

UNIVERSITY OF PITTSBURGH LAW REVIEW ONLINE

Vol. 84 • 2023

PUBLIC RIGHTS AND TAXATION: A BRIEF
RESPONSE TO PROFESSOR PARRILLO

Ann Woolhandler

ISSN 1942-8405 (online) • DOI 10.5195/lawreview.2023.897
<http://lawreview.law.pitt.edu>



This work is licensed under a Creative Commons Attribution-Noncommercial-No Derivative Works 3.0 United States License.

Pitt | Open
Library
Publishing

This journal is published by [Pitt Open Library Publishing](http://pittopenlibrarypublishing.com).

PUBLIC RIGHTS AND TAXATION: A BRIEF RESPONSE TO PROFESSOR PARRILLO

Ann Woolhandler*

A division exists between scholars who claim that Congress made only limited delegations to executive officials in the early Republic, and those who see more extensive delegations.¹ The dispute has at least two prongs. The nondelegation camp argues that Congress made most of the important decisions itself,² whereas the prodelegation group points to Congress's committing significant decisions to administrators.³ Nondelegation scholars also argue that certain categories, such as foreign affairs,⁴ should be treated as special exceptions allowing for greater

* William Minor Lile and Armistead M. Dobie Research Professor of Law, University of Virginia. Thanks to Michael Collins, John Harrison, Caleb Nelson, and Sai Prakash.

¹ See, e.g., Kevin Arlyck, *Delegation, Administration, and Improvisation*, 97 NOTRE DAME L. REV. 241, 244–47 (2021) (describing the debate); Kurt Eggert, *Originalism Isn't What it Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary*, 24 CHAP. L. REV. 707, 768–89 (2021) (reviewing scholarship as to originalism and nondelegation); Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 404 (2017) (reviewing over 2,000 cases decided before 1940 and concluding that the nondelegation doctrine was not a serious constraint on legislative power).

² See, e.g., Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 1490, 1497 (2021) (indicating that many of the delegations cited by the prodelegation scholars, including the direct tax, still involved Congress's keeping power over "important subjects"); *id.* at 1503 n.58 (citing others who support Chief Justice Marshall's importance test); Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388 (2019) (indicating that Congress legislated with great specificity as to customs).

³ See e.g., Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 279–80 (2021) (arguing that the original Constitution did not contain a nondelegation doctrine, whether the doctrine involves regulating the future conduct of private individuals or what is important); Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, 55 GA. L. REV. 81, 88 (2021) (emphasizing the importance of the patent and debt decisions that the First Congress delegated); *cf.* John Vlahoplus, *Early Delegations of Federal Powers*, 89 GEO. WASH. L. REV. ARGUENDO 55, 57–59 (2021) (discussing delegations to private parties).

⁴ See, e.g., Michael B. Rappaport, *The Selective Nondelegation Doctrine and the Line Item Veto: A New Approach to the Nondelegation Doctrine and Its Implications for Clinton v. City of New York*, 76 TUL.

delegations,⁵ while prodelegation scholars claim that delegations were not limited to special categories.⁶

In *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, Professor Nicholas Parrillo claims that congressional delegations under the direct tax of 1798 undercut arguments that early delegations of rulemaking addressed unimportant issues⁷ or were limited to specific categories.⁸ The legislation taxed certain property based on its “worth in money,”⁹ and as a direct tax had to be apportioned according to the population of each state.¹⁰ Parrillo points out that the

L. REV. 265, 313 (1994) (indicating that the nondelegation doctrine generally does not apply to foreign and military affairs).

