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# Originalism Isn't What It Used to Be: The Nondelegation Doctrine, Originalism, and Government by Judiciary

*Kurt Eggert\**

*"[T]he great security against a gradual concentration of the several powers in the same department, consists in giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others. . . . Ambition must be made to counteract ambition."*  
– James Madison<sup>1</sup>

*"[Originalism's] greatest defect, in my view, is the difficulty of applying it correctly. . . . [I]t is often exceedingly difficult to plumb the original understanding of an ancient text."*  
– Justice Antonin Scalia<sup>2</sup>

*"[Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted."* – James Madison<sup>3</sup>

*"I'm an originalist; I'm a textualist; I'm not a nut."*  
– Justice Antonin Scalia<sup>4</sup>

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<sup>1</sup> THE FEDERALIST NO. 51, at 268 (James Madison) (George W. Carey & James McClellan eds., 2001).

<sup>2</sup> Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849, 856 (1989).

<sup>3</sup> THE FEDERALIST NO. 47, *supra* note 1, at 251 (James Madison) (emphasis in the original).

<sup>4</sup> Jeremy Telman, *Explication Du Texte: "I'm An Originalist; I'm A Textualist; I'm Not A Nut"*, 50 VAL. U. L. REV. 629, 629 (2016).

## I. INTRODUCTION

The originalist defenders of the nondelegation doctrine, the purported constitutional rule that Congress cannot delegate its legislative rule-making power to federal agencies, have constructed an elaborate myth to justify that doctrine, which is found nowhere in the Constitution. According to the originalist myth, John Locke articulated that doctrine in his *Second Treatise of Government* of 1689<sup>5</sup> and so influenced the Framers of the Constitution that they somehow worked it implicitly and invisibly into the Constitution. And hence the Constitution's original meaning includes the nondelegation doctrine. Such nondelegation defenders assert that the Constitution strictly limits the delegation of legislative power by Congress, even if it does not prohibit it entirely, and that there is a veritable trove of evidence showing that the nondelegation doctrine was firmly established at the Founding. Some treat James Madison as the patron saint of the separation of powers and argue that the fact that Madison unsuccessfully attempted to include the nondelegation doctrine in the Constitution shows that it is somehow inherent in that document.

None of that myth is true. Or rather, the available historical evidence strongly indicates that the myths asserted by such defenders of the nondelegation doctrine are false. Locke's greatest influence on the colonists came before the Revolution, at a time when the colonists were considering whether to revolt from Britain. Once the Revolutionary War started, Locke's influence in the colonies plummeted. At the Constitutional Convention, Locke had little apparent influence, and even that seems to have been on the Anti-Federalists, rather than with the Framers. The drafters and ratifiers of the Constitution little discussed the delegation of legislative powers, let alone what limits there should be to such delegation. Madison was far more concerned, even fearful, that Congress would encroach on the powers of the Executive and the Judiciary than he was about Congress excessively delegating its powers. Madison even urged including in the Constitution provisions that would have mandated that some legislative policy-making power be delegated to the Executive and the judiciary, in the form of a Council of Revision, a council made up of the Executive and selected members of the national judiciary to exercise what was then called the revisionary power.

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<sup>5</sup> JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* § 141 (C.B. Macpherson ed., 1980).

When a nondelegation provision was proposed at the Constitutional Convention, it was rejected. When an amendment was proposed to the Constitution as part of the Bill of Rights that would have prohibited each branch of the government from employing the powers of another branch, it was rejected by the Senate. Congress, since its inception, has delegated legislative power with relative abandon, and doing so was not held unconstitutional until 1935 and never again after that year.

Why would originalists push such obvious and unconvincing myths? How could a supposed “constitutional doctrine” rejected for the Constitution and which has been meaningfully employed only twice even be said to exist in any meaningful way? Worse yet, why does it appear that, to seize greater control of America’s governance, the now starkly conservative Supreme Court may well use originalism to justify creating a brand new and robust version of the long dormant nondelegation doctrine? This novel creation would be, some originalists argue, justified by then-secret debates at the Constitutional Convention, by a pre-Revolutionary War pamphlet arguing that Parliament should recognize the legislative power of colonial legislatures, by a personal letter written decades later about the influences on the Revolution, by a hoary misunderstood agency maxim that seems to have sprung from a medieval printing error, by one of Locke’s writings that little influenced the drafters of the Constitution, by early legislation that actually delegated legislative power, and by court cases well after the Founding that permitted legislative delegation, among other unconvincing sources.

To explain why originalist defenders would defend a nondelegation doctrine unsupported by evidence at the Founding, this article examines another myth, that of originalism itself, the idea that the “intentions of the founders” as a group of drafters or ratifiers or that the original public meaning of words in the Constitution can be ascertained in such an accurate and meaningful way that they should determine the meaning of the Constitution. This article also criticizes the idea that the Supreme Court should rely on its own judgement of arcane and disputed historical facts and the complex context in which they occurred as a basis to overturn centuries of its own precedent in interpreting the Constitution. These two myths, the myth of the nondelegation doctrine and the myth of an originalist method valid enough to breathe life into it, wind around and support each other. The nondelegation doctrine would remain dormant if not dead but for originalism. A revived nondelegation doctrine would be originalism’s greatest triumph, as it would give an originalist Supreme Court a self-created, ill-defined, and

virtually uncontrollable license to overturn any regulatory legislation that the Court disfavored for policy reasons.

A revived nondelegation doctrine would transform the Supreme Court into a far more powerful version of the rejected Council of Revision, a proposal that was scrapped at the Convention because it would have turned judges into legislators, violated the separation of powers, and upset the balance of those powers. A new robust nondelegation doctrine would go even further, as no one could override the veto power that the Supreme Court would give itself anytime Congress directed federal agencies to craft regulations and make decisions that the Court decides Congress should make for itself. The Court would not have to share this mighty veto power with the President, nor could Congress override the Court's veto. The Court would be granting itself an awesome policy power that would be almost impossible for Congress to resist or the people to remove, because the doctrine would be considered an implicit constitutional doctrine that must be enforced both on Congress and on the Executive Branch. And it is hard to imagine that the Constitution would be amended to remove the nondelegation doctrine, something that is not even there.

If the Supreme Court creates a robust nondelegation doctrine, it would seize the power to control the size of the administrative state and the scope of regulatory legislation in a way not authorized by the Constitution, rejected by the founders when they rejected the Council of Revision, and virtually untouchable by the people themselves or the members of Congress who represent them. Originalism would have seized power for a "Government by Judiciary," the very danger which was the original basis for originalism and was the title of the "manifesto of originalism," Raoul Berger's 1977 book that helped spark the originalist movement, a book warning of the grave peril of the Supreme Court Justices seizing such policy-making power and imposing their will on the nation by revising constitutional mandates to fit their policy preferences.<sup>6</sup>

This article uses the current debate about delegation at the Founding and the new evidence uncovered, including evidence that this article brings to this debate, to examine whether the original intent or original public meaning at the Founding should be a deciding factor in a court's decision about the nondelegation

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<sup>6</sup> See RAOUL BERGER, *GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT* 417 (1977) ("Among the most fundamental [principles of the Constitution] is the exclusion of the judiciary from policymaking.").

doctrine. To the debate over delegation or nondelegation at the Founding, this article adds a comprehensive analysis of Madison's changing and contradictory views on the separation of powers and the usefulness and effect of an express nondelegation doctrine in the Constitution, his grave fear that Congress would usurp the powers of the other branches, and his support of a proposed Council of Revision, which would have constitutionally mandated the delegation of some legislative power to a council made up of the Executive and a group of judges.

Madison at various times attempted to add an express nondelegation or alternatively a non-encroachment doctrine to the Constitution, the latter of which would have forbidden one branch of government from usurping the powers of the other branches.<sup>7</sup> Madison also argued that express doctrines in constitutions are ineffective protections against the accumulations of the various powers in one branch. At least once, he also asserted that limitations on delegation are mandated by the Constitution despite their absence from the Constitution.

The Article also uses decades of work by historians to disprove a central claim of originalists that Locke and his *Second Treatise* were a great influence on the drafting of the Constitution. The consensus view among historians now seems to be that Locke's influence in America plummeted with the start of the Revolutionary War and that his *Second Treatise* had little influence on the drafting or ratification of the Constitution. Without the crutch of Locke's *Second Treatise*, originalists have virtually no evidence that the Constitution was intended to contain an implicit nondelegation doctrine.<sup>8</sup> The Article further argues that the Court enforcing a robust nondelegation doctrine would constitute judicially amending the Constitution to include restrictions and principles not only absent from the Constitution but also that the Framers and the First Congress expressly rejected.

This Article uses the nondelegation debate as a lens to see whether originalism as it is currently practiced is a useful or dangerous tool of constitutional interpretation. It builds on existing criticisms of originalism and how it has morphed largely from a theory of judicial restraint into an antimajoritarian call to judicial action, urging "judicial fortitude," the conservative term

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<sup>7</sup> CAROL BERKIN, *THE BILL OF RIGHTS: THE FIGHT TO SECURE AMERICA'S LIBERTIES* 152 (2016).

<sup>8</sup> Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 282 (2021).

for judicial activism and the idea that the Court should actively assert its judicial power in an effort to rein in the administrative state.<sup>9</sup> Justice Gorsuch, in a recent dissent, argued that the Court should exhibit “fortitude” in reviving the nondelegation doctrine,<sup>10</sup> very different from the judicial restraint Justice Scalia applied to nondelegation. Many have noted that originalism can be used as a mere cloak to hide courts’ asserting their policy preferences in the guise of honoring the intent of the Founders, and that while originalists once urged judicial restraint, now many applaud a now conservative Supreme Court striking down legislation enacted by Congress. However, this Article makes a separate point, that the “judicial fortitude” some originalists encourage directly violates the limited and non-policy-making role of the Court as expressed in the Founding Era.

This Article proceeds as follows. Part I examines the history of the nondelegation doctrine, its absence in the Constitution, the various theories designed to explain its existence, and the mere lip service it has received from the Court, other than during a single year. It then discusses Madison’s various efforts to include both a nondelegation doctrine and a non-encroachment amendment in the text of the Constitution, as well as his support for the creation of a Council of Revision, which would have delegated some legislative power to the Executive and a group of judges. Locke’s nondelegation mandate and historians’ assessment of what little influence it seems to have had on the Framers is also discussed, as well as other explanations and justifications for a constitutional nondelegation doctrine.

Part II recounts the origins of originalism, its initial emphasis on judicial restraint and on the avoidance of interfering in legislative policy-making. Then, it discusses how originalism’s initial focus on the framers’ original intent was rejected by many originalist theorists and replaced, first with the understanding of the ratifiers of the Constitution and then with the original public meaning of the words of the Constitution. The Article discusses the unworkable difficulty of putting modern originalism into practice. It also discusses how the many forms and mutations of originalism allow judges to choose how to apply originalism to achieve their favored policy results.

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<sup>9</sup> See generally PETER J. WALLISON, JUDICIAL FORTITUDE: THE LAST CHANCE TO REIN IN THE ADMINISTRATIVE STATE 109–36 (2018) (asserting the importance of a revived nondelegation doctrine to control the power of federal agencies).

<sup>10</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting).

Part III examines how originalism works in practice in justifying and discussing the nondelegation doctrine. It reviews the originalist concurrences and dissents regarding nondelegation that some Supreme Court Justices have authored in recent decades, applying a flawed, primitive form of originalism sometimes based on historical error or lack of context. Then the Article concludes with an analysis of originalist scholars' attempts to justify the nondelegation doctrine and what their attempts show about the flaws and challenges of employing originalism as a method of constitutional analysis.

## II. THE NONDELEGATION DOCTRINE, ITS MYSTERIOUS HISTORY, AND THE STAKES OF THE CURRENT DEBATE

The nondelegation doctrine was succinctly stated by Justice Harlan in 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."<sup>11</sup> This assertion has been often repeated, even recently by Justice Scalia in a unanimous decision by the Supreme Court, stating "'Article I, § 1, of the Constitution vests '[a]ll legislative Power herein granted . . . in a Congress of the United States' . . . [and] permits no delegation of those powers."<sup>12</sup> Defenders of the nondelegation doctrine typically use three arguments in their defense: "the separation of powers, public accountability, or the text of the U.S. Constitution."<sup>13</sup> Reasons given for the associated separation of powers doctrine are governmental efficiency, keeping government powers in balance, and assuring that law is made for the common good.<sup>14</sup> If the nondelegation doctrine is vital to the structure of government, it serves as "a prophylactic measure against tyranny. . ."<sup>15</sup> To these should be added the claim that the original intent of the Framers mandates a nondelegation doctrine, absent even words in the Constitution expressly stating that.

The nondelegation doctrine appears nowhere in the Constitution, leading to questions about whether it is in fact a constitutional mandate. Julian Davis Mortenson and Nicholas Bagley boldly assert:

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<sup>11</sup> *Field v. Clark*, 143 U.S. 649, 692 (1892).

<sup>12</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (quoting U.S. CONST. art. I, §1).

<sup>13</sup> Joseph Postell, *"The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 MO. L. REV. 1003, 1004 (2016).

<sup>14</sup> John F. Manning, *Separation of Powers As Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1994 (2011).

<sup>15</sup> Martin H. Redish, *Pragmatic Formalism, Separation of Powers, and the Need to Revisit the Nondelegation Doctrine*, 51 LOY. U. CHI. L.J. 363, 383 (2019).



“The nondelegation doctrine has nothing to do with the Constitution as it was originally understood. You can be an originalist or you can be committed to the nondelegation doctrine. But you can’t be both.”<sup>16</sup> Posner and Vermeule make the straightforward claim that the “nondelegation position lacks any foundation in constitutional text and structure, in standard originalist sources, or in sound economic and political theory.”<sup>17</sup> Why do we have the nondelegation doctrine, then? Their reply: “Nondelegation is nothing more than a controversial theory that floated around the margins of nineteenth-century constitutionalism—a theory that wasn’t clearly adopted by the Supreme Court until 1892, and even then only in dictum.”<sup>18</sup>

As the Supreme Court is now filled with Justices with an originalist bent, a fraught question or a great opportunity, depending on whom you ask, is whether the Court will finally set in place a stricter, more robust nondelegation doctrine. A strict nondelegation doctrine could, as Elena Kagan noted, render most of government unconstitutional, “dependent as Congress is on the need to give discretion to executive officials to implement its programs.”<sup>19</sup> As a law professor, now-Justice Amy Coney Barrett and her co-author stated, “Adherence to originalism arguably requires, for example, the dismantling of the administrative state. . . . Originalists have been pressed to either acknowledge that their theory could generate major disruption or identify a principled exception . . .” explaining why judges should not be bound by the Constitution’s original public meaning.<sup>20</sup>

Some originalists and others opposed to expansive nature of the administrative state harbor hopes that if a majority of the Court adopt an originalist view of the nondelegation doctrine, they will decide that it must be more strictly applied and so trim what they perceive as the dangerous power of federal agencies. For example, Peter Wallison argues that, without a stricter nondelegation jurisprudence, “forcing Congress to do the difficult work of legislating, we are headed ultimately for a form of government in which a bureaucracy in Washington – and not Congress – will make the major policy decisions for the

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<sup>16</sup> Mortenson & Bagley, *supra* note 8, at 282.

<sup>17</sup> Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721, 1722 (2002).

<sup>18</sup> *Id.* (citing *Field v. Clark*, 143 US 649, 692 (1892)).

<sup>19</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2130 (2019).

<sup>20</sup> Amy C. Barrett & John C. Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 1–2 (2016). The authors, though, emphasize “We do not ourselves undertake to examine how any of the precedents we mention would fare under an originalist analysis.” *Id.* at 2 n.1.

country.”<sup>21</sup> Wallison calls such strong measures “judicial fortitude,”<sup>22</sup> a term much more palatable to originalists than judicial activism.

The recent dissent of Justice Gorsuch in *Gundy* indicating interest in revitalizing the nondelegation doctrine has kicked up the interest in an originalist approach to the doctrine into a fever pitch.<sup>23</sup> Justice Gorsuch attempting to revive the nondelegation doctrine should have come as no surprise since he had twice discussed the doctrine while serving on the 10<sup>th</sup> Circuit.<sup>24</sup> Justice Alito, concurring in *Gundy*, also indicated interest in reviving the nondelegation doctrine.<sup>25</sup> Gary Lawson noted in 2019, “And while you never count your votes until they are cast, it is very hard to read *Gundy* and not count to five under your breath.”<sup>26</sup> With new Justice Amy Comey Barrett, the number might well be six.

The nondelegation doctrine has been one of the main battlegrounds “upon which the constitutionality of the growth of federal regulatory authority was tested”<sup>27</sup> and that battle is now heated. Justice Gorsuch’s *Gundy* dissent<sup>28</sup> raises the question of whether a now much more conservative Court will restrict Congress’s ability to draft the kind of regulatory legislation that is dependent on delegating significant rule-making authority to federal agencies. Advocates for a stricter nondelegation doctrine have argued that an unchecked administrative state without restrictions like a robust nondelegation doctrine would be “in the Framers’ eyes, tyrannical and illegitimate,”<sup>29</sup> and that the nondelegation doctrine could check what C. Boyden Gray called

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<sup>21</sup> See WALLISON, *supra* note 9, at 114.

<sup>22</sup> *Id.* at 166.

<sup>23</sup> See *Gundy*, 139 S. Ct. at 2116.

<sup>24</sup> See *United States v. Hinckley*, 550 F.3d 926, 948 (10th Cir. 2008) (Gorsuch, J., concurring). See also *United States v. Nichols*, 784 F.3d 666, 668 (10th Cir. 2015) (en banc) (Gorsuch, J., dissenting from denial of rehearing en banc). In *Nichols*, then-Judge Gorsuch in a dissent stated, “There’s “[t]here’s ample evidence, too, that the framers of the Constitution thought the compartmentalization of legislative power not just a tool of good government or necessary to protect the authority of Congress from encroachment by the Executive but essential to the preservation of the people’s liberty.” *Id.*

<sup>25</sup> See *Gundy*, 139 S. Ct. at 2131 (2019) (Alito, J., concurring) (“If a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”).

<sup>26</sup> Gary Lawson, “*I’m Leavin’ It (All) Up To You*”: *Gundy* and the (Sort-Of) Resurrection of The Subdelegation Doctrine, 2018–2019 CATO SUP. CT. REV. 31, 33 (2019).

<sup>27</sup> Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 479 (1989).

<sup>28</sup> *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., joined by Roberts, C.J. & Thomas, J., dissenting).

