to prevent from recurring. The decisions from *Eubank* through *Carter Coal* seek to achieve that result by prohibiting the government from using private parties to govern the life, liberty, and property of others because granting some such individuals legally and politically unaccountable power over others is not a government under law.

The private nondelegation doctrine decisions, coupled with the constitutional history of the Due Process Clauses, are fatal to the Lacey Act. The Act contains a blank space that every other nation may fill in as it pleases because Congress—and it is not too harsh a term—“punted” the matter to other countries. Foreign officials—not Congress, not a federal agency, and not federal or state common law—will decide which foreign laws trigger the Lacey Act. If no one may be deprived of life, liberty, or property without being afforded “due process”—that is, except according to “the law of the land”—no one may be convicted under the Lacey Act for violating a law with no domestic origin or legitimacy.

B. Article II Problems With the Lacey Act

Little more needs be said to explain why the Lacey Act violates the Appointments Clause. The discussion above makes the point that the Lacey Act delegates federal lawmaking or policymaking authority to foreign officials. The people in this nation do not elect those officials, neither the President nor

anyone else identified in Article II appoints or removes them, and no Article III court has the power to review their actions. If foreign officials hold office in a democratic republic like ours, they are selected for positions of authority by their own voters or by more senior government officials. If their government does not resemble ours, they may have received their power out of the barrel of a gun. However they come to hold whatever positions they occupy, foreign officials are not appropriate parties to exercise the executive authority of this nation. Allowing foreign government officials to define the laws that the Lacey Act incorporates is no more permissible than entrusting to those officials the authority to adjudicate a criminal charge under federal law. Each delegation would offend the text and purposes of Article II—as well as Article III and the Fifth Amendment Due Process Clause.⁴²¹

421. As Professor Lawson has noted, “[t]he conviction of a defendant under the criminal laws, for example, is surely something that requires the exercise of judicial rather than executive power.” Lawson, *supra* note 91, at 1246–47. See also *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1855); Robert J. Delahunty & John Yoo, *Against Foreign Law*, 29 HARV. J.L. & PUB. POL’Y 291, 299–304 (2005); Harrison, *supra* note 27, at 127–28; Posner & Vermeule, *supra* note 109, at 1757–59. There is no Supreme Court decision squarely on point—thankfully Congress has never tried to hand over American citizens to foreign nations for trial for an alleged violation of this nation’s criminal laws—but there are several rivers that do run together. The Supreme Court has made it clear over the past thirty years that Congress cannot vest non-Article III courts with decisionmaking authority over state law claims. See, e.g., *Stern v. Marshall*, 131 S. Ct. 2594, 2608–20 (2011) (holding unconstitutional under Article III a federal statute granting bankruptcy court the authority to adjudicate state law counterclaims); *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982) (same, state law contract issues); see also Sandra Dav O’Connor, *Federalism of Free Nations*, 28 N.Y.U. I. INT’L L. & POL. 35, 39–42 (1995) (“[T]he vesting of certain adjudicatory authority in international tribunals presents a very significant constitutional question in the United States. Article III of our Constitution reserves to federal courts the power to decide cases and controversies, and the U.S. Congress may not delegate to another tribunal ‘the essential attributes of judicial power.’”). The Court also has been unwilling to allow non-Article III judges, such as U.S. Magistrate Judges or administrative officials, to resolve potentially dispositive issues in a criminal case. See, e.g., *Gomez v. United States*, 490 U.S. 858, 871–76 (1989) (ruling that a federal magistrate cannot preside over jury selection without a defendant’s consent); *United States v. Raddatz*, 447 U.S. 667, 677–84 (1980) (ruling that a federal magistrate can preside over and make finding regarding a suppression motion as long as the district court can rehear the evidence de novo and make a final decision); *Estep v. United States*, 327 U.S. 114, 121–25 (1946) (ruling that a district court can review the legality of a selective service induction classification in a criminal prosecution for failing to report for service); but see *Gonzalez v. United States*, 553 U.S. 242, 243 (2008) (ruling that defense counsel may