⁵ Aditya Bamzai, *Delegation and Interpretive Discretion: Gundy, Kisor, and the Formation and Future of Administrative Law*, 133 HARV. L. REV. 164, 178 (2019) (suggesting that a nondelegation doctrine “might apply in a more rigorous fashion where private ‘rights’ are at issue and more deferentially where ‘privileges’ are at stake”); *id.* at 181 (indicating the distinction mapped onto public and private rights); Wurman, *supra* note 2, at 1502 (suggesting public as distinguished from private rights would allow more discretion); Ronald A. Cass, *Delegation Doctrine Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 HARV. J.L. & PUB. POL’Y 147, 157 (2017) (indicating that Congress deputized other officers to make decisions as to “housekeeping, of management of national property, of licensing, of procedures for performing duties aligned with the assignee’s other powers”); *cf.* Michael B. Rappaport, *A Two Tiered and Categorical Approach to Nondelegation Doctrine* 3 (San Diego Legal Stud., Working Paper No. 20-471, 2020) (recommending a strict version of nondelegation for “coercion of private rights in the domestic sphere”).

⁶ *See, e.g.*, Mortenson & Bagley, *supra* note 3, at 366 (arguing that if nondelegation proponents have to claim too many exceptions, then perhaps their theory is mistaken); Arlyck, *supra* note 1, at 247–48 (claiming that delegations were not limited to specific categories); *id.* at 286–92 (arguing that remission of penalties did not fit within any supposed foreign affairs exception); *id.* at 292–95 (arguing that remission did not fit a supposed benefits exception); *cf.* Cameron Silverberg, Note, *Trading Power: Tariffs and the Nondelegation Doctrine*, 73 STAN. L. REV. 1289, 1304 (2021) (arguing that Congress cannot delegate away all power as to foreign commerce); Note, *Nondelegation’s Unprincipled Foreign Affairs Exceptionalism*, 134 HARV. L. REV. 1132, 1134 (2021) (arguing that the Constitution offers no support for the categorical treatment of foreign affairs as an exception to the nondelegation doctrine).

⁷ Nicholas R. Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288, 1306 (2021) (referring to the “massive revision power” of the boards); *id.* at 1307 (referring to “wide discretion” and indeterminacy of valuation issues); *id.* at 1309–10 (stating that equalization decisions had “an important political aspect” and were often undertaken by state legislatures themselves).

⁸ *Id.* at 1301, 1305, 1313.

⁹ *Id.* at 1323–24.

¹⁰ *Id.* at 1318–19 (explaining direct taxes).

federal boards of tax commissioners for each state¹¹ could designate assessment districts¹² and, more significantly, could equalize the assessments among districts under a “just and equitable” standard.¹³ Not only were these powers significant, argues Parrillo, but they fell outside of limited nondelegation exceptions.¹⁴ The nondelegation scholars are “mistaken to say that no early congressional grant of rulemaking power was coercive and domestic;”¹⁵ the boards’ equalization power shows that rulemaking occurred even as to “domestic private rights.”¹⁶

Nondelegation scholar Professor Ilan Wurman addressed the importance question in the volume of the *Yale Law Journal* in which Parrillo’s article appeared.¹⁷ And while he noted that “[t]he direct-tax legislation is the clearest challenge to the nondelegation thesis,” he concluded: “Congress did make the important decisions—the amount to be raised, the actual assessment rates, that houses and land shall be treated separately, that city dwellers should bear the burden of the tax, and that valuations should approximate as near the true value as possible.”¹⁸

It may be unlikely that the nondelegation and prodelegation camps will be won over by the other’s estimations of the importance of issues that Congress, as opposed to administrators, decided. But a nondelegation proponent may still argue that regardless of differing views of importance, the delegations under the 1798 tax fell

¹¹ The President, with the advice and consent of the Senate, appointed a federal board for each state. *Id.* at 1304. Those boards appointed a principal assessor for each district, and assistant assessors. The assistants made the initial valuations, with a possibility of an appeal to the principal assessor. *Id.* at 1311, 1330.

¹² *Id.* at 1328–29 (emphasizing the importance of designation of assessment districts); *id.* (“The power governed the assessment’s organization, of course, but it also governed the assessment’s substance, because the boundaries of the assessment districts determined which properties would be bundled together for purposes of the board’s eventual en masse revisions of real-estate valuations.”).