<sup>29</sup> D.A. Candeub, *Tyranny and Administrative Law*, 59 ARIZ. L. REV. 49, 94 (2017) (“Administrative law will continue to sit uneasily with our legal and constitutional traditions and remain, in the Framers’ eyes, tyrannical and illegitimate.”).

the “unprecedented expansion of the administrative state.”<sup>30</sup> A more robust nondelegation doctrine could change the United States’ policy on a myriad of issues, including environmental protection, financial services oversight, and occupational health and safety.<sup>31</sup> It could strike cost containment strategies in Medicare and under Obamacare,<sup>32</sup> parts of economic relief programs like the Troubled Asset Relief Program (TARP)<sup>33</sup> and financial regulation like Dodd Frank.<sup>34</sup>

However, there is a gigantic sticking point to the originalist push to revive the nondelegation doctrine. Originalists assert that the meaning of the Constitution was fixed at its ratification (and the meaning of each amendment fixed at the time it was passed). Hence, originalists must prove that the Constitution contained a rule against delegation when it was ratified. However, the Constitution is silent on whether Congress can delegate its legislative power, and even originalists disagree whether it can.<sup>35</sup> How can the Constitution mean something it is silent about? One of the strongest defenses of originalism is based on the fact that the Constitution is a written text, and that originalism is somehow mandated by it being a written constitution.<sup>36</sup> How can originalism then purport to justify a doctrine not written in the Constitution?

If the Framers had wanted to limit Congress’s delegation of its legislative powers, they had several choices. One option is that they could have included the nondelegation doctrine as an express term in the Constitution or an early amendment thereto. This was proposed and rejected during the Constitutional Convention and a similar non-encroachment clause, forbidding each branch from using powers of another branch, was rejected

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<sup>30</sup> C. Boyden Gray, *The Nondelegation Canon's Neglected History and Underestimated Legacy*, 22 GEO. MASON L. REV. 619, 646 (2015).

<sup>31</sup> *Id.* at 620–21 (“Correcting those misconceptions [about the nondelegation doctrine] is crucial, not just for abstract constitutional debate, but more importantly, for the regulatory policy choices the United States government now faces.”).

<sup>32</sup> Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 DRAKE L. REV. 1085, 1093 (2012).

<sup>33</sup> *Id.* at 1098–99.

<sup>34</sup> *Id.* at 1109–10 (referring to the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010).

<sup>35</sup> See, e.g., Michael Stokes Paulsen, *Does the Constitution Prescribe Rules for Its Own Interpretation?*, 103 NW. U. L. REV. 857, 905–06 (2009) (“Congress may, in the exercise of its assigned powers, delegate whatever discretion it likes, pursuant to whatever strict or lax standards it chooses, to administrative agencies within the executive branch. So long as Congress retains the authority to undo the delegation, delegation is a form of exercise of its legislative power, not a relinquishment of it.”).

<sup>36</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 47 (1999).

as part of the Bill of Rights, as is discussed in Part A which follows. A second option is that the Framers, by vesting the Legislative, Executive, and Judicial powers in separate branches, could have trusted that the separation of powers, along with other defensive tools, would cause and allow each branch to zealously guard its own powers and delegate them only when they could limit and control the delegation, and when the delegation furthered the branch's purpose. Madison described the separation of powers and associated defensive means as "the great security against a gradual concentration of the several powers in the same department," as the ambition of each department would prevent it from giving too much of its power to another branch.<sup>37</sup> A third option is that the Framers could have intended, in addition to or as a result of the separation of powers, that an implicit nondelegation doctrine exist somehow in the fabric or penumbra of the Constitution even though they did not publicly discuss this during the drafting or ratification of the Constitution and rejected it for the text. There were no doubt other options, but this last one seems highly unlikely. If the Framers thought that the nondelegation doctrine were at all important, they likely would have included it in the Constitution's text, not leave it as a doctrine written in air. And this option is also the least effective, given the long dormancy of the nondelegation doctrine and the ongoing debate about whether it even exists as a constitutional mandate.

Seen in this light, originalists' efforts to create a new, more stringent nondelegation doctrine would not return the Constitution to its original meaning but rather would force into the Constitution terms that were rejected at the Founding. Originalists would have the Supreme Court amend the Constitution to include the terms and principles the Framers and First Congress rejected. Worse yet, a robust nondelegation doctrine would undermine the separation of powers as set by the Constitution, as the Court would be giving itself an ill-defined, uncontrollable license to overturn even long-standing regulatory legislation with which a majority of the Court disagrees. A robust nondelegation doctrine would empower the Court to overturn major policy decisions by Congress, both current and decades old, regarding the scope and method of environment protection, health care and insurance regulation, financial services regulation, and a myriad of other policy choices that should be left to Congress.

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<sup>37</sup> THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison).

### A. Madison, the Nondelegation Doctrine, and the Separation of Powers in the Constitution

The nondelegation doctrine is found nowhere in the Constitution.<sup>38</sup> However, Madison was involved in two attempts to insert into the Constitution clauses intended to prevent one branch of government from using the powers of another branch. Madison also was a proponent of adding to the Constitution a Council of Revision, which would have blended the separate powers and enabled a council made up of the President and members of the federal judiciary to review every act of Congress and give the Council of Revision a tool to revise legislation and a qualified veto of Congressional legislation on policy as well as constitutional grounds.<sup>39</sup>

Early during the Constitutional Convention while considering a very weak executive power, Madison's notes indicate the proposal to fix the powers of the Executive to be "with power to carry into effect the national laws, to appoint to offices in cases not otherwise provided for, and to execute such other powers *not Legislative nor Judiciary in their nature,*' as may from time to time be delegated by the national Legislature."<sup>40</sup> In other words, Congress could delegate non-legislative powers to the Executive, but not legislative powers. The words "not legislative nor judiciary in their nature" were added to this proposed amendment, Madison indicated, "in consequence of a suggestion by Genl. Pinckney that improper powers might otherwise be delegated."<sup>41</sup>

However, General Charles Cotesworth Pinckney's second cousin, Charles Pinckney, moved that the limitation on delegation be stricken, saying "they were unnecessary, the object of them being included in the 'power to carry into effect the national laws.'" Madison's notes indicate that he "did not know that the words were absolutely necessary. . . He did not however see any inconveniency in retaining them, and cases might happen in which they might serve to prevent doubts and misconstructions."<sup>42</sup> Madison's notes indicate his own thoughts and how he equivocated about the necessity of including in the Constitution an express nondelegation clause. This is hardly a

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<sup>38</sup> Cynthia R. Farina, *Deconstructing Nondelegation*, 33 HARV. J.L. & PUB. POL'Y 87, 89 (2010) ("The Constitution's text is of little help, for it says nothing explicit about delegating the power Article I confers.")

<sup>39</sup> See BERGER, *supra* note 6, at 300–11.

<sup>40</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787 65 (Max Farrand ed., Yale Univ. Press 1911) (emphasis added).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

stirring endorsement of a nondelegation doctrine or strong evidence that Madison thought the doctrine definitely should be included explicitly in the Constitution.

Charles Pinckney's motion to strike was based on the argument that the object of the added words was already included, though what exactly that means is not entirely clear. It could mean that the purpose of a bar on nondelegation was already achieved through other means or that the Executive power somehow already carried a limitation on using delegated legislative power in it, depending what the "object" is.<sup>43</sup> At this point, the drafters were undecided on what form the Executive should take, unitary or plural,<sup>44</sup> and the drafters were focused on defining the reach of Executive power.<sup>45</sup> This bar on delegation may have stricken as redundant because at that point in the Constitution's drafting, the powers of the Executive were much more sharply limited than they later would be in the final Constitution and "were confined to appointment and execution. . ."<sup>46</sup> When the Executive powers were broadened, however, no express nondelegation clause was inserted. The nondelegation provision may have been defeated because it was viewed as unnecessary, which to Posner and Vermeule "suggests, if anything, that legislative delegation to the executive was viewed as unproblematic."<sup>47</sup>

Madison was also a proponent of a proposal at the Constitutional Convention that would have blended the powers of the Executive and Judicial branches with that of the Legislative by establishing a Council of Revision, a body of the Executive and "a convenient number of the National Judiciary" to weigh in on laws as they were drafted to help Congress make better laws by participating in their revision, and with a power of veto qualified by the fact that it could be overridden by the legislature.<sup>48</sup> The

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<sup>43</sup> *Id.*; see also Aaron Gordon, *Nondelegation*, 12 NYU J.L. & LIBERTY 718, 743 (2019) (observing that Charles Pinckney, who moved to strike the phrase, and Edmund Randolph, who seconded the motion, both "felt that this limitation was inherent in the executive's power to 'carry into effect' the laws . . .").

<sup>44</sup> For example, Governor Edmund Randolph argued that a unitary executive is "the fetus of monarchy." See Michael W. McConnell, *James Wilson's Contributions to the Construction of Article II*, 17 GEO. J.L. & PUB. POL'Y 23, 32–33 (2019).

<sup>45</sup> *Id.* at 46 ("In this connection, it is suggestive that Madison . . . (and C.C. Pinckney) sought to limit executive power by denying to the President powers 'not legislative nor judiciary in their nature' . . .").

<sup>46</sup> *Id.* at 36 ("The result was a mere shadow of the 'energetic' and powerful executive that Wilson and Rutledge evidently had in mind, which would eventually emerge from the Convention.").

<sup>47</sup> Posner & Vermeule, *supra* note 17, at 1734.

<sup>48</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 21.

Executive and the judges making up the Council of Revision would thus have both the negative legislative power of a qualified veto and also the positive legislative power to review laws and assert their opinions and suggestions for revision, opinions given weight by the threat of veto.

James Wilson supported the Council of Revision, saying that “Laws may be unjust, may be unwise, may be dangerous, may be destructive; and yet not be so unconstitutional as to justify the Judges in refusing to give them effect.”<sup>49</sup> Wilson urged that the council have “a share in the Revisionary power” so that “they will have an opportunity of taking notice of these character[istics] of a law, and of counteracting, by the weight of their opinions the improper views of the Legislature.”<sup>50</sup> The Council of Revision would have allowed judges and the Executive to weigh in during the legislative drafting and revising process on whether laws were good policy and with their suggestions for improvement, even if the proposed laws were constitutional.<sup>51</sup> Thus, the Council of Revision would have given the Executive and the judicial members both qualified negative legislative power but also some positive legislative power during the drafting and revision process.<sup>52</sup> “According to Madison, good lawmaking required the input of judicial minds at the outset.”<sup>53</sup> Madison noted that some might object that the Council of Revision might “give too much strength either to the Executive or Judiciary” or would constitute a violation of the separation of powers as “a union of the Judiciary & Executive branches in the revision of the laws...”<sup>54</sup> but was not concerned about the other branches gaining such legislative power. “Experience in all the States had evinced a powerful tendency in the Legislature to absorb all power into its vortex. This was the real source of danger to the American Constitutions. . .”<sup>55</sup> Madison’s great concern was not the risk of excessive legislative delegation by Congress but rather the likelihood of excessive encroachment by Congress on an Executive and a Judiciary unable to protect themselves. He defended the Council of Revision against the charge it would

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<sup>49</sup> *Id.* at 73.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* For this point, see also James T. Barry III, *The Council of Revision and the Limits of Judicial Power*, 56 U. CHI. L. REV. 235, 250–51 (1989).

<sup>52</sup> THE RECORDS OF THE FEDERAL CONVENTION OF 1787, *supra* note 40, at 73.

<sup>53</sup> Barry III, *supra* note 51, at 250.

<sup>54</sup> *Revisionary Power of the Executive and the Judiciary*, [21 July] 1787, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-10-02-0067> [<http://perma.cc/SL2W-TSTK>] (citing 10 James Madison, *The Papers of James Madison* 109–110 (Robert A. Rutland et al. eds., 1977)).

<sup>55</sup> *Id.*

breach the separation of powers by arguing that giving the Executive and the judiciary this power over Congress would be “an auxiliary precaution in favor of” the separation of powers.<sup>56</sup> Far from denouncing this delegation of legislative power as an assault on the separation of powers, Madison argued it would help preserve that separation.

Madison's notes show he meant this delegation of legislative power to give the Executive and the judiciary policy-making power and to protect the rights of the public: “In short, whether the object of the revisionary power was to restrain the Legislature from encroaching on the other co-ordinate Departments, or on the rights of the people at large; or from passing laws unwise in their principle, or incorrect in their form, the utility of annexing the wisdom and weight of the Judiciary to the Executive seemed incontestable.”<sup>57</sup> Some originalists claim that Congress delegating legislative power could oppress the public. Madison stated that the Constitution in fact should delegate some legislative power, primarily negative but also a positive revisionary power, to the other branches to prevent Congress from encroaching on the rights of the people at large. Suppressing legislative delegation seems in direct contradiction to Madison's proposal and in opposition to Madison's fears that a too-powerful Congress would encroach on the rights of the people.

Madison went further in arguing for the delegation of legislative power to the executive and judicial branches in his 1788 observations on Jefferson's draft for Virginia's constitution.<sup>58</sup> There, Madison suggested that the executive and judicial branches be given a revisionary power meant as a “check to precipitate, to unjust, and to unconstitutional laws” that might be passed by the legislature.<sup>59</sup> Madison proposed that all bills be transmitted by the legislature to the executive and judicial branches and that: “If either of these object, let  $\frac{2}{3}$ , if both  $\frac{3}{4}$  of each House be necessary to overrule the objection. . .”<sup>60</sup>

If either the executive or judicial branch objects that the bill is unconstitutional, Madison's proposal would have required that

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<sup>56</sup> *Id.*

<sup>57</sup> *Revisionary Power of the Executive and the Judiciary, [6 June] 1787*, FOUNDERS ONLINE: NAT'L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-10-02-0022> [<http://perma.cc/6GF4-BQPR>] (citing 10 JAMES MADISON, THE PAPERS OF JAMES MADISON 35–36 (Robert A. Rutland et al. eds., 1977)).

<sup>58</sup> James Madison, *Observations on Jefferson's Draft of a Constitution for Virginia*, in THE FOUNDERS' CONSTITUTION (1788), <http://press-pubs.uchicago.edu/founders/documents/v1ch17s25.html> [<http://perma.cc/UE2E-7EJB>].

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*



the bill be suspended until the next election and a repassage of the bill “by  $\frac{2}{3}$  or  $\frac{3}{4}$  of both Houses, as the case may be” and that upon such override, neither the judiciary or the executive could pronounce it unconstitutional.<sup>61</sup> Madison was urging even greater delegation of legislative power, in that the judicial and executive branches each had the power to veto legislation, and that even if the legislature had the votes to overrule such veto, if the objection by either the Executive or the judiciary were that the bill was unconstitutional, no override was possible and any repassage of the bill would have to wait until after the next election, when new legislators might be seated and would reconsider.

This great power over the legislature by the judicial and executive branches would constitute a stunning breach of the separation of powers. And Madison’s odd twist that the legislature could repass the bill in a way that made it impregnable from constitutional challenge would allow the legislature to usurp the courts’ power to determine the constitutionality of such legislation. Madison had idiosyncratic ideas of how to defend the separation of powers and ones that might astonish those who would consider his intentions as a binding guide to how our government should function. If originalist Justices want to import Madison’s ideas into the Constitution, perhaps they should start with the idea that Congress can pass legislation in a way that makes it impregnable from the Court’s constitutional review. That would certainly shake up the separation of powers.

Opponents to the Council of Revision complained that judges should not be legislators, interfere in legislative business, or meddle in politics.<sup>62</sup> The Convention voted twice on the proposal for a Council of Revision, and it was twice voted down.<sup>63</sup>

Madison was involved in another attempt to insert something akin to the nondelegation doctrine into the Constitution through an amendment explicitly stating that no branch of the national government could exercise powers delegated by the Constitution to another department. Madison initially proposed this as an amendment to the text of the Constitution.<sup>64</sup> When Madison’s proposed textual amendments

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<sup>61</sup> *Id.*

<sup>62</sup> See BERGER, *supra* note 6, at 302.

<sup>63</sup> Barry III, *supra* note 51, at 257.

<sup>64</sup> BERKIN, *supra* note 7, at 152. Madison’s proposed amendments stated, “Eighthly. That immediately after article 6th, be inserted, as article 7th, the clauses following, to wit: The powers delegated by this Constitution are appropriated to the departments to

were transformed into a proposed bill of rights to be appended to the Constitution, it included as a Sixteenth Amendment:

The powers delegated by this Constitution are appropriated to the departments to which they are respectively distributed: so that the legislative department shall never exercise the powers vested in the executive or judicial nor the executive exercise the powers vested in the legislative or judicial, nor the judicial exercise the powers vested in the legislative or executive departments.<sup>65</sup>

Wurman refers to this as the “Nondelegation Amendment.”<sup>66</sup> This is not a nondelegation amendment, but rather a non-encroachment amendment, in that it does not forbid delegation explicitly, but only prevents each branch from exercising and hence encroaching on powers vested in another branch. How significant that difference is of course is open to dispute. Madison’s non-encroachment amendment seems part of Madison’s continuing effort to prevent Congress from usurping the powers of the other branches, rather than an attempt to prevent legislative delegation, especially given Madison’s failed effort to create a Council of Revision that would have delegated some legislative power to the other branches in order to prevent Congress from encroaching on executive or judicial turf.

Representative Sherman objected to Madison’s non-encroachment amendment as “altogether unnecessary, inasmuch as the Constitution assigned the business of each branch of the Government to a separate department.”<sup>67</sup> Sherman’s objection could well indicate that he thought a ban on encroachment was unnecessary, as the branches would use the constitutional means at their disposal to guard their powers out of self-interest, which Madison stated in Federalist 51 was the “great security” against the concentration of powers in one branch, as will be discussed.<sup>68</sup>

Madison agreed with Sherman’s objection, possibly in recognition of the “great security” provided by each branch’s jealous protections of their powers combined with their constitutional means of defense, but also “supposed the people would be gratified with the amendment, as it was admitted that the powers ought to be separate and distinct; it might also tend to an explanation of some doubts that might arise respecting the

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which they are respectively distributed: so that the Legislative Department shall never exercise the powers vested in the Executive or Judicial, nor the Executive exercise the powers vested in the Legislative or Judicial, nor the Judicial exercise the powers vested in the Legislative or Executive Departments.” *Id.*

<sup>65</sup> 1 ANNALS OF CONG. 453 (1789) (Gales & Seaton eds., 1834).

<sup>66</sup> Ilan Wurman, *Nondelegation at the Founding*, 130 YALE L.J. 15, 16–17 (2020).

<sup>67</sup> 1 ANNALS OF CONG., *supra* note 65, at 760.

<sup>68</sup> THE FEDERALIST NO. 51, *supra* note 1, at 268 (James Madison).

construction of the Constitution.”<sup>69</sup> Madison seemed to indicate he thought that his amendment would add something to the Constitution, but exactly what is not clear. Another representative condemned the amendment as “subversive of the Constitution,” which seems to indicate the idea that an express non-encroachment clause would cause significant damage to the structure of the Constitution.<sup>70</sup> While the non-encroachment amendment passed the House of Representatives, it was struck in the Senate,<sup>71</sup> the records of which give no indication of reasons for editing or rejecting any of the proposed amendments.<sup>72</sup>

Some originalists argue that these failed attempts to include the nondelegation doctrine or a non-encroachment clause in the Constitution indicate somehow that it is already there.<sup>73</sup> Ilan Wurman argued that Madison included the nondelegation doctrine to be “doubly sure.”<sup>74</sup> Clearly, Madison and at least a few others thought at various times that either a nondelegation or a non-encroachment doctrine should be included in the Constitution and were concerned that the some might think that the separation of powers would not be sufficient to prevent delegation of legislative powers. However, the Senate rejecting the non-encroachment doctrine is evidence that the nondelegation doctrine did not make it into the Constitution, not proof that it was already there. If the Court were now to read into the Constitution a strict nondelegation doctrine, it would in essence be amending the Constitution to include terms similar to the proposed amendment to the Constitution rejected during its drafting or to some extent akin to Madison’s proposed Sixteenth Amendment to the Constitution rejected by the Senate.