No Supreme Court precedent justifies any such delegation to foreign parties. Only the parties identified in Article II—the President, a Court of Law, or the Head of a Department—can appoint someone to an office enabling him or her to exercise federal power,⁴²² and, generally speaking, only the party with appointment authority can remove an officer he or she appointed.⁴²³ On occasion the Supreme Court has upheld limitations on an appointing authority's removal power.⁴²⁴ But the Court has never suggested that the President (or the other authorities identified in Article II) can be ousted from *both* the appointment *and* removal processes, and the Court's more recent decisions suggest that it would be reluctant to sustain any such limitation.⁴²⁵ Atop that, the Supreme Court held in *Buckley v. Valeo*⁴²⁶ and in *Bowsher v. Synar*⁴²⁷ that Congress can neither appoint nor remove officials who exercise federal authority, and ruled in *Printz v. United States*⁴²⁸ that Congress cannot evade those limitations by vesting nonfederal officials not subject to presidential review (there, state law enforcement officers) with the power to enforce federal law.⁴²⁹ It follows from *Buckley*, *Bowsher*, and *Printz* that Congress cannot vest in a foreign electorate the power to ap-

consent to having a federal magistrate preside over jury selection); *Peretz v. United States*, 501 U.S. 923, 936–39 (1991) (same). Finally, the Court has made it clear that the government cannot try a defendant in a military court-martial unless he or she was a service member at the time of the crime and remains one at the time of trial. *See, e.g.*, *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234, 248–49 (1960); *Reid v. Covert*, 354 U.S. 1, 19–20 (1957). In sum, there should be little doubt that Congress cannot empower foreign officials to preside over a federal criminal trial.

422. *See* U.S. CONST. art. II, § 2, cl. 2; *Pub. Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 483–84 & n.4 (1989) (Kennedy, J., concurring).

423. That proposition can be seen in the Supreme Court cases ruling that the default rule in the case of presidential appointments is that the President has the unfettered right to remove someone he or she appointed. *See, e.g.*, *Free Enter. Fund v. PCAOB*, 130 S. Ct. 3138, 3146–47, 3157 (2010); *Bowsher v. Synar*, 478 U.S. 714, 730 (1986); *Buckley v. Valeo*, 424 U.S. 1, 125–26 (1976). Logically, the same principle should apply if Congress vests appointment power in a Court of Law or the Head of a Department.

424. *See Morrison v. Olson*, 487 U.S. 654, 659–60 (1988); *Wiener v. United States*, 357 U.S. 349, 353–54 (1958); *Humphrey's Ex'r v. United States*, 295 U.S. 602, 625–26 (1935).

425. *See, e.g., Free Enter. Fund*, 130 S. Ct. at 3146.

426. 424 U.S. at 125–26.

427. 478 U.S. at 730.

428. 521 U.S. 898 (1997).

429. *See id.* at 922–23 (holding unconstitutional a statute that required state officials to enforce federal law).

point or remove foreign officials who exercise the authority to define federal law.⁴³⁰

IV. A POTENTIAL NECESSITY DEFENSE

The only remaining question is whether the government can defend the Lacey Act's incorporation of foreign law on the ground of necessity. The argument would go as follows: Each sovereign has the prerogative to define the law within its borders—that is what the definition of “sovereignty” entails—and it would be jingoistic in the extreme for the United States to expect other nations to accept our laws as governing the protection that animal and plant life should receive in their countries. As the result, only by incorporating foreign law into federal criminal statutes can the United States engage in cooperative endeavors with foreign governments to protect wildlife and plant species and to prevent the global depletion of either resource. To use the terminology often found in other areas of federal constitutional law,⁴³¹ the Lacey Act is a narrowly written law that serves a compelling governmental interest in a field—foreign relations—where both the strength of the governmental interest and judicial deference to the judgment of the political branches should be at their zenith.⁴³²

A Supreme Court reluctant to second-guess the importance of a foreign policy judgment by Congress and the President might try to find a way to avoid ruling that the government lacks a compelling interest in promoting the international cooperation

430. The Title of Nobility Clause prevents federal officials from accepting or holding any foreign position of authority without Congress's consent. *See* U.S. CONST. art. I, § 9, cl. 8 (“No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince or foreign State.”). If a federal official cannot hold a foreign office because of the fear of divided loyalties, it would follow that a foreign official cannot hold a federal office.