¹³ *Id.* at 1304, 1309 (emphasizing how little detail Congress provided with this standard); *id.* at 1334 (referring to the greatest rulemaking power of the boards as the review en masse of valuations). Given its greater importance, this comment will focus on equalization rather than districting.

¹⁴ *Id.* at 1301.

¹⁵ *Id.*

¹⁶ *Id.* at 1305, 1313.

¹⁷ Wurman, *supra* note 2, at 1549–54; *see also id.* at 1497 (indicating that many of the delegations cited by the prodelegation scholars, including the direct tax, still involved Congress’s keeping power over “important subjects”).

¹⁸ *Id.* at 1553–54.

into a special category.¹⁹ Admittedly, Parrillo’s evidence undermines some generalizations that early rulemaking was not “coercive and domestic.”²⁰ But taxation falls into the category of public rights, which could include matters that were domestic and coercive, but that nevertheless allowed for a more lenient application of separation of powers strictures.²¹

Parrillo insisted that the boards’ equalization decisions involved “domestic private rights,” not public rights.²² Common sense supports Parrillo’s rejection of a public rights characterization for issues affecting the amount of tax: “Ordering landowners to pay a sum of their money to the government, under penalty of having their goods or lands seized, is a rule of conduct for private persons.”²³ Taxation, he reasons, would not have recommended itself to the Framers as a carve-out from ordinary separation of powers rules.²⁴

Historical categories, however, may not always fit common sense intuitions. As Justice Curtis stated in treating tax collection as a matter of public right in *Murray’s Lessee v. Hoboken Land & Improvement Co.*, “probably there are few

¹⁹ Cf. Richard A. Epstein, *Delegation of Powers: A Historical and Functional Analysis*, 24 CHAP. L. REV. 659, 661 (2021) (“Executive prerogative in this area dates to the Domesday book, which surveyed English titles under the supervision of the King, acting with his Council, long before the tripartite distinction between legislative, executive, and judicial was fully established.”) (citations omitted); Ronald A. Cass, *Rulemaking Then and Now*, 28 GEO. MASON L. REV. 683, 690 (2021) (stating that “whatever characterization one gives to this particular episode, it certainly is not emblematic of a large group of founding-era delegations”).

²⁰ Parrillo, *supra* note 7, at 1302; see also Philip Hamburger, *Delegating or Divestiture*, 115 NW. U. L. REV. ONLINE 88, 104–08 (2020) (“What is missing from the Mortenson and Bagley article is what Congress did not do. To be precise, the Article does not point to any early instance when the Executive, with or without congressional authorization, made binding rules or adjudications that were national and domestic in their scope.”); Cass, *supra* note 5, at 157 (“Outside the realm of foreign affairs [Congress] did not authorize the President or the courts or other governmental officers to adopt rules that broadly regulated behavior of private individuals or entities or that controlled the conduct of other officials outside of the branch carrying out the legislated mandate.”); Rappaport, *supra* note 5, at 3 (recommending a strict version of nondelegation for “coercion of private rights in the domestic sphere”).

²¹ See authorities cited *supra* note 5.

²² Parrillo, *supra* note 7, at 1313 (referring to the tax delegation as involving “domestic private rights”).

²³ *Id.* at 1317.

²⁴ *Id.* at 1316–17 n.106 (“[I]t seems very strange to think that the Framers, if they thought it more important for some matters to be under legislative control than others, would put taxation on the *lesser* end of that scale.”).

governments which do or can permit their claims for public taxes . . . to become subjects of judicial controversy.”²⁵ The Taney Court had previously determined that Congress could make customs appraisers’ *ad valorem* determinations conclusive.²⁶ The reasons seem to have been the legislature’s plenary power over revenue, the need for immediate collection, and the nonfault nature of taxation.²⁷