Madison wrestled with how to prevent the legislative branch from encroaching on the Executive and Judicial Branches, at times advocating a nondelegation or non-encroachment doctrines to be included in the Constitution, at times supporting a proposal to allow the Executive and Judicial Branch to be empowered to participate in legislative power, at other times arguing the

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<sup>69</sup> 1 ANNALS OF CONG., *supra* note 65, at 453.

<sup>70</sup> *Id.* at 760–61 (statement of Representative Livermore).

<sup>71</sup> Wurman, *supra* note 66, at 17.

<sup>72</sup> ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER 162 (1997) (“The stark reportage of the Senate Journal provides not the slightest clue to the Senate’s reasons for these deletions. . .” including striking the sixteenth article on nondelegation.)

<sup>73</sup> Wurman, *supra* note 66, at 16–17. *See also* Gordon, *supra* note 43, at 743–44.

<sup>74</sup> Wurman, *supra* note 66, at 16 (“Here are two prominent representatives, both key players in the Constitutional Convention, arguing that a nondelegation amendment was unnecessary. Madison further argued that it was better to be doubly sure and make the principle explicit.”).

ineffectiveness of such a rigid, express separation of powers and defending its absence in the Constitution, and at least once indicating that he thought some limits on delegation were included in the Constitution. Madison discussed delegation extensively in the Federalist Papers arguing for the ratification of the Constitution. In Federalist 47, Madison addressed the criticism that the Constitution did not sufficiently separate the powers of government, which he called “[o]ne of the principal objections inculcated by the more respectable adversaries to the Constitution. . . .”<sup>75</sup> Madison noted the importance of the separation of powers, stating that the “accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny.”<sup>76</sup>

To address these concerns about the separation of powers, Madison said “The oracle who is always consulted and cited on this subject is the celebrated Montesquieu. . . [who] has the merit . . . of displaying and recommending it most effectually to the attention of mankind”<sup>77</sup> Madison failed even to mention Locke, however, showing Locke’s striking unimportance. Montesquieu, Madison asserted, “appears to have viewed the Constitution of England as the standard, or to use his own expression, as the mirror of political liberty” and so Madison examined the British system of separation of powers, to determine whether the Constitution fell short. Madison noted that the powers were not strictly separated under the Constitution of England, and that part of the legislative branch acts as a “great constitutional council to the executive chief” and is “invested with the supreme appellate jurisdiction.”<sup>78</sup>

From such examples, Madison concluded that Montesquieu did not advocate a strict separation of powers, and that “it may clearly be inferred that, in saying ‘There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates,’ . . . [Montesquieu] did not mean that these departments ought to have no PARTIAL AGENCY in, or no CONTROL over, the acts of each other.”<sup>79</sup> Madison seems to be asserting that under Montesquieu’s principles, Congress could, without undue risk, make the Executive Branch Congress’s agent, with Congressional control. Some of the

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<sup>75</sup> THE FEDERALIST NO. 47, *supra* note 1, at 249–55 (James Madison).

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

defenders of the nondelegation doctrine claim that the original meaning of the Constitution mandates that Congress, as the agent of the people, cannot delegate its powers to the Executive Branch as its sub-agent,<sup>80</sup> but Madison's words seem to refute that.

Madison states what he takes to be Montesquieu's asserted limits on delegation: "[Montesquieu's] meaning, as his own words import, and still more conclusively as illustrated by the example in his eye, can amount to no more than this, that where the WHOLE power of one department is exercised by the same hands which possess the WHOLE power of another department, the fundamental principles of a free constitution are subverted."<sup>81</sup> The improper delegation then was that of the whole legislative power, not a limited and directed delegation. Madison gave as an example of excessive concentration of powers in one branch "if the king, who is the sole executive magistrate, had possessed also the complete legislative power. . ." and thus read Montesquieu as not advocating a complete separation of powers, "but rather in favor of a modified, incomplete, separation of governmental powers."<sup>82</sup>

Madison noted that some states had express separation of powers clauses in their state constitutions preventing each branch from encroaching on the powers of the other branches, but those did not effectively prevent the admixture of powers among the branches. Madison specifically addresses the Massachusetts state constitution, which stated: "that the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them."<sup>83</sup> Madison indicates that such a declaration "goes no farther than to prohibit any one of the entire departments from exercising the powers of another department. In the very Constitution to which it is prefixed, a partial mixture of powers has been admitted."<sup>84</sup> Madison then notes the failure of such express language in state constitutions to prevent the admixture of powers. "If we look into the constitutions of the several States, we find that, notwithstanding the emphatical

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<sup>80</sup> THE FEDERALIST NO. 47, *supra* note 1, at 251 (James Madison) (emphasis in original).

<sup>81</sup> *Id.*

<sup>82</sup> Matthew P. Bergman, *Montesquieu's Theory of Government and the Framing of the American Constitution*, 18 PEPP. L. REV. 1, 34 (1990).

<sup>83</sup> THE FEDERALIST NO. 47, *supra* note 1, at 254 (James Madison).

<sup>84</sup> *Id.*

and, in some instances, the unqualified terms in which this axiom has been laid down, there is not a single instance in which the several departments of power have been kept absolutely separate and distinct.” and “in no instance has a competent provision been made for maintaining in practice the separation delineated on paper.”<sup>85</sup> In defending the Constitution’s lack of express lines drawn between the branches from critics complaining about that absence, Madison points out how even state constitutions that had express bars on branches using other branches’ powers did not achieve a full separation of powers.

Madison returned to this subject in Federalist 48, stating that what is impermissible is when one branch’s power is “directly and completely administered by either of the other departments. . .” and that the legislature is the great danger, given that any “projects of usurpation by [the other branches] would immediately betray and defeat themselves.”<sup>86</sup> Congress delegating specific legislative powers under its direction and control clearly would not constitute its legislative power being “directly and completely administered” by federal agencies, and so appears to receive Madison’s blessing. Madison also asserted that appeals to the populace would not effectively prevent the accumulation of power in one branch of government.<sup>87</sup>

After determining that neither an express constitutional prohibition on branches using other branches’ powers nor an appeal to the people was sufficient to prevent encroachment by one branch on the other, Madison, in Federalist 51, asserts that only one method would be effective, a structure of government with a separation of powers, so that “each department should have a will of its own” and that each branch will keep the others “in their proper places.”<sup>88</sup> Madison concluded that the “great security” against the accumulation of powers in one branch is neither an express bar on branches using other branches’ powers nor an appeal to the people, but rather, “giving to those who administer each department the necessary constitutional means and personal motives to resist encroachments of the others.”<sup>89</sup> Once that structure is put in place, the people running each

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<sup>85</sup> *Id.*

<sup>86</sup> See generally THE FEDERALIST NO. 48, *supra* note 1 (James Madison).

<sup>87</sup> THE FEDERALIST NO. 49, *supra* note 1, at 257 (James Madison).

<sup>88</sup> THE FEDERALIST NO. 51, *supra* note 1, at 267 (James Madison) (“The only answer that can be given is, that as all these exterior provisions are found to be inadequate, the defect must be supplied, by so contriving the interior structure of the government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places.”).

<sup>89</sup> *Id.*

branch would be driven to jealously protect their powers by their own ambition. “Ambition must be made to counteract ambition. The interest of the man must be connected with the constitutional rights of the place.”<sup>90</sup> In other words, the object of a nondelegation or non-encroachment doctrine, to prevent the accumulation of powers in one branch, is better accomplished simply by the separation of powers and giving each branch constitutional tools to resist encroachment, because the ambition of the people in each branch will prevent the accumulation of powers in any branch. By comparison, the nondelegation doctrine would give the Court an offensive tool against both Congress and the Executive, and allow the Court to interfere in the cooperation between the two other branches. The power to delegate gives Congress a defensive tool against the Executive Branch, in that Congress can dictate to federal agencies and assign them tasks, including rule-making. The nondelegation doctrine would strip this defensive power from Congress. After Congress passes a law and the President does not veto it, why should the Court interfere in how they cooperate? The nondelegation doctrine is not a defensive tool for the Court, as its judicial powers are not threatened by congressional delegation to the Executive Branch. Instead, the nondelegation doctrine would simply an offensive weapon for the Court improperly to seize power from both Congress and the Executive Branch.

Madison spoke again about delegation as a Virginia Representative during the Post Roads Debate during the Second Congress, in which members discussed whether they should set the locations of post roads and post offices, a power vested in them by the Constitution, or should delegate that task to the President, as one motion proposed.<sup>91</sup> The motion to delegate failed, as the members debated whether the House had the duty to set the locations of post roads and post offices, given that the Constitution assigned the House that task and power.<sup>92</sup> Madison argued against the amendment, stating that “there did not appear to be any necessity for alienating the powers of the House; and that if this should take place, it would be a violation

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<sup>90</sup> *Id.*

<sup>91</sup> David P. Currie, *The Constitution in Congress: The Second Congress*, 90 NW. U. L. REV. 606, 629 (1996) (“Representative Sedgwick moved to replace the detailed specification of routes in the House bill with a direction that the mail should be carried between Wiscasset, in the district of Maine, to Savannah, Georgia, ‘by such route as the President of the United States shall, from time to time, cause to be established.’” (citing 3 ANNALS OF CONG. 229 (1791) (Gales & Seaton eds., 1849)).

<sup>92</sup> *Id.* at 628–32.

of the Constitution.”<sup>93</sup> From this, Christine Kexel Chabot argued that Madison may have had necessity in mind as a necessary justification for delegation.<sup>94</sup> However, she also noted that not everyone agreed with Madison’s “‘necessity’ test” for delegation.<sup>95</sup>

Madison may have been commenting that by delegating that power to the President, the House would lose it permanently, because once the post roads and post offices, or any significant number of them, were built, it would be impracticable for Congress to undo the presidential plan. However, even despite this objection, the House did eventually delegate to the President the discretion to establish other roads as post roads.<sup>96</sup> and delegated to the Postmaster General the power to determine where the post offices should be.<sup>97</sup> As Mortenson and Bagley note, “Far from demonstrating the force of Madison’s constitutional objection, the statute as enacted expressly conferred the open-ended authority that Madison had claimed was unconstitutional during debate.”<sup>98</sup> David Currie, after noting extensive delegation to the Executive Branch regarding the postal issues, indicated that a constitutional objection to delegation may not have been the driving element in this debate, stating, “Despite all the crocodile tears, one is tempted to attribute the House’s zest for detail more to a taste for pork than to a principled concern for the virtues of representative government.”<sup>99</sup>

When deciding how to repay the enormous national debt, much of which was incurred to fund the Revolutionary War,<sup>100</sup> Congress debated whether it could delegate its borrowing power provided under Article I, Section 8. Chabot stated, “It is no surprise that Madison referred to the borrowing law as a delegation of ‘great trust’ that left key terms of loans and ‘execution of one of the most important laws’ to the President.”<sup>101</sup> Though one might imagine that discussion of delegation would have “consume[d] the entire debate” in the House of Representatives, this did not happen.<sup>102</sup>

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<sup>93</sup> 3 ANNALS OF CONG. 239 (1791) (Gales & Seaton eds., 1849).

<sup>94</sup> Christine Kexel Chabot, *The Lost History of Delegation at the Founding*, GA. L. REV. (manuscript at 43) (forthcoming 2021), <https://ssrn.com/abstract=3654564>.

<sup>95</sup> *Id.* (manuscript at 41–42).

<sup>96</sup> *Id.* (manuscript at 42).

<sup>97</sup> *Id.* (manuscript at 43).

<sup>98</sup> Mortenson & Bagley, *supra* note 8, at 353.

<sup>99</sup> Currie, *supra* note 91, at 631.

<sup>100</sup> Chabot, *supra* note 94 (manuscript at 20).

<sup>101</sup> *Id.* (manuscript at 4) (quoting LLOYD’S NOTES FROM MAY 19, 1790, *reprinted in* DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: APRIL–AUGUST 1790, at 1349).

<sup>102</sup> *Id.* (manuscript at 21).



Instead, debate focused more on which member of the Executive Branch should be delegated such borrowing power, with Madison asserting that it should be the President.<sup>103</sup> Instead of rejecting congressional delegation, House members responded to the constitutional concerns by supporting delegation “with some limitation on the amount to be borrowed.”<sup>104</sup>

Another important example of delegation by Congress in its first years was the Alien Friends Act of 1798,<sup>105</sup> which authorized the President to order aliens as he deemed dangerous to depart the country. During the debates, the constitutionality of the act was debated, not regarding delegation, but instead about which of the enumerated powers of Congress justified the legislation.<sup>106</sup> Throughout the debates, only two members “voiced anything that bore a resemblance to a nondelegation argument.”<sup>107</sup> Those arguments failed and the legislation was passed.<sup>108</sup> Wurman notes that during the debate, no one argued that Congress could freely delegate—an argument Wurman claims “they surely would have been motivated to make if it were true.”<sup>109</sup> That claim seems off, since it is easy to see why only two nondelegation arguments in the course of the debates would generate no pro-delegation responses. Even so, Wurman admits, “It is certainly possible to infer that the nondelegation principle itself was rejected, but there is no way to know that with any degree of confidence.”<sup>110</sup>

In his Virginia Report of 1800, Madison, by then a member of the Virginia legislature,<sup>111</sup> returned to the topic of the Alien Friends Act and its delegation of legislative power by Congress. Madison noted, “Details, to a certain degree, are essential to the nature and character of a law; and, on criminal subjects, it is proper, that details should leave as little as possible to the discretion of those who are to apply and to execute the law.”<sup>112</sup> Congress should, he asserted, not grant “a general conveyance of

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<sup>103</sup> *Id.* (citing LLOYD’S NOTES FROM MAY 19, 1790, reprinted in DEBATES IN THE HOUSE OF REPRESENTATIVES, SECOND SESSION: APRIL-AUGUST 1790, at 1354).

<sup>104</sup> *Id.*

<sup>105</sup> An Act Concerning Aliens, § 1, 1 Stat. 570, 571 (1798).

<sup>106</sup> Mortenson & Bagley, *supra* note 8, at 365.

<sup>107</sup> *Id.* at 366.

<sup>108</sup> *Id.*

<sup>109</sup> Wurman, *supra* note 66, at 25.

<sup>110</sup> *Id.* at 26.

<sup>111</sup> H. Jefferson Powell, *The Political Grammar of Early Constitutional Law*, 71 N.C. L. REV. 949, 962 n.72 (1993).

<sup>112</sup> *The Report of 1800 [7 January 1800]*, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-17-02-0202> [http://perma.cc/5H5L-CWBY] (citing 17 JAMES MADISON, THE PAPERS OF JAMES MADISON 303–51 (David B. Mattern et al. eds., 1991)).

authority, without laying down any precise rules, by which the authority conveyed, should be carried into effect. . .” because otherwise “the whole power of legislation might be transferred by the legislature from itself, and proclamations might become substitutes for laws.”<sup>113</sup>

Madison stated the test of whether a law constitutes a proper delegation and hence constitutional is “whether it contains such details, definitions, and rules, as appertain to the true character of a law; especially, a law by which personal liberty is invaded, property deprived of its value to the owner, and life itself indirectly exposed to danger.” And so, the question is whether the law contains enough “details, definitions, and rules” to appear to be a real law, and not just a handing off of the legislative power to another branch.

These statements by Madison are notable in that they include the claim that excessive delegation is unconstitutional. If Madison’s intent as of 1800 alone were to determine the meaning of the Constitution, then the nondelegation doctrine would be the constitutional mandate that Congress can delegate only where it has drafted a law with enough “details, definitions, and rules” to appear to be a real law, which is a far cry from the claim that Congress cannot delegate its legislative powers. Such a doctrine would have the same hazards as the current intelligibility rule, as it would not guide the courts in determining how much detail is sufficient, however. And the post-Ratification interpretation of one of the Framers, whose views on this subject varied over the years, should not determine the meaning of the Constitution.

## B. The Vesting Clauses, Separation of Powers, and Silence as the Sources of the Nondelegation Doctrine

Given the absence of the nondelegation doctrine in the Constitution, those asserting its importance have struggled to determine its original basis. Any constitutional limitation of delegation would have to be implicit, but proving an implicit limitation on delegation would be a challenge “because constitutional interpreters are properly reluctant to find implicit restrictions on express textual grants” of congressional legislative power, given that the detailed express restrictions in Article I, Section 9 suggest “by negative implication that no other limitations should be recognized.”<sup>114</sup>

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<sup>113</sup> *Id.*

<sup>114</sup> Posner & Vermeule, *supra* note 17, at 1729.

Those who seek a nondelegation doctrine with teeth search for any constitutional basis for it, despite its absence in the Constitution's text. Some claim that nondelegation is a necessary corollary to Article I, Section 1 of the United States Constitution, which provides that "[a]ll legislative Powers herein granted shall be vested in a Congress of the United States."<sup>115</sup> However, Article I does not specify what Congress can do with the legislative power vested in it or whether it can delegate those powers. While Article II vests Executive power in the President, few question the President's authority to delegate to federal agencies.<sup>116</sup>

Phillip Hamburger has argued strenuously that restrictions on legislative delegation spring directly from the Vesting Clauses, and that because the Constitution vests all legislative power in Congress, Congress cannot delegate any of that power.<sup>117</sup> Hamburger asserts therefore that the nondelegation doctrine should be "put aside—not on the grounds offered by Professors Mortenson and Bagley, but because the Constitution speaks instead in stronger terms about *vesting*."<sup>118</sup> In his 2014 book, Hamburger gives a fuller argument, relying heavily on the word "all" in the legislative vesting clause. In contrast to the judicial and executive clauses, which omit the word "all," Hamburger states that "when granting legislative power, the Constitution speaks of *all* legislative powers."<sup>119</sup> The President can "delegate some executive power to his subordinates," Hamburger argues, because the Constitution does not vest all legislative power to the President, but "Congress cannot delegate any of its legislative powers, for they all rest in Congress."<sup>120</sup>

Hamburger's vesting argument is an influential one, since, as he notes, Justice Gorsuch employed a vesting argument in *Gundy v. United States*, and also cites to Hamburger's work on nondelegation in his dissent.<sup>121</sup> Few would claim that Congress cannot leave even the slightest detail to federal agencies to fill in.

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<sup>115</sup> U.S. CONST. art. I, § 1.

<sup>116</sup> U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America.").