431. *See, e.g., Fisher v. Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2419 (2013) (ruling that racial classifications are subject to a “strict scrutiny” and “compelling governmental interest” standard).

432. *See, e.g., Haig v. Agee*, 453 U.S. 280, 291–92, 307 (1981) (collecting Supreme Court decisions to that effect); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 166 (1803). *See also Zivotofsky ex rel. Zivotofsky v. Clinton*, 132 S. Ct. 1421, 1437–38 (2012) (Breyer, J., dissenting).

necessary to safeguard wildlife and plants from global depletion. But there is no escape from the conclusion that the Supreme Court has already refused to craft an exception to Article I simply to ensure that the government can function smoothly.⁴³³ In *INS v. Chadha*,⁴³⁴ the Court held the legislative veto unconstitutional on the ground that it violated the Article I Bicameralism and Presentment requirements,⁴³⁵ even though Justice White made a powerful argument in dissent that the legislative veto “is an important if not indispensable political invention that allows the President and Congress to resolve major constitutional and policy differences, assures the accountability of independent regulatory agencies, and preserves Congress’s control over lawmaking” in the modern administrative state.⁴³⁶ Moreover, there is a readily available alternative tool for the government to use to achieve its sought-after goals: international extradition. The United States could extradite an alleged offender to the foreign nation whose criminal laws were allegedly broken. Of course, extradition may not be an available option in every case because a foreign nation may treat the alleged conduct as merely a civil or administrative infraction. But if a foreign nation treats the infraction in that manner, the United States has no interest in elevating it to a federal offense. The United States does not need to be more Catholic than the Pope.

V. CONCLUSION

Congress could reasonably decide that this nation should limit the effect that importation of foreign-made raw materials or processed goods should have on the government, infrastructure, and environment in foreign lands. The relevant question, however, is not whether the federal government should assist foreign governments in enforcing their own laws, whether overseas logging and hunting in violation of some foreign law

433. See *Printz v. United States*, 521 U.S. 898, 931–32 (1997) (rejecting the government’s “cluster of arguments that can be grouped under the heading: ‘The Brady Act serves very important purposes, is most efficiently administered by [state and local law enforcement officers] during the interim period, and places a minimal and only temporary burden upon state officers.’”).

434. *INS v. Chadha*, 462 U.S. 919 (1983).

435. *Id.* at 945–59.

436. *Id.* at 972–73, 968–75 (White, J., dissenting).

should be prosecuted, or whether the domestic economic benefits and worldwide environmental gains from reducing deforestation is a legitimate goal of the federal government. The relevant issue is whether the Lacey Act attempts to accomplish those objectives in a constitutionally permissible way. The answer is “no.” Congress said nothing about the type of laws that are incorporated (civil versus criminal), the form that those laws may take (foreign constitutions vs. statutes vs. regulations vs. judicial decisions vs. administrative opinions), the nature of the government whose laws are relevant (democracies versus dictatorships versus military juntas), or the underlying national economic and social structure whose laws are counted (Marxist versus socialist versus free market economies). Congress lateraled those decisions to foreign nations, empowering them to make every call regarding what “law” the Lacey Act should incorporate. The Act offers literally no guidance for the exercise of discretion by a foreign nation. But even if it did, the Act still would be unconstitutional because it grants federal authority to officials who are not elected by citizens of this country or appointed by the representatives whom those citizens do elect.

As Judge Frank Easterbrook has noted, “[t]he Founders’ objection to George III was that no one elected him, and we were stuck with him till he died. They did not wage a revolution to turn the same power over to a bunch of judges!”⁴³⁷ Far less did the Framers wage that revolution to turn governmental power over to foreign governments like—or worse than—the one they had just defeated. Even under the most charitable reading of the Supreme Court’s cases, the Lacey Act violates Articles I and II because the Act grants to a foreign country the same prerogative that our Constitution grants only to elected or appointed officials in this nation: the power to govern “We the People of the United States.”

437. Easterbrook, *supra* note 27, at 227.