Parrillo recognizes that issues of taxation might be treated as matters of public right for purposes of final determination outside of the Article III courts.²⁸ He argues, however, that treating a matter as one of public rights that can be conclusively determined by non-Article III decisionmakers is a different question from whether Congress can delegate rulemaking power under Article I.²⁹ He relies *inter alia* on the fact that “the Framers explicitly and repeatedly defined taxation as a legislative power.”³⁰

To say a matter is particularly legislative, however, may have divergent implications. Criminal law involves impositions on individual freedom from incarceration, and legislating the content of criminal law is peculiarly legislative. Treating criminal law as especially legislative entails, on one hand, that Congress

²⁵ 59 U.S. (18 How.) 272, 282 (1856); *see also* authorities cited *supra* note 19.

²⁶ *Cary v. Curtis*, 44 U.S. (3 How.) 236 (1845), *discussed in* Ann Woolhandler, *Judicial Deference to Administrative Law—A Revisionist History*, 43 ADMIN. L. REV. 197, 223–24 (1991).

²⁷ Robert W. Kirst, *Administrative Penalties and the Civil Jury: The Supreme Court’s Assault on the Seventh Amendment*, 126 U. PA. L. REV. 1281, 1295 (1978) (emphasizing the need to raise revenue as the reason for allowing administrative collection of taxes). Indeed, one might argue that taxes are not squarely “rules of conduct,” but rather liquidated debts owed to the government—thus resembling collections the revenue officers owed to the Treasury in *Murray’s Lessee*, 59 U.S. (18 How.) at 278–79. My thanks to John Harrison for this suggestion. *See also* Kirst, *supra* at 1295, 1298 (indicating that the early cases allowed summary collection for taxes but not penalties); James E. Pfander & Andrew G. Borraro, *Public Rights and Article II, Judicial Oversight of Agency Action*, 82 OHIO ST. L.J. 493, 500 (2021) (“[W]hen tax assessors fixed the assessed value of property . . . they were exercising a form of assigned constitutive authority that established a new, prospectively binding legal obligation.”); *id.* at 503 (“These constitutive decrees differ from the exercise of ‘adjudicative’ power—which entails a retrospective settlement of disputed matters of right under the law as stated.”); *cf. id.* at 498, 539 (arguing that the distress warrant in *Murray’s Lessee* established government priority but did not foreclose judicial contest by the party alleged to owe the money).

²⁸ Parrillo, *supra* note 7, at 1316–17 n.106.

²⁹ *Id.* at 1317 n.106. *But cf.* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1024–1035 (2006) (indicating statutory retroactivity was more allowable for matters of public rights).

³⁰ Parrillo, *supra* note 7, at 1316; *id.* at 1304 (relying on *Bi-Metallic Investment Co. v. State Board of Equalization*, 239 U.S. 441 (1915), to indicate that equalization was rulemaking).

(1) make the rules³¹ and (2) cannot generally delegate the making of binding subrules to administrators,³² but on the other hand, (3) must consign the ultimate applications of law to particular individuals to the regular court system. One can contrast criminal law with pension awards—an area of public rights where the legislature had near plenary power.³³ A legislature could not only make the rules and subrules,³⁴ but also make individual awards, all largely insulated from review by the regular court system.³⁵ And the legislature could delegate the making of the subrules³⁶ and individualized decisions to executive officials³⁷—again with little if any required regular court review.

Despite its impact on existing property entitlements, taxation seemed to be treated somewhat like pensions. Legislatures generally made the broad rules, as Wurman indicates Congress did for the 1798 direct tax. Legislatures also often made

³¹ See *United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court shall have jurisdiction of the offense.”).

³² *But cf.* *United States v. Grimaud*, 220 U.S. 506 (1911) (allowing delegation to the Secretary of Agriculture to make rules carrying criminal penalties that governed the use of government lands); *United States v. Breen*, 40 F. 402, 403–04 (C.C.E.D. La. 1889) (allowing the Secretary of War to make rules to protect Mississippi River improvements and Congress to make such violation criminal), *noted in* *Whittington & Iuliano*, *supra* note 1, at 424–25. *But cf.* *Bamzai*, *supra* note 5, at 180–81 (explaining the Court’s reasoning in *Grimaud* as based on use of government lands as a privilege).