<sup>117</sup> Philip Hamburger, *Delegating or Divesting?*, 115 NW. U. L. REV. 88, 110 (2020) ("First, because the Constitution vests all legislative powers in Congress, Congress cannot vest any such powers elsewhere. Second, Congress cannot divest itself of the powers that the Constitution vests in it."). Hamburger notes, however, that a "full exposition of these points must await another publication. *Id.*

<sup>118</sup> *Id.* at 88 (italics in original).

<sup>119</sup> PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 387 (2014).

<sup>120</sup> *Id.*

<sup>121</sup> See 139 S. Ct. 2116, 2135, 2140 n.62 (2019) (Gorsuch, J., dissenting) ("Accepting, then, that we have an obligation to decide whether Congress has unconstitutionally divested itself of its legislative responsibilities, the question follows: What's the test?").

However, Congress can legislate with incredible detail and, in the early days of the Republic, frequently did.<sup>122</sup> Hamburger's argument would mandate that because Congress can legislate with great detail, only it can specify such details, which would turn legislative acts into unworkable monstrosities. Such a bar would rob Congress of the power to employ the discretion and flexibility of federal agencies when Congress thought it necessary or desirable and would make government far less efficient.

Those asserting that the nondelegation doctrine can be found in the Vesting Clauses, however, should wrestle with the original meaning of the word "vest" in the Constitution and whether vesting legislative powers in Congress precludes or limits delegating those powers. Richard Epstein is rare among originalists discussing nondelegation in attempting to tease out the original meaning of the word "vest" in the Vesting Clauses, and his discussion shows the difficulty in finding a delegation bar in Article I's vesting of all legislative power in Congress. Epstein states, "The use of the term 'vested' brings back images of vested rights in the law of property; that is, rights that are fully clothed and protected, which means, at the very least, that they cannot be undone by ordinary legislative action. . . ."<sup>123</sup> From this, Epstein derives the conclusion that legislative power cannot be delegated to an agency or other branch of government or otherwise.<sup>124</sup>

A property analogy for the Vesting Clauses weighs against the existence of a nondelegation doctrine, however, since some property interests may at times become transferable and sold only when they become vested and not before. For example, interests in a will may become transferable when they are vested, though they may not be when merely contingent.<sup>125</sup> If the vesting of legislative power may be analogized to the vesting of property rights, it seems that, while Congress should not be able

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<sup>122</sup> See Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787–1801*, 115 YALE L.J. 1256, 1292 (2006) ("Early Congresses also micromanaged administration . . . in excruciating detail. The 1791 statute . . . laying taxes on distilled spirits, occupies fifteen pages in the *Statutes at Large* and specifies everything from the brand of hydrometer to be used in testing proof, to the exact lettering to be used on casks that have been inspected, to the wording of signs to be used to identify revenue offices.").

<sup>123</sup> RICHARD A. EPSTEIN, *THE DUBIOUS MORALITY OF ADMINISTRATIVE LAW* 36 (2020).

<sup>124</sup> *Id.*

<sup>125</sup> See *Real Property—Vested Remainders—Validity of Assignment*, 30 YALE L.J. 100, 100 (1920) (discussing that in deciding whether a property interest in an estate may be transferred, "the court avoided the necessity of determining the transferability of contingent remainders and followed the well-settled rule, to which judicial history of that very jurisdiction has long contributed, that vested remainders are fully transmissible as other species of property" (citing *In Re Whitney's Estate*, 176 Cal. 12 (1917))).

to transfer its legislative powers wholesale, it should be free to delegate their use to the Executive Branch, like a property owner vested with title may lend the use of that property to another.

Another common claim for the source of the nondelegation doctrine is that it stems from the separation of powers, itself also not directly stated in the Constitution.<sup>126</sup> However, the separation of powers by itself would seem to justify some legislative delegation, not forbid it. As Justice Scalia noted in *Mistretta v. United States*, absolute separation of power is impossible, and “a certain degree of discretion, and thus of lawmaking, inheres in most executive or judicial action,” and therefore it is up to Congress “to determine-up to a point-how small or how large that degree shall be.”<sup>127</sup>

Gary Lawson argues that the absence in the Constitution of text allowing delegation shows that delegation of legislative power is forbidden. To Lawson, the correct question is, “Does any clause of the Constitution expressly or implicitly permit the delegation of legislative authority?”<sup>128</sup> Because the Constitution creates a “government of limited and enumerated powers,” Lawson states that any claim that a branch of that government can do something must be based on an enumerated power to do so. While legislative power is vested in Congress, his argument goes: Congress can do nothing with that power not explicitly permitted elsewhere in the Constitution, and because delegation is not mentioned, it is barred.<sup>129</sup> This argument, however, seems to fly in the face of Article I, Section 9’s list of specific powers denied Congress. If Congress has only those powers expressly granted to it, there would be no need for a list of powers denied Congress. From the division of power in the Vesting Clauses, Lawson asserts there must be a baseline, a line past which the various branches cannot otherwise intrude into powers granted other branches. “The Vesting Clauses, and indeed the entire structure of the Constitution, make no sense otherwise.”<sup>130</sup> To buttress this argument, Lawson cites to Madison and the

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<sup>126</sup> *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989) (“The nondelegation doctrine is rooted in the principle of separation of powers that underlies our tripartite system of Government . . .” (citing *Field v. Clark*, 143 U.S. 649, 692 (1892))).

<sup>127</sup> *Id.* at 417 (Scalia, J., dissenting).

<sup>128</sup> See Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 337 (2002).

<sup>129</sup> *Id.* Douglas Ginsburg made a similar argument, asserting “Nor can the Congress confer such a lawmaking power by statute, for the simple reason that the Congress has no enumerated power to create lawmakers.” Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, HERITAGE FOUND. (Jan. 6, 2011), <https://www.heritage.org/the-constitution/report/legislative-powers-not-yours-give-away> [<http://perma.cc/5VCE-TPFR>].

<sup>130</sup> Lawson, *supra* note 128, at 340.

Massachusetts Constitution of 1780, but acknowledges in a footnote that the historical sources are not conclusive evidence.<sup>131</sup>

### C. Locke as the Source for the Nondelegation Doctrine

Defenders of the nondelegation doctrine often credit John Locke's *Second Treatise of Government* as one of the primary sources for the that doctrine.<sup>132</sup> In his *Second Treatise of Government*, Locke stated as a constraint on legislative power that it, 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."<sup>133</sup>

Some originalist scholars and judges treat Locke's statement as if it were incorporated implicitly into the Constitution. Aaron Gordon stated, "Locke's ideas profoundly influenced the development of America's Constitution, and there is substantial evidence that his disapproval of legislative delegation in particular was incorporated into our founding document . . ."<sup>134</sup> Ilan Wurman boldly states, "The nondelegation principle can be traced to John Locke's *Second Treatise*, which was deeply influential on the Founding generation."<sup>135</sup> Justice Gorsuch's *Gundy* dissent echoed that claim, stating without any citation of authority and, given the historical record, in all likelihood erroneously that Locke was "one of the thinkers who most influenced the Framers' understanding of the separation of powers."<sup>136</sup> Justice Rehnquist cited Locke for the proposition that "the legislative can have no power to transfer their authority of making laws and place it in other hands."<sup>137</sup> Justice Thomas cited Locke for the same proposition, and contended that Locke's and others' writing "about the relationship between private rights

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<sup>131</sup> *Id.* at 341 n.51.

<sup>132</sup> Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1311 (2003).

<sup>133</sup> LOCKE, *supra* note 5, at 363 (emphasis omitted).

<sup>134</sup> Gordon, *supra* note 43, at 739.

<sup>135</sup> Wurman, *supra* note 66, at 29.

<sup>136</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting).

<sup>137</sup> *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 672–73 (1980) ("In his *Second Treatise of Civil Government*, published in 1690, John Locke wrote that '[t]he 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.'").

and governmental power profoundly influenced the men who crafted, debated, and ratified the Constitution.”<sup>138</sup>

The supposed influence of Locke’s *Second Treatise* over the drafters of the Constitution is thus central to originalists’ claim that the Constitution contains an implicit nondelegation doctrine. Thomas Merrill noted, “The premise here is that the Framers were familiar with and largely approved of Locke’s political philosophy. So if Locke supported the legislative monopoly position, the Framers presumably supported the legislative monopoly position.”<sup>139</sup> This unwarranted overemphasis of Locke’s influence is not limited to the nondelegation doctrine but rather is endemic among some “[t]heorists . . . committed to at least one version of foundational rights, [who] claim to look at the American past but see little more than John Locke.”<sup>140</sup>

Claims that Locke’s nondelegation proposition or even Locke’s writings generally were a central influence on the drafting of the Constitution appear to be false. Instead, the historical record indicates, as will be discussed, that: (1) Locke’s nondelegation argument appears little mentioned in America in the years leading up to the Constitution’s drafting; (2) limitations on delegation in general seem little discussed during the drafting and ratification of the Constitution; (3) Locke’s primary influence in the colonies was in the justification of revolution and among the clergy, who were drawn to Locke’s religious preoccupations; (4) by the time the Constitution was drafted, the evidence indicates that Locke’s influence on politics had already declined dramatically in America; (5) in the 1780s, Locke was cited at times by the Anti-Federalists, but rarely if ever by the Federalists; and (6) Madison voiced wariness of Locke as a guide to separation of powers issues and, in his most extended discussion of the delegation of powers, Madison did not even mention Locke, but instead cited Montesquieu as “the great oracle.”<sup>141</sup>

Nondelegation advocates have turned up almost no evidence that Locke had any influence regarding nondelegation in the years immediately before the Ratification. Nicholas Parrillo notes that “the secondary literature turns up only one instance of an

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<sup>138</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 72–74 (2015).

<sup>139</sup> Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2132 (2004).

<sup>140</sup> Martin Flaherty, *History ‘Lite’ in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 528 (1995).

<sup>141</sup> THE FEDERALIST NO. 47, *supra* note 1.

American from 1765 through 1788 citing this point from Locke, in an anonymous newspaper essay” in discussing the states delegating their legislative powers to the Continental Congress, which is a very different subject.<sup>142</sup>

Locke may have been influential in America before the Revolution started, but not afterwards, and his influence mostly came from his other writings, not from the *Second Treatise* relied on by supporters of the nondelegation doctrine. Few copies of Locke's *Two Treatises* reached the colonies before 1724, and those known copies that initially arrived in the northern colonies were typically part of the *Collected Works of John Locke*, “three clumsy and faintly forbidding folio volumes.<sup>143</sup> Only one edition of Locke's *Two Treatises* was published during the colonial period in America, in 1773, and it was not printed again in America for 164 years.<sup>144</sup> As John Dunn stated, “The story of how the *Two Treatises of Government* was causally responsible (for what other sorts of responsibility could it bear?) for the direction of American political theory in the eighteenth century is, of course, largely false.”<sup>145</sup> Pocock states that this era of Revolution and the slow emergence of republics occurred in “an intellectual scene dominated to the point of obsessiveness by concepts of virtue, patriotism, and corruption, in whose making and transmission Locke played little part”<sup>146</sup> Steven Dworetz recounts how an earlier generation of scholars wildly overestimated Locke's influence in America and that later scholars responded by underestimating Locke's influence in the colonies as they considered rebellion.<sup>147</sup> Dworetz demonstrates the influence of Locke's *Second Treatise* by showing that twenty-five lines from it were quoted, word for word, by the “Jerseymen,” a well-armed movement fighting over land rights in the late 1740s.<sup>148</sup>

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<sup>142</sup> Nicholas R. Parrillo, *Supplemental Paper to: A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, at 6 n.11 (C. Boyden Gray Ctr. for the Study of the Admin. State, Working Paper No. 20-17, 2021), <https://ssrn.com/abstract=3696902>.

<sup>143</sup> John Dunn, *The Politics of Locke in England and America in the Eighteenth Century*, in *POLITICAL OBLIGATION IN ITS HISTORICAL CONTEXT: ESSAYS IN POLITICAL THEORY* 70 (1980).

<sup>144</sup> FORREST McDONALD, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 66 (1985).

<sup>145</sup> JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE ‘TWO TREATISES ON GOVERNMENT’* 7 (1969).

<sup>146</sup> J.G.A Pocock, *Virtue and Commerce in the Eighteenth Century*, 3 *J. INTERDISC. HIST.* 119, 127 (1972).

<sup>147</sup> STEVEN M. DWORETZ, *THE UNVARNISHED DOCTRINE: LOCKE, LIBERALISM, AND THE AMERICAN REVOLUTION* 13–27 (1990).

<sup>148</sup> *Id.* at 74.



Dworetz is careful to note, however, the sudden and drastic decline in Locke's influence in the colonies once war started and as the colonists started turning their thoughts to "disquisitions on the design of governments and constitutions. This transition from the Revolutionary to the Constitutional era seems to have occurred around 1776; and, significantly, it coincided with, and was reflected in, a dramatic decline in Locke's 'rate of citation.'"<sup>149</sup> The Framers apparently did not consider Locke a useful guide in how to design their new government.

Noted historians Oscar Handlin and Lillian Handlin perhaps somewhat overstated the case when they claimed that "a careful reading of the Two Treatises leads to the inescapable conclusion that it was not likely that any among the Founding Fathers had read this bedrock of American political theory" but appear completely accurate when they stated that "his reputation in the colonies rested not on the treatises on government," but rather on his work on epistemology and education.<sup>150</sup> They added, perhaps missing a few counterexamples: "Locke wrote at length [in the *Second Treatise*] about two subjects that should have concerned Americans; yet as far as the record shows, his views never became subjects for conversation in the lanes of Boston or Philadelphia, or even grist for debaters, pamphleteers, and journalists."<sup>151</sup>

As Gary Rosen stated, "Locke was most cited during the struggle for independence, when basic matters of political right were at issue," but founders turned to other philosophers "when institutions were a primary concern."<sup>152</sup> Locke was a large influence among the clergy in the colonies, who shared his religious preoccupations and embraced his justification for revolution.<sup>153</sup> James Otis, one of the few colonists who publicly mentioned Locke's views on nondelegation,<sup>154</sup> was a link between

<sup>149</sup> *Id.* at 44.

<sup>150</sup> Oscar Handlin & Lillian Handlin, *Who Read John Locke? Words and Acts in the American Revolution*, 58 AM. SCHOLAR 546, 547 (1989).

<sup>151</sup> *Id.* at 548.

<sup>152</sup> GARY ROSEN, AMERICAN COMPACT: JAMES MADISON AND THE PROBLEM OF FOUNDING 205 n.40 (1999) (citing Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984)).

<sup>153</sup> DWORETZ, *supra* note 147, at 32. "From the perspective of eighteenth-century colonists, the theistic Locke was most likely to have been *the* Locke. . . This is especially so with the New England clergy, [who] were demonstrably conversant with Locke's writings, and they had similar "religious preoccupations. They openly embraced Locke's political ideas—for example, the justification for revolution. . ." *Id.* (emphasis in original).

<sup>154</sup> See discussion *infra* text accompanying notes 184–88.

the clergy and revolutionary ferment.<sup>155</sup> In the 1760s, Locke was cited on politics primarily about the relationship between Britain and the American colonists, and in the 1770s to justify breaking with England and writing new constitutions.<sup>156</sup> Locke's influence in America seems to have dropped dramatically after the start of the Revolutionary War and he was rarely cited after 1781.<sup>157</sup> One study of American resistance pamphlets indicates that citations of Locke dropped off once the fighting started and that "after the fighting began in 1775, the revolutionary writers began to change their focus away from resistance theory, and direct invocation of Locke became more rare."<sup>158</sup>

Locke had little influence in the drafting of the Constitution and more influence among those who opposed the final document. Locke had "relatively little to say about specific institutions."<sup>159</sup> and so it is "not surprising that his influence was . . . very indirect on those writing the Constitution."<sup>160</sup> Locke's *Second Treatise* ends with a chapter entitled "Of the Dissolution of Government" and, as Forrest McDonald notes, "As to what legitimately follows the dissolution of government, however, the chapter is ambiguous."<sup>161</sup>

Locke was rarely publicly cited by the Federalists during the 1780s, at least in ways that show up in the historical record.<sup>162</sup> During the 1780s, Locke was cited more often, however, by the Anti-Federalists, so his influence during the drafting period seems to have been primarily with those opposing the Constitution as drafted.<sup>163</sup> Anti-Federalists were drawn to Locke's natural-rights individualism.<sup>164</sup>

<sup>155</sup> DWORETZ, *supra* note 147, at 54 ("Otis, to be sure, was not a man of the cloth. But he did have close ties to some radical and influential ministers—close enough for one prominent Tory to identify him as the driving force behind the notorious 'Black Regiment' of seditious preachers.")

<sup>156</sup> DONALD S. LUTZ, *THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 143 (1988).

<sup>157</sup> Donald S. Lutz, *The Intellectual Background to the American Founding*, 21 *TEX. TECH. L. REV.* 2327, 2336 (1990).

<sup>158</sup> Alex Tuckness, *Discourses of Resistance in the American Revolution*, 64 *J. HIST. IDEAS* 547, 550 (2003).

<sup>159</sup> Lutz, *supra* note 157, at 144. *See also* John Dunn, *Consent in the Political Theory of John Locke*, 10 *HIST. J.* 153, 153–54 (1967).

<sup>160</sup> LUTZ, *supra* note 156, at 2347. *See also* Flaherty, *supra* note 140, at 546 ("[T]he constitution the Americans advanced was fully consistent with Locke, and at times augmented with Lockean references, though . . . it owed little to the philosopher directly.")

<sup>161</sup> MCDONALD, *supra* note 144, at 145.

<sup>162</sup> LUTZ, *supra* note 156, at 145.

<sup>163</sup> *Id.*

<sup>164</sup> Daniel Walker Howe, *Introduction: Anti-Federalist/Federalist Dialogue and Its Implications for Constitutional Understanding*, 84 *NW. U. L. REV.* 1, 2 (1989).

Merle Curti, a great defender of Locke's influence in America, stated "Treatises of Civil Government was seldom cited in the Constitutional Convention of 1787. . ." <sup>165</sup> and Curti gives as an example of such rare citation a statement by an Anti-Federalist who later walked out of Convention without signing the Constitution. <sup>166</sup> Even Jerome Huyler, in a book chapter attempting to prove Locke's influence on the drafting of the Constitution, comes up mostly dry. Huyler points only to Locke's influence on such general topics as the sanctity of property, the importance of enlightened reason, and equal protection. <sup>167</sup> Even when Huyler points out someone in the Founding Era who was influenced by Locke, it was Samuel Adams, then an Anti-Federalist, who "frequently" quoted Locke "verbatim." <sup>168</sup>

Donald Lutz, in a noted study of citations during the Founding Era, found that the observable influence of Montesquieu soared while Locke's plummeted during the drafting of the Constitution and of state constitutions. <sup>169</sup> Lutz concluded, "Locke's influence [in the design of the Constitution or state constitutions] has been exaggerated . . . and finding him hidden in passages of the U.S. Constitution is an exercise that requires more evidence than has hitherto ever been provided." <sup>170</sup>

Madison himself seemed wary of trusting Locke on separation of powers issues, given how long-ago Locke had written and that Locke was writing about monarchical British government with a Parliament that ill represented the people. Writing as "Helvidius" in a 1793 newspaper debate with Alexander Hamilton, Madison argued that for separation of powers issues, "our own reason and our own constitution, are the best guides" since "a just analysis" of "the powers of government, according to their executive, legislative and judiciary qualities are not to be expected in the works of the most received jurists, who wrote before a critical attention was paid

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<sup>165</sup> Merle Curti, *The Great Mr. Locke: America's Philosopher, 1783-1861*, 11 HUNTINGTON LIB. BULL. 107, 135 (1937) (citing 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, 437 (Max Farrand ed., 1911)).