³³ *Crowell v. Benson*, 255 U.S. 22, 51 (1932) (listing pensions and taxation as matters Congress could commit to determination by agencies rather than making the determination itself).

³⁴ See *Wurman*, *supra* note 2, at 1533. Wurman attributes the flexibility to the awards’ being a nonexclusive power of Congress. *Id.*

³⁵ *Mortenson & Bagley*, *supra* note 3, at 342 & n.334 (citing Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 LA. L. REV. 625, 637 (1985)); *cf.* *Arlyck*, *supra* note 1, at 266–67 (indicating remission of penalties had been exercised by the legislature).

³⁶ Thus, Congress provided early that the pensions should be “under such regulations as the President of the United States may direct.” Act of Sept. 29, 1789, ch. 24, 1 Stat. 95, 95, *discussed in* *Mortenson & Bagley*, *supra* note 3, at 343. Wurman indicates that the regulations were more specification or gap-filling rather than interpretation. Ilan Wurman, *The Specification Power*, 68 U. PA. L. REV. 689, 711–12 (2020); *see also* *Wurman*, *supra* note 2, at 1540–41 (indicating pension statutes were specific); Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 400 (2002) (indicating Congress had made important decisions as to the initial pensions act); *id.* at 400–01 (indicating that the succeeding statute had no such constraints but might be justified as concerning the military).

³⁷ The justices in *Hayburn’s Case*, 2 U.S. (2 Dall.) 409 (1792), objected to making decisions that were reviewable by the Secretary of War but did take evidence under a later statute. *See* *Mortenson & Bagley*, *supra* note 3, at 344.

intermediate decisions, such as equalization between different areas.³⁸ And legislatures traditionally could make individual assessment decisions. Indeed, the Court as late as the early twentieth century referred to “the legislative function of making an assessment.”³⁹ Legislatures even then continued to make individualized *ad valorem* and benefits assessment determinations—and this largely insulated from regular judicial review.⁴⁰

What does this imply for the allowance of delegations, such as those seen in the 1798 direct tax? It might imply that analogously to pensions, the legislature might be able to commit both the making of subrules as well as applications to administrators. Obviously, legislatures often delegated individual assessment decisions, and Parrillo’s own study shows that legislatures could also delegate the intermediate decisions such as inter-district equalization.⁴¹ One could argue, as does Parrillo, that this shows that even core legislative activity could be delegated.⁴² But it also may be taken to show that in areas of public rights—implying plenary legislative control—legislatures could rather easily delegate to administrators the legislature’s own authority to make intermediate rules as well as particularized decisions.⁴³

Parrillo relies on the absence of judicial review for the equalization decisions to reinforce the significance of the delegation to create legally binding decisions. He states that there were no avenues for review of either the equalization decisions (and presumably no easy way to contest their delegation to boards) or individual

³⁸ Parrillo, *supra* note 7, at 1312 (referring to the tax during the War of 1812).

³⁹ *Security Trust & Safety Vault Co. v. City of Lexington*, 203 U.S. 323, 334 (1906); *see also* *State Railroad Tax Cases*, 92 U.S. 575, 614–15 (1875) (discussing the reluctance of federal courts to grant injunctions in tax cases, stating “the levy of taxes is a legislative, and not a judicial, function. Its exercise, by the constitution of all States, and by the theory of our English origins, is entirely legislative.”).

⁴⁰ *See, e.g.*, Ann Woolhandler, *Delegation and Due Process: The Historical Connection*, 2008 SUP. CT. REV. 223, 230–33, 256–57 (2009); *Spencer v. Merchant*, 125 U.S. 345, 351, 353 (1888) (treating a legislative determination of benefits as conclusive).

⁴¹ *See* Parrillo, *supra* note 7, at 1304; *cf. id.* at 1352 (indicating that where a state legislature’s apportionment was to counties, the legislature sometimes then provided for a subapportionment, by an elected county political body, to the towns within a county).

⁴² *Cf.* Whittington & Iuliano, *supra* note 1, at 424 (noting Jacksonian era cases challenging delegations of taxing authority); *id.* at 427 (showing invalidation rates by subject matter).

⁴³ *Cf.* Mortenson & Bagley, *supra* note 3, at 347 (treating decentralized delegations to customs officers as functionally equivalent to the Treasury Secretary being empowered to make general rules as to search and seizure).

assessments.⁴⁴ This lack of reviewability for assessment and equalization seems to have been part of the public rights package that allowed legislatures to give administrators some of the legislature's own powers to enter effectively final decisions as to individual assessments and equalization. The legislature could have made the decisions itself with little by way of judicial involvement, and might also give the decision to administrators with a similar lack of review.⁴⁵

Ratemaking later presented an analogous scenario. The operation of a railroad was a matter of public right,⁴⁶ and one of plenary legislative power. Setting maximum rates was a matter for the legislature.⁴⁷ The legislative power also entailed a lack of judicial review; *Munn v. Illinois* indicated that rate decisions generally

⁴⁴ Parrillo, *supra* note 7, at 1304 (indicating that the boards' equalization decisions were final); *id.* at 1311 ("Part IV shows that the federal boards' mass revisions were final and absolutely binding on taxpayers: none of the potential avenues for judicial review of tax administration in the period were available to review the revisions, either in general or as applied. . . . Nor was there any opportunity for judicial review of the quantum of the assessment during the enforcement process (in which the delinquent taxpayers' goods could be seized by distress, or their land sold against their will). Nor was there such an opportunity in tax-title litigation after enforcement, nor in tort suits against officers for unlawful distress of goods after enforcement."). *But cf.* Kirst, *supra* note 27, at 1330–32 (discussing the existence of common law actions against federal collectors of revenue more generally).

⁴⁵ See Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 596–97 (2007) (discussing the ability to delegate an order for bridge removal as an obstruction of free navigation in *Union Bridge Co. v. United States*, 204 U.S. 364 (1907), and indicating that the reasoning was that Congress could have made the determination itself and also could authorize the Secretary of War to do so with little judicial review); *cf.* Woolhandler, *supra* note 40, at 230 ("The absence of judicial review of public rights . . . might entail not only a lack of court-accorded process, but also an absence of review of legislative and agency procedures."). The insouciance to the delegations seems in part to have derived from an idea that in determining matters of public rights over which the legislature had plenary authority, the administrators were in some sense seen as officers closely associated with the legislature. See Woolhandler, *supra* note 40, at 236 nn.47–50. This is not to say there were not delegation challenges in tax cases. See Whittington & Iuliano, *supra* note 1, at 423–24 (reviewing state and federal cases and concluding that delegation of taxation authority had been a significant subject).

⁴⁶ Operating a railroad involved a governmental privilege, particularly because it required tapping into governmental eminent domain power. See *Munn v. Illinois*, 94 U.S. 113, 125 (1877) (indicating that the regulation of carriers' rights to fix charges was not an interference with private property); see also *id.* at 145, 148 (Field, J., dissenting) (indicating that the grain elevators could not be subject to price regulation because government had conferred no special privilege); Charles W. McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863–1897*, 61 J. AM. HIST. 970, 985 (1975) (describing Justice Field's views, indicating that because railroads had eminent domain privileges, they could be subsidized and regulated in ways not allowed for ordinary trades).

⁴⁷ Legislatures thus had powers to prescribe maximum rates—a legislative power that did not necessarily exist as to common occupations. *Cf.* McCurdy, *supra* note 46, at 996.

could not be reviewed for reasonableness.⁴⁸ The plenary legislative power also meant that—at least for a time—the Court saw the delegation of ratemaking to commissions as unexceptionable, and also that their determinations—like those of the legislature—would not be subject to federal judicial review.⁴⁹ Thus, the ability to delegate legislative powers and the ability to sidestep judicial review traveled together.