<sup>166</sup> *Id.* at 135 n.1 ("Luther Martin cited Locke to prove that individuals, under primitive conditions, are equally free and independent, and that the case was the same with states until they surrendered their equal authority."). "A strong anti-Federalist opposed to the plan for a strong central government, Martin displayed his disapproval of what the Convention produced by walking out without signing the Constitution." *Luther Martin*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/biography/Luther-Martin> [<http://perma.cc/X5PN-JD5G>] (last visited Apr. 18, 2021).

<sup>167</sup> JEROME HUYLER, *LOCKE IN AMERICA: THE MORAL PHILOSOPHY OF THE FOUNDING ERA* 251-73 (1995).

<sup>168</sup> *Id.* at 266.

<sup>169</sup> Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 192 (1984).

<sup>170</sup> *Id.* at 192-93.

to those objects, and with their eyes too much on monarchical governments.”<sup>171</sup> Madison seemed to recognize that with a democratically elected president, the Founders would be creating a very different government than Locke’s England, so they should not trust Locke’s analysis.

Madison added that Locke and Montesquieu “are evidently warped by a regard to the particular government of England, to which one of them owed allegiance; and the other professed an admiration bordering on idolatry.”<sup>172</sup> Madison clearly distrusted Locke’s teachings about how governments should be structured, given Locke’s “warped” regard. Locke’s paltry influence during the drafting of the Constitution, almost all with the Anti-Federalists, should not be allowed magically to insert a nondelegation doctrine into the Constitution and hence overrule the decisions of the Framers and the First Congress. reject. For the Court to adopt a robust nondelegation doctrine absent in the Constitution and based on Locke’s outdated dictum would be akin to the Court siding with the Anti-Federalists and their allegiance to Locke in rejecting the Framers’ decisions.

As evidence of Locke’s purported deep influence on the drafting of the Constitution, Wurman cites a book by Bernard Bailyn on the ideological foundations of the American Revolution,<sup>173</sup> not on the drafting of the Constitution, two fundamentally different eras and enterprises and influences in one might have nothing to do with the other. Bailyn’s book indicates that Locke was cited before the Revolutionary War on justifications for revolt, such as natural rights and the “social and governmental contract,” but nowhere indicates that Locke was a significant influence in the drafting of the Constitution.<sup>174</sup> Bailyn instead notes that it was writers like “Grotius, Pufendorf, Burlamaqui, and Vattel” who were cited “on the principles of civil government.”<sup>175</sup> As noted by Steven Dworetz, Bailyn’s book

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<sup>171</sup> “*Helvidius*” Number 1, [24 August] 1793, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Madison/01-15-02-0056> [http://perma.cc/X66L-U6KY] (citing 15 JAMES MADISON, THE PAPERS OF JAMES MADISON 66–74 (Thomas A. Mason et al. eds., 1985)).

<sup>172</sup> *Id.*

<sup>173</sup> Wurman, *supra* note 66, at 29 n.146 (citing BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 27–30 (1992)).

<sup>174</sup> *Id.* at 27.

<sup>175</sup> *Id.* (“In pamphlet after pamphlet the American writers cited Locke on natural rights and on the social and governmental contract, Montesquieu and later Delolme on the character of British liberty and on the institutional requirements for its attainment, Voltaire on the evils of clerical oppression, Beccaria on the reform of criminal law, Grotius, Pufendorf, Burlamaqui, and Vattel on the laws of nature and of nations, and on the principles of civil government.”).

argues “that the politics and political thought of the American Revolution had been decisively conditioned and constrained by an essentially non-Lockean ideological tradition.”<sup>176</sup>

Wurman then cites to a book by Alan Gibson that argues that “the Lockean variation of the principles of classical liberalism” is at “the core of the Founders’ political thought,” but this tells us nothing about Locke’s *Second Treatise* or nondelegation.<sup>177</sup> Moreover, Gibson’s new edition of this book states that the work of noted historian J.G.A. Pocock “has led scholars to direct attention away from the influence of the political thought of John Locke in the eighteenth century and particularly in the American Founding.”<sup>178</sup> Gibson also discusses how American colonists in the 1780s turned away from the radical Whiggism exemplified by Locke to “profoundly reconsider the set of assumptions that they held about republican government.”<sup>179</sup> This provides yet another explanation for the precipitous decline of Locke’s influence in America when the Revolution started. Wurman’s last basis for his foundational claim regarding Locke’s influence on the Constitution is a law review article by Jack Rakove, which states the Founders were “eclectically conversant with the works of luminaries like Hobbes, Locke, Montesquieu, Hume, and Blackstone” in a long list of similar influences, including among many others “European authorities as Grotius, Pufendorf, and Delolme” and “the legacy of Newtonian science. . .”<sup>180</sup> Rakove’s long list hardly gives Locke’s influence primacy of place in influencing the drafting of the Constitution in general, let alone delegation in particular.

Aaron Gordon claims that “Locke’s condemnation of legislative delegation was frequently cited by statesmen and commentators in late-Eighteenth and early-Nineteenth Century America. . .”, but his only sources from the Founding name Locke for this point appear to be a 1763 political pamphlet by James Otis discussing Locke’s argument and an 1818 John Adams letter in

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<sup>176</sup> DWORETZ, *supra* note 147, at 17–18.

<sup>177</sup> Wurman, *supra* note 66, at 29 n.146 (quoting ALAN GIBSON, INTERPRETING THE FOUNDING: GUIDE TO THE ENDURING DEBATES OVER THE ORIGINS AND FOUNDATIONS OF THE AMERICAN REPUBLIC 13–21 (2006)).

<sup>178</sup> *Id.* at 35. For an extended discussion of whether the Founding Generation adopted Lockean ideals, see *supra* pp. 13–18.

<sup>179</sup> *Id.* at 47 (describing the disagreement between Wills and Jayne).

<sup>180</sup> Jack N. Rakove, *Fidelity through History (Or to It)*, 65 *FORDHAM L. REV.* 1587, 1598 (1997). Rakove helpfully provides a list of historians to consult on the influences on late eighteenth-century political thinking in America, including the above-mentioned Bernard Bailyn, John Dunn, “and, of course, J.G.A. Pocock . . .” *Id.* at 1598 n.32.

which Adams, then in his 80s, in tracing the sources of the Revolution, copied part of the Otis pamphlet from more than a half-century earlier.<sup>181</sup> That Gordon's only apparent evidence naming Locke is the text of the same pamphlet in two different forms, one from the pre-Revolutionary era and the other from more than thirty years after the drafting, indicates how very little influence Locke had on the drafting of the Constitution, especially given Gordon's obviously meticulous research to dig up even the slightest shred of evidence of nondelegation at the Founding.

Moreover, the Otis pamphlet cited by Gordon actually undercuts his nondelegation argument, since it constitutes the argument that Parliament can delegate legislative power to subordinate legislatures, and that the legislatures of the colonies should not be easily stripped of their legislative powers, subordinate though they were, because of the natural and equitable rights of the colonists.<sup>182</sup> Otis stated: "The supreme national legislative cannot be altered justly 'till the commonwealth is dissolved, nor a subordinate legislative taken away without forfeiture or other good cause."<sup>183</sup> Otis argued that Locke's assertion that a legislature's "whole power is not transferable" should not prevent the recognition of colonial legislatures.<sup>184</sup> Doing so would not transfer the whole power of Parliament but rather a limited power to legislate on subjects pertinent to the colonies. In doing so, Otis was not following Locke's dictum against delegation designed to protect Parliament's power from the King, but rather completely changing it. Otis took Locke's principles, "which were designed originally to support claims to parliamentary supremacy in late seventeenth-century England, and refashioned these principles to provide theoretical justification for the legitimacy of colonial assemblies as autonomous institutions" despite Parliament's supremacy.<sup>185</sup> Otis was not citing Locke to condemn legislative delegation but rather to request it for the colonies.

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<sup>181</sup> Aaron Gordon, *Nondelegation Misinformation: A Rebuttal To "Delegation At The Founding" And Its Progeny* (April 30, 2021), <https://ssrn.com/abstract=3561062> (manuscript at 19 n.114) (citing JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1763) and *Letter to William Wirt* (Mar. 7, 1818), in *WORKS OF JOHN ADAMS* 293 (Charles Francis Adams ed., 1856)).

<sup>182</sup> JAMES OTIS, *THE RIGHTS OF THE BRITISH COLONIES ASSERTED AND PROVED* (1763) ("[C]olonists will have an equitable right notwithstanding any such forfeiture of charter, to be represented in Parliament, or to have some new subordinate legislature among themselves. It would be best if they had both.").

<sup>183</sup> *Id.*

<sup>184</sup> *Id.*

<sup>185</sup> Lee Ward, *James Otis and the Americanization of John Locke*, 4 AM. POL. THOUGHT 181, 182 (2015).

Gordon also relies for nondelegation at the Founding on an 1818 letter from John Adams, which Gordon claims “likewise expressed agreement with Locke’s disapproval of legislative delegation.”<sup>186</sup> However, the text is evidence that Locke was influential before the Revolution, but that his influence declined dramatically thereafter. In the letter, Adams described the Otis pamphlet as one of the influences of the Revolution and something he had been very familiar with back then but it appears he had not seen it since.<sup>187</sup> That Gordon refers to the same pamphlet in two different forms, the pamphlet itself decades before the ratification of the Constitution and a copying out of some of the pamphlet decades after, undermines his claim that Locke’s condemnation of delegation was much discussed at the Founding.

Gordon also claims as evidence instances where colonists complained about Parliament’s delegation of power to the King, including a 1774 tract by Thomas Jefferson objecting to delegation of power in England to the King<sup>188</sup> However, in his other examples, he does not state that Locke was even mentioned, which indicates Locke’s waning influence in the colonies. Also, Parliament as representative of the people (however poorly) delegating to a royal monarch is very different than Congress delegating to an elected President, so criticizing Parliament’s delegation of power to a monarch does not show how Americans would feel about Congress delegating to a democratically elected president.

Locke recognized the necessity of delegating legislative power and allowed that the Executive would share some legislative power. Lee Ward noted that Locke’s theory of delegated powers is “sufficiently comprehensive to provide for the establishment of a system of laws that would provide independent constitutional authority for both the supreme legislative power and a supreme Executive power that holds some share of the legislative power.”<sup>189</sup> Merrill asserted that Locke himself seems to have thought that Parliament could

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<sup>186</sup> Gordon, *supra* note 43, at 740–41.

<sup>187</sup> *From John Adams to William Wirt, 7 March 1818*, FOUNDERS ONLINE: NAT’L ARCHIVES, <https://founders.archives.gov/documents/Adams/99-02-02-6863> [<http://perma.cc/BQ2A-TVBX>] (citing JOHN ADAMS, THE ADAMS PAPERS (early access document to forthcoming final authoritative source), <https://founders.archives.gov/content/volumes#Adams> [<http://perma.cc/72BE-7RZA>]).

<sup>188</sup> Gordon, *supra* note 43, at 741 (citing THOMAS JEFFERSON, A SUMMARY VIEW OF THE RIGHTS OF BRITISH AMERICA (1774), in 1 MEMOIRS, CORRESPONDENCE, AND PRIVATE PAPERS OF THOMAS JEFFERSON 112–13 (Thomas Jefferson Randolph ed., 1829)).

<sup>189</sup> Ward, *supra* note 185, at 193.

delegate legislative power to the King under certain circumstances and that Locke “believed the executive had inherent authority to act with the force of law, subject to being overridden by subsequent action of the legislature.”<sup>190</sup> Merrill also showed that Locke may have allowed for delegation of legislative power where the supreme legislative body had given its sanction. Locke asserted that no edict of any other entity can have “have the force and obligation of a Law, which has not its Sanction from that Legislative, which the publick has chosen and appointed.”<sup>191</sup> Merrill notes that this could mean that “the legislature does have the power to confer authority on other persons to act with the force of law, provided it gives its ‘sanction’ to this outcome. . .”<sup>192</sup>

Locke’s position restricting legislative delegation was far from universal, even in England in his day. Philip Hamburger noted that Locke’s position was one that “Englishmen of whiggish views tended to argue. . .”<sup>193</sup> Hamburger further describes how the Whigs themselves arguably violated the principle described by Locke by passing the Septennial Act, which replaced triennial elections with elections every seven years, against the objection of the Tories.<sup>194</sup> “Taking up whiggish arguments, Tories complained that Parliament had reconveyed its power.”<sup>195</sup> According to Hamburger, neither political party in England had so fixed a position on delegation that they were “unwilling to shift gears when it suited them.”<sup>196</sup>

It is important to note that the Framers rejected England’s form of government and constructed a system of government far different from that of Locke’s England. In Britain in the 1680s, legislative power was held by a combination of the King, Lords, and Commons, while the “king alone was supreme in the monarchical functions.”<sup>197</sup> While Parliament was hardly a completely democratic institution, the monarchy was not at all democratic. Locke’s views on delegation is an aspect of the fact that “the deep structure of Locke’s account of politics is

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<sup>190</sup> Merrill, *supra* note 139, at 2133 (“The principal complication is that Locke in fact was not opposed to all sharing of legislative power in the functional sense, because he endorsed the concept of the executive prerogative.”).

<sup>191</sup> *Id.* at 2134 (quoting JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 356 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690)).

<sup>192</sup> *Id.*

<sup>193</sup> HAMBURGER, *supra* note 119, at 381.

<sup>194</sup> *Id.*

<sup>195</sup> *Id.* at 382.

<sup>196</sup> Hamburger, *supra* note 117, at 97.

<sup>197</sup> Suri Ratnapala, *John Locke’s Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 218 (1993).



profoundly democratic.”<sup>198</sup> And so it makes sense that Locke would in general condemn delegation of legislative power from an at least partially representative Parliament to an unelected monarch.<sup>199</sup> However, the Framers might not have thought that such condemnation would apply to America’s Congress delegating to the Executive Branch. Further, the delegation notorious in Locke’s day was “The Statute of Proclamations”, passed to give legislative authority to proclamations of Henry VIII in 1539. This delegation was completely unlike Congress’s delegation to federal agencies today, in that it gave Henry VIII as king-in-council power to create law on almost any topic, unconnected from the policy dictated by or the direction of Parliament, and with few limitations.

Defenders of the nondelegation doctrine have argued that it is foundational.<sup>200</sup> However, nondelegation was not a significant issue in the drafting or ratification of the Constitution. Nicholas Parrillo, after an exhaustive search, stated, “Legislative delegation was not an object of sustained constitutional discussion.”<sup>201</sup> The few references he did find give little indication of the contours of any proposed bar on delegation, Parrillo notes, “because the references that speak to such issues appear to have been rejected by majorities of their audiences, or involved types of delegations categorically different from those that Congress makes to an agency.”<sup>202</sup> Posner and Vermeule combed the ratification debates for discussion of delegation and found “nothing of any real relevance.”<sup>203</sup> If the nondelegation doctrine were a foundational element of the Constitution as some claim, surely more than just a passing mention of nondelegation would appear somewhere in the vast records of the multitude of debates at the Convention and during ratification, many about constitutional meaning. However, as Mortenson and Bagley assert, “there is trifling evidence of a nondelegation doctrine even being argued for by aggressive legal innovators, let alone broadly accepted by the Founders as a group.”<sup>204</sup>

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<sup>198</sup> Ian Shapiro, *John Locke's Democratic Theory*, in *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 309, 310 (Ian Shapiro ed., Yale Univ. Press 2003).

<sup>199</sup> Ward, *supra* note 185, at 193.

<sup>200</sup> Redish, *supra* note 15, at 366 (“Without enforcement of the nondelegation doctrine, the foundational precepts of the American system of government are seriously undermined.”).

<sup>201</sup> Parrillo, *supra* note 142 (manuscript at 7 n.12).

<sup>202</sup> *Id.* at 8.

<sup>203</sup> Posner & Vermeule, *supra* note 17, at 1734 (“A search for references to delegation in the ratification debates of Massachusetts, Connecticut, New Hampshire, New York, Pennsylvania (including the Harrisburg Proceedings), Maryland, Virginia, North Carolina, and South Carolina turned up nothing relevant.”).

<sup>204</sup> Mortenson & Bagley, *supra* note 8, at 293.

Another theory argues that nondelegation is an essential part of agency theory, and that as an agent of the public, Congress is prohibited from delegating the powers granted to it. This is supposedly derived from the common law maxim *delegata potestas non potest delegari*—one with delegated authority lacks the power to delegate it further.<sup>205</sup> Sotirios Barber noted that this maxim is primarily seen in the common law of agency, though has been applied as a rule of constitutional law, and argues that both may be mere applications of “the general principle of nondelegation which attaches to any delegated power” without expressed contrary provisions.<sup>206</sup> Where this general principle resides, Barber does not say.

The *Delegata* maxim and the associated agency doctrine seem to be a *post hoc* explanation justifying the nondelegation doctrine, not an influence on the Framers. The *Delegata* maxim does not appear much discussed in the Founding Era and neither it nor any variant appears in the “tens of thousands of pages of searchable archival material from the Continental Congress, from the drafting and ratification of the Constitution, and from the records of the first ten years of Congress . . .”<sup>207</sup> and did not show up in any form in the United States federal and state case reports until 1794.<sup>208</sup> Mortenson and Bagley note a fundamental flaw in the proposition that agency rules govern constitutional meaning: those making that proposal “cannot point to any evidence that the private law agency analogy should govern constitutional interpretation.”<sup>209</sup>

More importantly, it appears that the *Delegata* maxim, as understood in the Founding Era, would permit the delegation of the power to do specific acts, and only bar the transfer of the whole powers of a governmental officer or entity. For example, the Pennsylvania Supreme Court in the case *Respublica v. Duquet* upheld the delegation of legislative power by the state to the City of Philadelphia, and in the 1809 case *Hunt v. Burrel*, the court held that an undersheriff could validly delegate the power to execute a writ.<sup>210</sup> The court held that the *Delegata* maxim is correct “when

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<sup>205</sup> See Douglas H. Ginsburg & Steven Menashi, *Nondelegation and the Unitary Executive*, 12 U. PA. J. CONST. L. 251, 254 (2010) (stating “Locke developed the nondelegation doctrine out of an elementary maxim of the law of agency, *delegata potestas non potest delegari*—delegated powers cannot be further delegated.”).

<sup>206</sup> SOTIRIOS A. BARBER, *THE CONSTITUTION AND THE DELEGATION OF CONGRESSIONAL POWER* 26–27 (1975).