Late in the nineteenth century and early in the twentieth century, parties raised more nondelegation issues.⁵⁰ When the Court took on such questions, it was apt—as it is today—to use nondelegation canons to limit the delegations rather than totally to forbid them.⁵¹ Thus in *Londoner v. Denver*, the Court stated “where the legislature of a State, instead of fixing the tax itself, commits to some subordinate body the duty of determining whether, in what amount, and upon whom it shall be levied, and of making an assessment and apportionment” due process required notice and an opportunity to be heard.⁵² So, too, the Court required additional process for delegated ratemaking. As the Court said in one case,

The maxim that a legislature may not delegate legislative power has some qualifications, as in the creation of municipalities, and also in the creation of administrative boards. . . . In creating such an administrative agency, the legislature, to prevent its being a pure delegation of legislative power, must enjoin

⁴⁸ *Munn v. Illinois*, 94 U.S. 113, 133 (1877) (addressing grain elevators); *Peik v. Chicago & Nw. Ry. Co.*, 94 U.S. 164, 175–76 (1877) (addressing railroads).

⁴⁹ See *Woolhandler*, *supra* note 40, at 234–35; *Spring Valley Water Works v. Schottler*, 110 U.S. 348, 353–54 (1884); *State R.R. Comm’n Cases*, 116 U.S. 307, 331, 335 (1886) (rejecting various challenges to the commission’s ratemaking powers).

⁵⁰ *Whittington & Iuliano*, *supra* note 1, at 421 (indicating more challenges to rulemaking by executive agencies arose in the Gilded Age); *id.* at 419 (providing a graph showing the rise of nondelegation cases in state and federal courts).

⁵¹ Cass Sunstein, *The Non-Delegation Canons*, 67 U. CHI. L. REV. 315 (2000); *cf.* *Whittington & Iuliano*, *supra* note 1, at 409–10 (discussing early state cases that used something like an intelligible principle limitation); *id.* at 410 (discussing *In re Adams*, 21 Mass. (4 Pick.) 25, 29 (1826), which indicates that a delegation needed to provide clear guidelines and could not allow an arbitrary discretion).

⁵² *Londoner v. Denver*, 210 U.S. 373, 385–86 (1908). Municipalities were often treated similarly to agencies. See, e.g., *Whittington & Iuliano*, *supra* note 1, at 421 (explaining that at the state level, delegations to local governments were a prominent body of nondelegation decisions).

upon it a certain course of procedure and certain rules of decision in the performance of its function.⁵³

Concerns as to delegation thus helped to usher in greater requirements of procedural due process for individual tax determinations and for ratemaking,⁵⁴ and assisted in enhancing procedural and nonarbitrariness constraints on agencies more generally.⁵⁵

Professor Parrillo has contributed to our knowledge of early delegations, but has not provided so convincing a refutation of nondelegation premises as he claims. One may conclude, as does Professor Wurman, that Congress determined the important questions; one may also conclude, as argued herein, that taxation is in a special category despite being “domestic and coercive.”⁵⁶ even without a conclusive resolution of the originalist debate, perhaps it is possible to agree that nondelegation doctrine produces salutary effects of avoiding extreme delegations, and encouraging the courts and Congress to provide for procedures and safeguards against arbitrariness.

⁵³ *Wichita R.R. & Light Co. v. Public Utils. Comm’n of Kansas*, 260 U.S. 48, 58–59 (1922).

⁵⁴ *Woolhandler*, *supra* note 40, at 261–62.

⁵⁵ *Id.* at 252–55 (indicating that while the Court did enhance substantive nonarbitrariness review, it made gestures toward requiring, but did not ultimately require, procedural due process with respect to delegees’ districting and formulaic determinations for benefits).

⁵⁶ *See* authorities cited *supra* note 5.