<sup>207</sup> Mortenson & Bagley, *supra* note 8, at 297.

<sup>208</sup> *Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799); *Hunt v. Burrel*, 5 Johns. 137 (N.Y. Sup. Ct. 1809).

duly applied; for to make a deputy by a deputy, in the sense of the maxim, implies an assignment of the whole power, which a deputy cannot make. A deputy has general powers, which he cannot transfer; but he may constitute a servant, or bailiff, to do a particular act.”<sup>211</sup>

In other words, as understood in the early years of the Republic, the *Delegata* maxim would not prohibit Congress from a limited delegation of its legislative power to a federal agency, but rather would only bar a delegation of its whole legislative power to another entity.

The *Delegata* maxim has many exceptions that “give away the game,” in the words of Posner and Vermeule.<sup>212</sup> They cite the exceptions listed by Justice Story, an early explicator of that maxim: from the express language, or from fair presumptions, from the particular transaction, or through the usage of trade.<sup>213</sup> If Congress’s legislation must be built on explicitly enumerated powers, such as the Necessary and Proper Clause, they argue that “[n]ondelegation proponents must explain why those enumerated powers don’t represent just the sort of provision that, in Story’s framework, create a ‘fair presumption’ that the delegate may redelegate its powers as necessary or appropriate.”<sup>214</sup>

Justice Story explained the bar on an agent delegating her powers in his *Commentaries on the Law of Agency*. “One, who has a bare power or authority from another to do an act, must execute it himself, and cannot delegate his authority to another; for this being a trust or confidence reposed in him personally, it cannot be assigned to a stranger . . .”<sup>215</sup> Justice Story himself, though, notes the limits of the *Delegata* maxim, stating that “there are cases, in which the authority may be implied; as where it is indispensable by the laws, in order to accomplish the end; or it is the ordinary custom of trade; or it is understood by the parties to be the mode, in which the particular business would or might be done . . .”<sup>216</sup> Duff and Whiteside tartly note, “In other

<sup>211</sup> *Id.*

<sup>212</sup> Posner & Vermeule, *supra* note 17, at 1733.

<sup>213</sup> *Id.* (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY §§ 14–15 (Charles P. Greenough ed., Little, Brown & Co. 9th ed. rev. 1882)).

<sup>214</sup> *Id.*

<sup>215</sup> Patrick W. Duff & Horace E. Whiteside, *Delegata Potestas Non Potest Delegari: A Maxim of American Constitutional Law*, 16 CORNELL L.Q. 168, 168 (1929) (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 13 (C.C. Little & J. Brown 2nd ed. rev. 1839)).

<sup>216</sup> *Id.* at 169 (quoting JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 14 (C.C. Little & J. Brown 2nd ed. rev. 1839)).

words, delegated authority cannot be re-delegated unless there is some reason why it should be.”<sup>217</sup> Even under agency law at the time the Constitution was drafted, then, Congress could have delegated its legislative power in order to accomplish the purposes of legislation. Also, delegation by Congress has been the norm since the Founding,<sup>218</sup> so it is clearly customary by now and understood as a significant part of how government functions.

Furthermore, the *Delegata* maxim itself seems to have arisen originally from a printer's error. In 1929, Duff and Whiteside conducted an extensive search for the origins of the *Delegata* doctrine, tracing it back from its use by American and English sources and to a misprinted Medieval document. They concluded that instead of asserting that delegated power cannot be itself delegated, the original meaning was that the power of the King cannot “be so delegated, that the primary (or regulating) power does not remain with the King himself” and so the *Delegata* doctrine owes “its vogue in the common law to the carelessness of a sixteenth century printer.”<sup>219</sup> Under the doctrine's original meaning, Congress would be permitted to delegate legislative power to federal agencies so long as it retains the primary and regulating power to legislate itself, something that would virtually always be true in a system where Congress's laws take precedence over federal agencies' regulations.

#### D. The Nondelegation Doctrine's Brief Life and Long Dormancy in the Supreme Court

As has been often noted, the Supreme Court's history of applying the nondelegation doctrine in any meaningful way started well after the Founding and it did not invalidate legislation based on that doctrine until 1935, and not after that year. The first mention of the nondelegation doctrine, indirectly, was in the *Cargo of the Brig Aurora v. United States*, when the Court did not respond directly to the nondelegation argument and then in *Wayman v. Southard* in 1825, Chief Justice Marshall's opinion seems to indicate that Congress cannot delegate powers purely legislative except when it can, and the line between important subjects which cannot be delegated and other subjects which may be delegated is difficult to draw.<sup>220</sup>

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<sup>217</sup> *Id.*

<sup>218</sup> See generally Chabot, *supra* note 94.

<sup>219</sup> Duff & Whiteside, *supra* note 215, at 173.

<sup>220</sup> *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813). The statute in question authorized the president to lift a statutory embargo if he determined that the countries involved either had indicated respect for the commerce of the United

In their extensive analysis of the history of the nondelegation doctrine, Whittington and Iuliano noted, “[t]he Court had remarkably little to say regarding the delegation of legislative power from the late Marshall Court through the remainder of the nineteenth century” and “avoided serious engagement with the principles and standards of nondelegation . . . .”<sup>221</sup> It was not until the *Field v. Clark*<sup>222</sup> in 1892 that the Court addressed nondelegation more directly. There, the court considered a statute that delegated to the President the ability to trigger higher tariff rates for countries that failed to participate in reciprocal free trade. In response to the argument that this inappropriately delegated legislative powers to the President, the Court stated, “That Congress cannot delegate legislative power to the President is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”<sup>223</sup> Still, the Court upheld the delegation in the statute at issue, finding that it did not give the President legislative power.<sup>224</sup>

The Court followed that with a 1904 case concerning whether Congress could delegate to the Secretary of the Treasury authority to prevent adulterated tea from entering the American market.<sup>225</sup> The Court found that “Congress legislated on the subject as far as was reasonably practicable” and that preventing delegation of further discretionary decision-making denying to Executive officials with discretionary power would in essence declare “that the plenary power vested in Congress to regulate foreign commerce could not be efficaciously exerted.”<sup>226</sup> Hence, the practical necessity of Congress delegating some decisions to accomplish its goals justified the delegation. The Court further justified delegation to an agency to fill in the details of a statute in the Grimaud case in 1911, noting its use since the Founding,

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States. The Supreme Court did not respond to this argument directly but merely noted, “we can see no sufficient reason, why the legislature should not exercise its discretion in reviving the [law allowing trade], either expressly or conditionally, as their judgment should direct.” *Id.* at 388. In *Wayman v. Southard*, 23 U.S. 1, 43, 6 L. Ed. 253 (1825), Chief Justice Marshall’s opinion added little clarity on what legislative delegation is permitted, stating, “[t]he line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.” *Id.*

<sup>221</sup> Keith E. Whittington & Jason Iuliano, *The Myth of the Nondelegation Doctrine*, 165 U. PA. L. REV. 379, 396 (2017).

<sup>222</sup> 143 U.S. 649 (1892).

<sup>223</sup> *Id.* at 692.

<sup>224</sup> *Id.*

<sup>225</sup> *Buttfield v. Stranahan*, 192 U.S. 470 (1904).

<sup>226</sup> *Id.* at 496.

and that when Congress “indicated its will” with legislation, it could delegate the “power to fill up the details” by the establishment of administrative rules and regulations.<sup>227</sup>

The Court created a more explicit rule regarding what delegation is permitted in the case *J.W. Hampton, Jr. v. United States*, where it held that Congress could delegate so long as it lay down an “intelligible principle” to guide the Executive Branch, which would render it “the mere agent of the law-making department . . . .”<sup>228</sup> The “intelligible principle” rule remains the primary standard by which courts determine whether delegation is constitutionally permissible.<sup>229</sup> The Court broadly approved delegation for a period thereafter. “By the Progressive Era, the Court was willing to characterize almost any action that a government official performed as nonlegislative.”<sup>230</sup>

The Court approving every congressional delegation came to a screeching, albeit brief, halt in 1935, in the cases *Panama Refining Co. v. Ryan*<sup>231</sup> and *A.L.A. Schechter Poultry Corporation v. United States*,<sup>232</sup> both concerning the National Industrial Recovery Act (“NIRA”). In *Panama Refining*, the Court struck down the delegation to the President of power to prohibit transportation of petroleum and its products in excess of state permission upon the Court’s finding that “Congress has declared no policy, has established no standard, has laid down no rule.”<sup>233</sup> In *Schechter*, the Court objected to legislation authorizing the President to approve those “codes of fair competition”<sup>234</sup> that were submitted to him by trade associations regarding such issues as labor practices and minimum wages.<sup>235</sup> In his concurring opinion to *Schechter*, Justice Cardozo stated, “[t]he delegated power of legislation which has found expression in this code is not canalized within banks that keep it from overflowing. It is unconfined and vagrant . . . .”<sup>236</sup>

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<sup>227</sup> *United States v. Grimaud*, 220 U.S. 506, 517, 521 (1911).

<sup>228</sup> 276 U.S. 394, 409, 411 (1928).

<sup>229</sup> *See, e.g., Mistretta v. United States*, 488 U.S. 361, 373–74 (1989) (listing the broad delegations the Court has permitted).

<sup>230</sup> *Whittington & Iuliano, supra* note 221, at 399.

<sup>231</sup> 293 U.S. at 388 (1935).

<sup>232</sup> 295 U.S. at 495 (1935).

<sup>233</sup> 293 U.S. at 430.

<sup>234</sup> 295 U.S. at 529.

<sup>235</sup> 295 U.S. at 541–42 (“In view of the scope of that broad declaration and of the nature of the few restrictions that are imposed, the discretion of the President in approving or prescribing codes, and thus enacting laws for the government of trade and industry throughout the country, is virtually unfettered. We think that the code-making authority thus conferred is an unconstitutional delegation of legislative power.”).

<sup>236</sup> 295 U.S. at 551 (Cardozo, J., concurring).

These are “the only two cases in which the Supreme Court has struck down a federal law for violating the nondelegation doctrine.”<sup>237</sup> The nondelegation doctrine has been virtually dormant, at least at the Supreme Court level, since 1935, leading to Cass Sunstein’s famous quip that the nondelegation doctrine “has had one good year, and 211 bad ones (and counting).”<sup>238</sup>

Since 1935, the Supreme Court has continued to worry over the nondelegation doctrine, returning to it on occasion never to revive it, but also never quite willing either to declare it defunct. While it purports to enforce the requirement of an intelligible principle to permit delegation, even when Congress’s direction to the Executive Branch is less than intelligible, “the Court usually merely interprets the authorizing statute to avoid the difficulty.”<sup>239</sup> In the recent case, *Whitman v. American Trucking Ass’ns*, the Court continued to uphold the intelligible principle test.<sup>240</sup> There, Justice Scalia writing for a unanimous Court, indicated that permitting delegation where there is an “intelligible principle” limiting and guiding the exercise of delegated power was, in the words of William K. Kelley, “both a sound way to implement the Constitution and simultaneously judicially unenforceable.”<sup>241</sup>

### III. THE DEVOLUTION OF ORIGINALISM AND ITS GROWING ATTACK ON REPRESENTATIONAL DEMOCRACY

#### A. Original Originalism

Despite its long dormancy and only one year of life, the nondelegation doctrine has remained a constant topic among legal scholars debating whether it still exists in any meaningful way and why or why not. While some have proclaimed regularly that the nondelegation doctrine is dead, opposing professors often respond, in the words of Phillip Hamburger, “as if in a Monty Python skit. ‘Not dead yet!’”<sup>242</sup> Some originalist scholars and others interested in curbing the power of the administrative state have done their best to resuscitate the doctrine. Suzanna Sherry asked, “[h]ow many ways can conservatives spin an originalist

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<sup>237</sup> See Mortenson & Bagley, *supra* note 8, at 283–84.

<sup>238</sup> Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000).

<sup>239</sup> HAMBURGER, *supra* note 119, at 378.

<sup>240</sup> 531 U.S. 457, 465 (2001).

<sup>241</sup> William K. Kelley, *Justice Scalia, the Nondelegation Doctrine, and Constitutional Argument*, 92 NOTRE DAME L. REV. 2107, 2112 (2017).

<sup>242</sup> HAMBURGER, *supra* note 119, at 378.

tale to support their deregulatory, small-government vision? The answer is apparently infinite.”<sup>243</sup>

That originalists would urge courts to be more active in overturning Congress’s legislation and setting such basic policy as the size of government and its regulation is a direct assault on the foundations of originalism, in that originalism was originally conceived as a justification for judicial restraint and as protection for Congress’s legislative power from judicial activism. Originalism was first designed to prevent “Government by Judiciary,” the title of an enormously influential “originalism manifesto,”<sup>244</sup> but now some originalists want the courts to seize the wheel of government and engage in judicial activism.<sup>245</sup> Originalists first complained that activist judges were using their judicial power to amend rather than interpret the Constitution, but now some would have the Court create as a robust constitutional mandate the nondelegation amendment that was rejected for the Constitution.<sup>246</sup> Explaining this sea change in the nature and purpose of originalism requires a review of how dramatically originalism has mutated since it was first conceived.

Originalism as a movement began in the early 1970s among conservatives fighting back against the liberal decisions of what they viewed as an “activist” Warren Court.<sup>247</sup> While some earlier court decisions had had an originalist bent, of course,<sup>248</sup> judges rarely did much historical research to determine the original intent of the Framers or the original meaning of the

<sup>243</sup> Suzanna Sherry, *The Imaginary Constitution*, 17 GEO. J. L. & PUB. POL’Y 441, 442 (2019).

<sup>244</sup> ERIC J. SEGALL, ORIGINALISM AS FAITH 60 (2018).

<sup>245</sup> Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1083 (2005).

<sup>246</sup> See *supra* text accompanying notes 40–47.

<sup>247</sup> James E. Fleming, *Fidelity to Our Imperfect Constitution*, 65 FORDHAM L. REV. 1335, 1347 (1997). James Fleming called originalism “a conservative ideology that emerged in reaction against the Warren Court” but “did not exist” before that time.

<sup>248</sup> For example, see Chief Justice Taney’s words in *Dred Scott*:

No one, we presume, supposes that any change in public opinion or feeling, in relation to this unfortunate race, . . . should induce the court to give to the words of the Constitution a more liberal construction in their favor than they were intended to bear when the instrument was framed and adopted.

Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 22 (2009) (citing *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 426 (1856) and these words as an example of “strong originalism”). *But see* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379, 407 (2011) (“Taney’s self-conscious embrace of originalism even when it leads to moral depravity . . . was bad originalism. . . . These errors raise a suspicion that Taney’s aggressive positivism was but a façade for his abject racism.”).



Constitution, and instead “cherry-picked evidence of original meaning to suit their purposes.”<sup>249</sup>

The introduction of originalism is often credited to Robert Bork, who as a law professor in 1971 published a law review article that lamented how far he thought the Warren Court had strayed from the Constitution’s text and original meaning.<sup>250</sup> Bork declared that in cases of constitutional interpretation, “[t]he judge must stick close to the text and the history, and their fair implications, and not construct new rights.”<sup>251</sup> Doing so protects Congress and state legislatures and their setting of policy, Bork argued, and he asserted that “courts must accept any value choice the legislature makes unless it clearly runs contrary to a choice made in the framing of the Constitution.”<sup>252</sup> Bork’s view of judicial restraint, that courts should accept legislation unless it is clearly unconstitutional, is akin to, though weaker than, that of Harvard law professor James Bradley Thayer, who in an influential 1893 law review article, urged that courts should invalidate a statute only if its unconstitutionality is “so clear that it is not open to rational question.”<sup>253</sup>

Though originalism has since evolved into a veritable smorgasbord of conflicting approaches and interpretations, two essential elements of most originalism approaches are the following. First is the idea that the meaning of the Constitution became fixed at its drafting or its ratification (or perhaps when the meaning is liquidated through practice).<sup>254</sup> The second central pillar is the claim that the meaning of the Constitution once fixed should be a restraint on its interpretation unless or until the Constitution is amended.<sup>255</sup>

Originalism has been defended on both positive and normative grounds. Among the positive grounds is the assertion that it

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<sup>249</sup> Jeremy Telman, *Originalism as Fable (Reviewing Eric Segall, Originalism as Faith)*, 47 HOFSTRA L. REV. 741, 748 (2018)).

<sup>250</sup> Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

<sup>251</sup> *Id.* at 8.

<sup>252</sup> *Id.* at 10–11.

<sup>253</sup> James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893). For a discussion of Thayer’s thesis, see Richard A. Posner, *The Rise and Fall of Judicial Self-Restraint*, 100 CAL. L. REV. 519, 522 (2012).

<sup>254</sup> See Lawrence B. Solum, *The Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 NOTRE DAME L. REV. 1 (2015) (“The meaning of the constitutional text is fixed when each provision is framed and ratified: this claim can be called the Fixation Thesis. This thesis is one of two core ideas of originalist constitutional theory: the other is the Constraint Principle, which holds that the original meaning of the constitutional text should constrain constitutional practice.”).

<sup>255</sup> *Id.*

provides the most accurate understanding of the meaning of the Constitution.<sup>256</sup> Among normative grounds is the claim that jurisprudence based on originalism “facilitates the realization of a political system grounded on popular sovereignty.”<sup>257</sup> Keith Whittington argued that originalism protects the effectiveness of the popular will that created the Constitution and that judges who fail to employ originalism could, through their rulings, set that will aside.<sup>258</sup> Randy Barnett argued that originalism best protects substantive ideas of justice by protecting “background natural rights retained by the people” as a “constitutional assumption that is hard-wired into the meaning of the Constitution itself.”<sup>259</sup> McGinnis and Rappaport argued that the Constitution should be given its original meaning because only doing so will preserve the beneficial effects of the supermajoritarian process of the Constitution’s enactment and amendment, which affords “deep deliberation” and creates “the consensus and nonpartisanship necessary for fostering allegiance to a constitution that desirably regulates politics and society.”<sup>260</sup>

The opposing view to originalism is living constitutionalism, perhaps most broadly defined as “simply in opposition to originalism.”<sup>261</sup> Living constitutionalism is distinguished by incorporating “contemporary values and attitudes into the judicial ‘understanding’”<sup>262</sup> of the Constitution, and treating it as “an adaptive document that responds to changing social and economic conditions through altered judicial interpretations of its central textual provisions.”<sup>263</sup> Originalism at first focused on the intent of the drafters of the Constitution and so what has been

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<sup>256</sup> JOHN O. MCGINNIS & MICHAEL B. RAPPAPORT, ORIGINALISM AND THE GOOD CONSTITUTION 117 (2013).

<sup>257</sup> KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 3 (1999).

<sup>258</sup> *Id.* at 156.

<sup>259</sup> Randy E. Barnett, *The Misconceived Assumption About Constitutional Assumptions*, 103 NW. U. L. REV. 615, 652–53 (2009).

<sup>260</sup> MCGINNIS & RAPPAPORT, *supra* note 256, at 33.

<sup>261</sup> Nelson Tebbe & Robert L. Tsai, *Constitutional Borrowing*, 108 MICH. L. REV. 459, 514 n.240 (2010).

<sup>262</sup> Michael C. Dorf, *The Majoritarian Difficulty and Theories of Constitutional Decision Making*, 13 U. PA. J. CONST. L. 283, 295 n.46 (2010).

<sup>263</sup> G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 299 (2000) (quoted in Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243, 1259 (2019), which discussed the varied definitions of living originalism).

called “the most important of originalist sources”<sup>264</sup> is *The Federalist*, “which explained the Founders’ intent.”<sup>265</sup>

In 1977, Raoul Berger published his originalism manifesto, *Government by Judiciary*, which asked, “[w]hy is the ‘original intention’ so important? . . . A judicial power to revise the Constitution transforms the bulwark of our liberties into a parchment barrier.”<sup>266</sup> Berger offered this bulwark to defend the majoritarian power of Congress from “the tendency of legal liberalism to undermine legislative power and the rule of law.”<sup>267</sup> Berger’s book thus had a “majoritarian, restraintist thrust” as it was designed to protect legislative power from activist judges.<sup>268</sup> Because Berger argued that courts should follow the intent of the founders, Berger was labeled as a “strict intentionalist” by Paul Brest,<sup>269</sup> who in 1981 coined the word “originalism.”<sup>270</sup> By coining the word, Brest formalized originalism as a concept.<sup>271</sup>

Berger’s book had an entire chapter devoted to the fact that the Framers explicitly excluded the judiciary from policymaking, rejecting the idea of judges’ participation in a Council of Revision of legislation, and citing the Framers in support.<sup>272</sup> Nearly all who spoke on this subject at the Convention or during the ratification process agreed that judges should not be part of policy-forming in the legislative process.<sup>273</sup> Given the Framers’ strident opposition to judicial policy-making, originalists should fiercely oppose judicial activism, even by originalist judges, and reject giving judges the power to construct a nondelegation doctrine that would enable them to act as a Council of Revision to overturn regulatory legislation they disagree with.

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<sup>264</sup> Frank B. Cross, *Originalism—the Forgotten Years*, 28 CONST. COMMENT. 37, 38 (2012) (citing Pamela C. Corley, Robert M. Howard, & David C. Nixon, *The Supreme Court and Opinion Content: The Use of the Federalist Papers*, 58 POL. RES. Q. 329, 329 (2005)).

<sup>265</sup> Edwin Meese III, *Challenges Facing Our System of Justice*, 3 AVE MARIA L. REV. 303, 307–08 (2005). See discussion of this point in Frank B. Cross, *Originalism—The Forgotten Years*, 28 CONST. COMMENT. 37, 38 (2012).

<sup>266</sup> BERGER, *supra* note 6.

<sup>267</sup> JOHNATHAN O’NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 126 (2005).

<sup>268</sup> *Id.* at 129.

<sup>269</sup> Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. J. 1063, 1089 (1981).

<sup>270</sup> Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

<sup>271</sup> Randy E. Barnett & Evan D. Bernick, *The Letter and the Spirit: A Unified Theory of Originalism*, 107 GEO. L.J. 1, 9 (2018) (“Only after Brest invented the term ‘originalism’ did originalists adopt the label and defend it.”).

<sup>272</sup> BERGER, *supra* note 6, at 300 (“The Judiciary Was Excluded from Policymaking”).

<sup>273</sup> *Id.* at 302 (citing BENJAMIN F. WRIGHT, THE GROWTH OF AMERICAN CONSTITUTIONAL LAW 18, 244 (1942)).

Berger argued that what the Supreme Court was actually doing was far more radical than merely formulating novel interpretations. The Court instead was engaged in “what Justice Harlan described as the Supreme Court’s ‘exercise of the amending power,’ its continuing revision of the Constitution under the guise of interpretation.”<sup>274</sup> Berger said that his book was designed to “demonstrate that the Court was not designed to act, in James M. Beck’s enthusiastic phrase, as a ‘continuing constitutional convention’ . . .”<sup>275</sup>

Berger’s book stimulated such “an explosion of academic interest in the framers’ intent,” that “responding to Berger’s thesis has become somewhat of a cottage industry in constitutional scholarship.”<sup>276</sup> Originalist scholarship in the 1980s, influenced by Berger, also followed his lead and typically argued that “the liberal reformist use of modern judicial power threatened the rule of law and the formulation of public policy in legislatures.”<sup>277</sup> Hence, judicial restraint and the protection of legislative power were the primary goals of early originalism.

## B. Attacks on Intentionalist Originalism

With the advent of originalism, criticisms, sometimes harsh, were inevitable. However, even before originalism was conceived as a distinct method of constitutional interpretation, the use of history and original intent to determine the meaning of the Constitution had been harshly criticized. In his 1965 article “Clio and the Court: An Illicit Love Affair,” Alfred H. Kelly identified two almost inevitable problems with courts employing original intent to determine the meaning of the Constitution.<sup>278</sup> One was the problem of “law office history,” where the courts pull out selective quotes from the Framers or elsewhere that buttress their points, without engaging in sufficient historical investigation to see the entire historical picture, then consider and cite only their favored authorities and texts while ignoring the rest.<sup>279</sup> Kelly argued that the Court used this tool to engage in “extreme political activism, involving extensive judicial intervention in contemporary political problems” and as a

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<sup>274</sup> BERGER, *supra* note 6, at 1 (citing *Reynolds v. Sims*, 377 U.S. 533, 591 (1964)).

<sup>275</sup> *Id.* at 2.

<sup>276</sup> Richard B. Saphire, *Judicial Review in the Name of the Constitution*, 8 U. DAYTON L. REV. 745, 753 (1983) (footnote omitted).

<sup>277</sup> O’NEILL, *supra* note 267, at 135.

<sup>278</sup> Alfred H. Kelly, *Clio and the Court: An Illicit Love Affair*, 1965 SUP. CT. REV. 119 (1965).

<sup>279</sup> *Id.* at 122 n.13 (“By ‘law-office’ history, I mean the selection of data favorable to the position being advanced without regard to or concern for contradictory data or proper evaluation of the relevance of the data proffered.”).

“precedent-breaking instrument” so that by purporting “to return to the aboriginal meaning of the Constitution” the Court could “declare that in breaking with precedent it was really maintaining constitutional continuity.”<sup>280</sup>

A second hazard Kelly identified is how the Supreme Court, by stating and relying on their particular restatement of constitutional history, reifies that history, so that lesser courts must accept as true the Court’s account of history, however inaccurate. And even the Court itself must accept that reified history to some extent because of the principle of *stare decisis*. Kelly condemned the “creation of history a priori by what may be called ‘judicial fiat’ or ‘authoritative revelation’”<sup>281</sup> Kelly further noted “In a sense, by quoting history, the Court made history, since what it declared history to be was frequently more important than what the history might actually have been.”<sup>282</sup>

While early originalists had very different purposes than those of the courts that Kelly chastised, they faced similar critiques. An early attack came from Professor Paul Brest, who asserted, among other things, that it is difficult to determine the “intent” of a group of people, that doing so for the drafters or the ratifiers is almost impossible, and that even if that could be done, translating that intent to modern problems is another fraught challenge.<sup>283</sup> Furthermore, there are considerable reasons to reject being governed by intentions from the Founding Era, when women and racial minorities were excluded from governmental decision-making.<sup>284</sup> Larry Simon argued, “The Constitution was adopted by propertied, white males who had no strong incentives to attend to the concerns and interests of the impoverished, the nonwhites, or nonmales who were alive then, much less those of us alive today . . .”<sup>285</sup> Other critics piled on, objecting to modern Americans being ruled by an unchangeable (except through amendment) intent from centuries ago, the often-discussed “dead hand of the past.”<sup>286</sup>

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<sup>280</sup> *Id.* at 125.

<sup>281</sup> *Id.* at 122.

<sup>282</sup> *Id.* at 123.

<sup>283</sup> Brest, *supra* note 270, at 214–15.

<sup>284</sup> *Id.* at 230.

<sup>285</sup> Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CALIF. L. REV. 1482, 1499 (1985).

<sup>286</sup> Michael S. Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277, 357 (1985) (“The dead hand of the past ought not to govern, for example, our treatment of the liberty of free speech, and any theory of interpretation that demands that it does is a bad theory.”).

A notable early critic of the originalism project was Professor Jefferson Powell, who argued that the “vast majority of contemporary constitutional disputes involve facts, practices, and problems that were not considered or even dreamt of by the founders” and that applying the Constitution to questions it does not answer requires any interpreter to “use some process of generalization or analogy to go beyond what history can say.”<sup>287</sup> Powell also attacked the idea that the Framers of the Constitution intended or even expected that their intentions, sometimes stated in secretly conducted debates, govern the meaning of that document. Instead, Powell asserted that the “framers shared the traditional common law view . . . that the import of the document they were framing would be determined by reference to the intrinsic meaning of its words or through the usual judicial process of case-by-case interpretation.”<sup>288</sup>

Madison himself counseled against using the intentions of the Framers as a guide to the meaning of the Constitution, saying that that the sense of the Framers “could never be regarded as the oracular guide in expounding the Constitution.”<sup>289</sup> That the Framers did not intend that their intentions govern the meaning of the Constitution is evidenced by the fact that they kept secret their journals of the convention’s secretly conducted debates, at least until after the Constitution had been ratified.<sup>290</sup> As C.A. Lofgren notes, “[t]his strongly hints that the delegates feared that if the journals were published, they could affect subsequent interpretation.”<sup>291</sup>

### C. Original Understanding Originalism

These criticisms had teeth, and even Bork himself came to reject original intent originalism, saying no “even moderately sophisticated originalist” holds that interpretative weight should be given the subjective intent of the Framers.<sup>292</sup> Some originalists then shifted their focus to the meaning of the Constitution held by the ratifiers instead.<sup>293</sup> Since it was the ratification of the

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<sup>287</sup> H. Jefferson Powell, *Rules for Originalists*, 73 VA. L. REV. 659, 664–65 (1987).

<sup>288</sup> H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 903–04 (1985).

<sup>289</sup> 5 ANNALS OF CONG. 776 (1849).

<sup>290</sup> Charles A. Lofgren, *The Original Understanding of Original Intent?*, 5 CONST. COMMENT. 77, 81 (1988).

<sup>291</sup> *Id.* at 82.

<sup>292</sup> ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 218 (1990).

<sup>293</sup> Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L. J. 1113, 1137 (2003) (“The shift to original understanding was part of an increased recognition that it was the action of the

Constitution, not its drafting, that conferred on the Constitution its legitimacy to govern the public, it is the intention of the ratifiers, not the drafters, that matters, according to this theory. And, some argued, the intent of the ratifiers is not mere evidence of the Constitution's meaning but rather determines that meaning, or as Charles Lofgren stated, "how the ratifiers understood the Constitution, and what they expected from it, defines its meaning."<sup>294</sup>

Original understanding originalism, however, retrospectively assigns the ratifiers a completely different task than the one they actually performed. The ratifiers did not need to understand all the various terms of the Constitution, as their focus was on a single question: should the Constitution be ratified?<sup>295</sup> While the meaning of individual terms collectively mattered in that decision, the ratifiers never had to reach any group consensus on what any Constitutional term meant. Furthermore, determining the ratifiers' collective understanding of the Constitution is impossible. The debates over ratifying the Constitution were a "cacophonous argument" and so are no valid guide to any consensus understanding of its terms.<sup>296</sup> With such diverse and often contradictory sources, originalists can derive a host of perhaps contradictory yet plausible interpretations, "few conclusively verified or falsified."<sup>297</sup> With "the extraordinary diversity of the polemics the campaign produced, and the decentralized, unfocused nature"<sup>298</sup> of the ratifiers' discussions and debates, Jack Rakove concludes that it is almost impossible to "disaggregating a collective intention to ratify the Constitution into original understandings of particular clauses"<sup>299</sup> rendering original understanding originalism unworkable.

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Constitution's Ratifiers—state ratifying conventions in the case of the original document and state legislatures in the case of the amendments—whose actions gave legal life to the otherwise dead words on paper drafted by the Philadelphia Convention and the Congresses proposing the amendments.”)

<sup>294</sup> Lofgren, *supra* note 290, at 112.

<sup>295</sup> JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 17 (1996) (“The only understanding we can be entirely confident the majority of ratifiers shared was that they were indeed deciding whether the Constitution would ‘form a more perfect union’ than the Articles of Confederation . . .”).

<sup>296</sup> *Id.* at 132 (“That debate took the form not of a Socratic dialogue or an academic symposium but of a cacophonous argument in which appeals to principle and common sense and close analyses of specific clauses accompanied wild predictions of the good and evil effects that ratification would bring.”).

<sup>297</sup> *Id.* at 133.

<sup>298</sup> Rakove, *supra* note 180, at 1597.

<sup>299</sup> *Id.*

#### D. Original Meaning Originalism

Since original understanding originalism shared the same flaws as original intent originalism, some originalists created a new vision of originalism, one that would focus instead on the supposedly objective original public meaning of the text of the Constitution. Bork explained, “The search is not for a subjective intention. . . . [W]hat counts is what the public understood. . . . The original understanding is thus manifested in the words used and in secondary materials, such as debates at the [ratifying] conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.”<sup>300</sup> Original public understanding originalism therefore tries to step away from the subjective meaning that those involved in the process may have intended and instead turns to a supposedly objective meaning to be gleaned from all sorts of documents from the time. Original public understanding originalism thus turned originalism into “an empirical investigation of linguistic usage.”<sup>301</sup>

The grave hazard of original public meaning originalism is that it strips words out of their context in the text of the Constitution and potentially allows any uses of those words during the Founding to be used to interpret the Constitution. Original meaning originalists “continue to cherry pick quotes and present this amateurish research as systematic historical inquiry. In this method there is no serious attention to establishing the relative influence of particular texts.”<sup>302</sup> Seeking a single original public meaning at the Founding for many of the most important terms used in the Constitution is impossible.<sup>303</sup> This search will too often fail on critical issues and so on many of the most important issues would be a misbegotten method.<sup>304</sup>

#### E. A Panoply of Originalisms

Other varieties of originalism include libertarian originalism, typically based on the idea that the Constitution’s

<sup>300</sup> BORK, *supra* note 292, at 144.

<sup>301</sup> Barnett & Bernick, *supra* note 271, at 10.

<sup>302</sup> Saul Cornell, *Originalism on Trial: The Use and Abuse of History in District of Columbia v. Heller*, 69 OHIO ST. L. J. 625, 627 (2008).

<sup>303</sup> Mark Tushnet, *Heller and the New Originalism*, 69 OHIO STATE L. J. 609, 617 (2008) (“The new originalism seeks the original public meaning of constitutional terms, but there is (was) no single such meaning, again at least for interesting constitutional terms.”).

<sup>304</sup> James E. Fleming, *Are We All Originalists Now? I Hope Not!*, 91 TEX. L. REV. 1785, 1808 (2013) (“The quest for the original public meaning is misconceived because on most important provisions there will not be a definitive original public meaning that will be useful in resolving our disagreements, much less in resolving hard cases.”).



legitimacy is based on its protection of liberty and natural rights, rather than the consent of the governed,<sup>305</sup> and progressive or “Living Originalism,” the idea that the Framers intended future generations to be free to interpret the standards and principals of the Constitution and so avoid a static and unworkable Constitution. Then there is original methods originalism, which calls for the meaning of the Constitution to be gleaned “using the interpretive methods that the enactors would have deemed applicable to it.”<sup>306</sup> However, there was no agreed-on set of interpretive rules, given the conflicts and divisions of the Founding Era, “including a deep rift separating Federalists from Anti-Federalists and an even larger divide between popular and elite approaches to constitutional texts.”<sup>307</sup>

This panoply of alternative and often conflicting originalist methods gives judges cart blanche to choose whichever method and sources best serve their personal preferences. Originalist judges regularly cite to Madison and/or Hamilton in *The Federalist Papers*, which indicates they are still focused on a primitive form of original intent in which they pick quotes from a few favored sources, choosing those from the Founding they would likely agree with.<sup>308</sup> The biases of originalist judges are shown by which Founding Era texts they rely on. As Jamal Greene noted, “Discounting the views expressed by Brutus or the Federal Farmer in favor of those expressed by Publius is difficult to explain on the logic of original-meaning originalism.”<sup>309</sup>

Far from originalism being a constraint on judges, the vast smorgasbord of originalist options frees them to rule as they like and justify their decision based on the originalist method that leads to their personal desired result. Worse yet, originalist judges regularly use originalist methods when doing so suits their purposes but ignore them when it does not.<sup>310</sup> Political scientists who have researched the

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<sup>305</sup> See generally RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (2004). Ilan Wurman labels Barnett’s position “Libertarian Originalism” and argues that “Richard Epstein takes essentially the same view of constitutional legitimacy as Barnett.” Ilan Wurman, *The Original Understanding of Constitutional Legitimacy*, 2014 *BYU L. REV.* 819, 825–26 (2014).

<sup>306</sup> MCGINNIS & RAPPAPORT, *supra* note 256, at 116.

<sup>307</sup> Saul Cornell, *Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism*, 82 *FORDHAM L. REV.* 721, 736 (2013).

<sup>308</sup> Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 *COLUM. L. REV.* 1389, 1429 (2013).

<sup>309</sup> *Id.* at 1430 (footnotes omitted).

<sup>310</sup> Scott Lemieux, *Antonin Scalia and the Death of Originalism*, *NEW REPUBLIC* (Feb. 24, 2016), <http://newrepublic.com/article/130408/antonin-scalia-death-originalism> [<http://perma.cc/WQQ2-76GS>] (“Before and after Scalia, justices will use history when they believe it supports their *ex ante* conclusions and ignore it when they believe it doesn’t.”).

Supreme Court regularly assert that the Justices' personal and political values hold more sway over their decisions than precedent, text, and other positive law.<sup>311</sup> Jamal Greene has argued that "in the great battles between Justices Black and Frankfurter and Justices Breyer and Scalia, the originalist position has indeed become as much 'rhetoric as decision procedure.'"<sup>312</sup> With different originalisms as *ala carte* options, originalism no longer is a unified decision procedure, leaving it a mere rhetorical cloak hiding that judges are merely following their own personal predilections.

## F. The Challenges of Originalisms

A great flaw of originalism is that lawyers, judges, and even legal scholars are often inadequate or even terrible historians and "constitutional discourse is replete with historical assertions that are at best deeply problematic and at worst, howlers."<sup>313</sup> The historical records originalists rely on are distressingly incomplete.<sup>314</sup> Because the record is "incorrect in some places, has gaps in others, and contains tensions in still others," it may, as noted by Lee Strang, cause judges to "misperceive the original intent or create a false original intent."<sup>315</sup>

Justice Scalia gave perhaps the best description of the nearly impossible challenge an originalist faces in seeking the Constitution's original meaning:

Properly done, the task requires the consideration of an enormous mass of material . . . for example, . . . the records of the ratifying debates in all the states. Even beyond that, it requires an evaluation of the reliability of that material—many of the reports of the ratifying debates, for example, are thought to be quite unreliable. And further still, it requires immersing oneself in the political and intellectual atmosphere of the time— somehow placing out of mind knowledge that we have which an earlier age did not, and putting on beliefs, attitudes, philosophies, prejudices and loyalties that are not those of our day.<sup>316</sup>

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<sup>311</sup> SEGALL, *supra* note 244, at 156.

<sup>312</sup> Jamal Greene, *On the Origins of Originalism*, 88 TEX. L. REV. 1, 85 (2009).

<sup>313</sup> Martin S. Flaherty, *supra* note 140, at 525.

<sup>314</sup> James H. Hutson, *The Creation of the Constitution: The Integrity of the Documentary Record*, 65 TEX. L. REV. 1, 2 (1986) ("The purpose of this Article is to issue a caveat about Convention records, to warn that there are problems with most of them and that some have been compromised—perhaps fatally—by the editorial interventions of hirelings and partisans. To recover original intent from these records may be an impossible hermeneutic assignment.").

<sup>315</sup> Lee J. Strang, *How Big Data Can Increase Originalism's Methodological Rigor: Using Corpus Linguistics to Reveal Original Language Conventions*, 50 U.C. DAVIS L. REV. 1181, 1192 (2017).

<sup>316</sup> Scalia, *supra* note 2, at 856–57.

Such effort would be too difficult and time-consuming for almost all judges, and would likely lead them to cherry-pick meaning from a few favored sources and engage in “law-office linguistics.”<sup>317</sup> Consulting dictionaries from the Founding Era will not resolve ambiguities, because dictionaries, especially old ones, are designed to designate “linguistically permissible” meanings, not indicate which meanings are most likely to apply best to constitutional questions.<sup>318</sup> Further, dictionaries define words, not phrases and do not provide context. Finding dictionaries that exactly capture the meaning of the Founding Era is challenging because “dictionaries from the Founding Era are often based on Samuel Johnson’s Dictionary, which heavily relied on earlier sources.”<sup>319</sup>

To solve these problems, some argue that a more robust method would be to use a massive database of documents of the Founding Era and undertake what are termed corpus linguistics searches of hundreds of thousands of texts to determine how the public would likely have understood the meaning of the Constitution’s various terms.<sup>320</sup> However, this “Big Data” approach can give a false sense of objectivity, as those searching the corpus can affect their results, inadvertently or not, by how they construct their searches or how they subjectively interpret the results of their searches.<sup>321</sup> Judges would hard-pressed to judge the accuracy of such searches, and so would likely just accept whichever results match their personal policy preferences.

A great challenge for originalists is how to address vagueness, ambiguity, or gaps in the Constitution that is not resolved by resorting to texts from the Founding Era or teasing out the original meaning of the terms. Originalists have proposed various strategies, including the use of presumptions, searching for liquidation of meaning, and the use of the “Construction Zone” to resolve vagueness, ambiguity, or gaps in the Constitution. Presumptions can guide judges when they are in the “Construction Zone,” a territory posited by some originalists as where meaning has run out, and yet courts must still construe the terms after they have exhausted their efforts to interpret it

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<sup>317</sup> James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760-1799*, 59 S. TEX. L. REV. 181, 187 (2017).

<sup>318</sup> James C Phillips et al., *Corpus Linguistics & Original Public Meaning: A New Tool to Make Originalism More Empirical*, 126 YALE L.J. F. 20, 22 (2016).

<sup>319</sup> *Id.*

<sup>320</sup> Donald L. Drakeman, *Is Corpus Linguistics Better Than Flipping A Coin?*, 109 GEO. L.J. ONLINE 81, 82 (2020).

<sup>321</sup> *Id.* at 85.

and decide a case.<sup>322</sup> Others argue that there is no real “Construction Zone,” and that construction is just an aspect of interpretation.<sup>323</sup>

The original originalists argued for judicial restraint and a presumption of constitutionality<sup>324</sup> and Bork stated that courts should defer to the legislature’s value judgment “unless it clearly runs contrary to a choice made in the framing of the Constitution”<sup>325</sup> and that democracy is impossible without such judicial restraint.<sup>326</sup> Originalists have increasingly rejected the presumption of constitutionality and the judicial restraint it provides.<sup>327</sup> Randy Barnett, for example, argues instead for a “general Presumption of Liberty,” based on the Ninth Amendment and the Privileges or Immunities Clause, “which places the burden on the government to establish the necessity and propriety of any infringement on individual freedom.”<sup>328</sup> Rather than being presumed constitutional, legislation that restricts individual liberty would be presumed unconstitutional unless the government can “show why its interference with liberty is both necessary and proper . . . .”<sup>329</sup> Such a shift in presumptions would transform originalism from a system of judicial restraint to one of judicial activism. It would transform the Supreme Court into a Council of Revision, enforcing deregulation policy by casting out legislation libertarians and anti-regulation Conservatives that disagree with and so strike against the administrative state. Originalists are torn between two contradictory forms of originalism, and the “central challenge . . . is over who is right: Professor Barnett, who claims that originalism leads to judicial activism on behalf of a

<sup>322</sup> Amul R. Thapar & Joe Masterman, *Fidelity and Construction*, 129 YALE L.J. 774, 795 (2020).

<sup>323</sup> Barnett & Bernick, *supra* note 271, at 14 (“First, some critics have simply denied the distinction exists. This was the tack taken by Justice Scalia and Bryan Garner in their 2012 book *Reading Law*. In that volume, Scalia and Garner contended that the interpretation-construction distinction was based on a linguistic misunderstanding.”).

<sup>324</sup> Lino A. Graglia, “*Interpreting the Constitution: Posner on Bork*,” 44 STAN. L. REV. 1019, 1044 (1992) (arguing that “originalism should be understood as requiring a strong presumption of constitutionality.”).

<sup>325</sup> Bork, *supra* note 250, at 10–11.

<sup>326</sup> *Id.* (“If the judiciary really is supreme, able to rule when and as it sees fit, the society is not democrat.”).

<sup>327</sup> Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 4, 81 (2017) (“Originalists have refined their arguments in the intervening years, however, and they have abandoned the claim that one should be an originalist because originalism produces more restrained judges. Originalism has shifted from being a theory about how judges should decide cases to a theory about what counts as valid, enforceable law.”).

<sup>328</sup> BARNETT, *supra* note 305, at 262.

<sup>329</sup> *Id.*

libertarian state, or Justice Scalia and Judge Bork, who claim that originalism leads to judicial restraint.”<sup>330</sup>

Other originalists mix these methods, arguing that a presumption of liberty should apply when considering federal acts, while a presumption of constitutionality should apply to state acts, based on the idea that the Constitution grants the federal government enumerated, and hence limited powers, while the states retain plenary police powers.<sup>331</sup> Still other originalists argue there should be no such widespread presumptions, as the original interpretive conventions answer most constitutional questions without needing presumptions.<sup>332</sup> This widespread disagreement about whether any of these presumptions should be applied and, if so, which, indicates that originalism provides judges with broad latitude to have their originalist interpretations of the Constitution be guided by their personal preferences.

The theory of liquidation is the idea that the founders anticipated that judges or other government officials could determine meaning after the Ratification and “settle practically underdeterminate new law by adopting one permissible interpretation rather than another.”<sup>333</sup> Liquidation should only be applied, according to this theory, if the original meaning is unsettled with multiple possible meanings, hence “underdeterminate,” and the result “must be within the range of permissible preliquidation underdeterminacy that exists after application of other appropriate interpretive conventions.”<sup>334</sup> Originalists find an argument for liquidation in statements by both Hamilton<sup>335</sup> and Madison.<sup>336</sup> Philip Hamburger noted, “Although

<sup>330</sup> Steven G. Calabresi, *The Originalist and Normative Case Against Judicial Activism: A Reply to Professor Randy Barnett*, 103 MICH. L. REV. 1081, 1082 (2005).

<sup>331</sup> See ILAN WURMAN, A DEBT AGAINST THE LIVING: AN INTRODUCTION TO ORIGINALISM 61 (2017) (citing Gary Lawson, *Legal Indeterminacy: Its Cause and Cure*, 19 HARV. J.L. & PUB. POL’Y 411, 423–28 (1996)).

<sup>332</sup> *Id.*

<sup>333</sup> Jeffrey A. Pojanowski & Kevin C. Walsh, *Enduring Originalism*, 105 GEO. L.J. 97, 142 (2016).

<sup>334</sup> *Id.*

<sup>335</sup> THE FEDERALIST NO. 82, *supra* note 1, at 426 (Alexander Hamilton) (“The erection of a new government, whatever care or wisdom may distinguish the work, cannot fail to originate questions of intricacy and nicety; . . . Time only can mature and perfect so compound a system, liquidate the meaning of all the parts, and adjust them to each other in a harmonious and consistent WHOLE.”).

<sup>336</sup> THE FEDERALIST NO. 37, *supra* note 1, at 236 (James Madison) (“All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications.”).

only Madison and Hamilton appear to have descanted on the liquidation of meaning, other Federalists also argued that interpretation would resolve difficulties.”<sup>337</sup> Other originalists, however, oppose the idea that liquidation can fix the original meaning of the Constitution. For example, Gary Lawson stated, “Past precedents do not ‘fix’ or ‘liquidate’ (to use the in-vogue Madisonian term) the Constitution’s communicative meaning.”<sup>338</sup> Whether new “original meaning” could be created after the Constitution was ratified is a burning issue regarding the nondelegation doctrine. Because that doctrine is absent from the Constitution, any rules regarding how it is to be applied would have to be constructed by the current court either out of whole cloth or based on post-Ratification actions either by Congress or the courts. A new robust nondelegation would not be the result of settling indeterminate meaning in the Constitution, however, but rather would be the Court inserting what it thinks the Constitution should have mandated but fails to do in any recognizable manner.

Originalism has been criticized for having a significant race and gender problem, given that the Constitution was drafted and ratified by white men at a time when slavery was legal and women were denied the vote. Some have argued that originalism was redeemed from this taint by the end of slavery and the passage of constitutional amendments that largely rectified, though many think did not fully correct, the original errors in the Constitution.<sup>339</sup> Those making this claim must wrestle with the failure of the Reconstruction Amendments, however, a topic often ignored.<sup>340</sup> The narrative of originalism as restoring the original ideals, intent, and meaning of the Constitution and its amendments is difficult to reconcile with the struggles of the Civil Rights era. Jamal Greene stated, “For me, as an African-American, a narrative of restoration is deeply alienating; what America has been is hostile to my personhood and denies my membership in its political community. The only way I can call this Constitution my own is to view it through a lens of redemption, the lens that originalism rejects.”<sup>341</sup>

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<sup>337</sup> Philip A. Hamburger, *The Constitution's Accommodation of Social Change*, 88 Mich. L. Rev. 239, 310 (1989).

<sup>338</sup> Lawson, *supra* note 26, at 41.

<sup>339</sup> See MCGINNIS & RAPPAPORT, *supra* note 256, at 106–12.

<sup>340</sup> Jamal Greene, *Fourteenth Amendment Originalism*, 71 MD. L. REV. 978, 980–82 (2012) (“[T]he Reconstruction Era is painful and embarrassing to—and therefore best forgotten by—many of those whose cultural and political commitments lead them to originalism.”).

<sup>341</sup> Jamal Greene, *Originalism's Race Problem*, 88 DENV. UNIV. L. REV. 517, 521 (2011) (emphasis omitted).

## IV. ORIGINALISM AND THE NONDELEGATION DOCTRINE DEBATE

## A. Judicial Originalism and the Nondelegation Doctrine

The Supreme Court has only fitfully applied originalism to decide nondelegation questions and, most notably and thoroughly, only in dissents and concurrences. Doing so would be a supremely challenging task, given the back-breaking challenge to conduct sufficient historical research to accomplish the task. Robert Pushaw noted that “originalism requires a historian’s expertise and a vast amount of time—two resources that most lawyers and all the Justices lack.”<sup>342</sup> Even Justice Scalia, one of the Court’s great originalists, agreed, noting that the Court typically decides cases the same Term they are argued, giving Justices only a few months to engage in any necessary historical research and querying “Do you have any doubt that this system does not present the ideal environment for entirely accurate historical inquiry? Nor, speaking for myself at least, does it employ the ideal personnel.”<sup>343</sup>

Justice Rehnquist conducted a minimalist originalist analysis of the nondelegation doctrine in his concurrence in the 1980 case *American Petroleum Institute*, regarding regulations designed to address occupational exposure to benzene.<sup>344</sup> The concurrence cites Locke for the proposition that “the legislative can have no power to transfer their authority of making laws and place it in other hands.”<sup>345</sup> However, Justice Rehnquist’s concurrence does not indicate that Locke’s nondelegation ideas influenced the Framers. It then cites Madison for the idea that while a division of powers among the branches is a useful principle, “the degree of separation which the maxim requires, as essential to a free government, can never in practice be duly maintained.”<sup>346</sup> This seems to undercut Locke’s argument. Rehnquist then stated, “It is the hard choices, and not the filling in of the blanks, which must be made by the elected

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<sup>342</sup> Robert J. Pushaw, Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 PEPP. L. REV. 463, 482 (2020) (“Consequently, the Court typically cobbles together historical tidbits provided in attorneys’ briefs to justify a result—so-called ‘law office history.’”).

<sup>343</sup> Scalia, *supra* note 2, at 861.

<sup>344</sup> *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., concurring).

<sup>345</sup> *Id.* at 672–73 (“In his Second Treatise of Civil Government, published in 1690, John Locke wrote that ‘[t]he 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.’”).

<sup>346</sup> *Id.* at 673.

representatives of the people.”<sup>347</sup> For this proposition, which is the central point of the concurrence, Justice Rehnquist offers no authority.

Rehnquist addressed nondelegation again the next year in a case involving whether Congress could delegate to the Secretary of Labor, acting through the Occupational Safety and Health Administration, the setting of cotton dust standards to protect workers from unhealthy working conditions without explicitly requiring a cost-benefit analysis.<sup>348</sup> Justice Rehnquist agreed that some delegation is permissible but would have held this delegation unconstitutional.<sup>349</sup> Justice Rehnquist's reasons for doing so show why a more robust nondelegation doctrine would allow the Court to throw out legislation it disagreed with for the most nit-picky of reasons. Justice Rehnquist agreed that Congress could have constitutionally delegated the decision “to set exposure standards without regard to any kind of cost-benefit analysis.”<sup>350</sup> However, because Congress did not expressly require, prohibit, or permit a cost-benefit analysis, Rehnquist thought delegating the decision on how to make a decision was unconstitutional.<sup>351</sup> “Require, prohibit, or permit” is the legislative equivalent to “yes, no, or maybe.” Permitting but not requiring a cost-benefit analysis would allow the agency to decide whether to do so, which appears to be the result of the vague language Congress chose, which does not direct any such choice. It is unclear why Justice Rehnquist thought that granting the agency discretion with one set of words was constitutional, while using another set of words granting same discretion was not. Justice Rehnquist would have thrown out the legislation not because of the type or amount of power and/or discretion it delegated, but rather because he did not like the specific terms Congress used to delegate that discretion.

Justice Scalia, despite being a noted originalist who addressed nondelegation on several occasions, was a staunch defender of the nondelegation doctrine.<sup>352</sup> He did not base his nondelegation opinions on an originalist analysis, perhaps in

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<sup>347</sup> *Id.* at 687.

<sup>348</sup> *Am. Textile Mfrs. Inst., Inc. v. Donovan*, 452 U.S. 490, 493 (1981).

<sup>349</sup> *Id.* at 547 (Rehnquist, J., dissenting) (“I do not mean to suggest that Congress, in enacting a statute, must resolve all ambiguities or must ‘fill in all of the blanks.’”).

<sup>350</sup> *Id.* at 545.

<sup>351</sup> *Id.* at 547.

<sup>352</sup> Kelley, *supra* note 241, at 2108 (“The Supreme Court has had no fiercer defender of the nondelegation principle than Justice Antonin Scalia, and no more deferential implementer of that principle when it came to applying it in real cases.”).



recognition that the Constitution was silent on the subject.<sup>353</sup> As a law professor, Justice Scalia noted that the nondelegation doctrine is a self-contradictory protection of the separation of powers, as it would transfer legislative power not to agencies but instead to the courts.<sup>354</sup> Worse yet, while Congress may have some control over agencies by passing new legislation or using other leverage, Congress has no power over the Court to alter the Court's decisions. A robust nondelegation doctrine would thus significantly weaken Congress under the guise of protecting it and give the Court the power to interfere in Congress's policy decisions. Then-Professor Scalia asserted that nondelegation should not generally be considered a justiciable issue and so, "except perhaps in extreme cases," should not be enforced by the Court, requiring the sorts of judgments "much more appropriate for a representative assembly than for a hermetically sealed committee of nine lawyers."<sup>355</sup> As Calabresi and Lawson noted, "Because it is impossible to formulate the nondelegation doctrine in a fashion that does not leave considerable room for judicial discretion, it is not surprising that Justice Scalia effectively declared it nonjusticiable."<sup>356</sup>

In 1986, then-Judge Scalia joined a per curiam opinion of the three-judge court which addressed the constitutionality of delegation in the Gramm-Rudman-Hollings Act.<sup>357</sup> That opinion did not challenge the laxity of enforcement of the nondelegation doctrine,<sup>358</sup> and further rejected the idea that there are "core functions" of the legislative power that cannot be delegated.<sup>359</sup> How such "core functions" differ from Justice Rehnquist's "quintessential legislative" choices is unclear, but it seems clear that Judge Scalia was not following Justice Rehnquist's lead on nondelegation.

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<sup>353</sup> *Id.* at 2119 ("It is indeed conspicuously absent in Justice Scalia's nondelegation jurisprudence that he never took the occasion independently to consider the original meaning of the nondelegation doctrine.").

<sup>354</sup> See Antonin Scalia, *A Note on the Benzene Case*, 4 REGUL. 25, 28 (1980) ("[T]o a large extent judicial invocation of the unconstitutional delegation doctrine is a self-denying ordinance—prohibiting the transfer of legislative power not to the agencies, but to the courts themselves.").

<sup>355</sup> *Id.*

<sup>356</sup> Steven G. Calabresi & Gary Lawson, *The Rule of Law as a Law of Law*, 90 NOTRE DAME L. REV. 483, 486 (2014).

<sup>357</sup> *Synar v. United States*, 626 F.Supp. 1374, 1383–85 (D.D.C. 1986), *aff'd sub. nom. Bowsheer v. Synar*, 478 U.S. 714 (1986).

<sup>358</sup> *Id.* at 1384.

<sup>359</sup> *Id.* at 1385 ("We reject this 'core functions' argument for several reasons. First, plaintiffs cite no case in which the Supreme Court has held any legislative power, much less that over appropriations, to be nondelegable due to its 'core function' status.").

In the 1989 case, *Mistretta v. United States*, involving the delegation to a Sentencing Commission of the power to determine appropriate sentences, Justice Scalia, in his dissent, based his defense of congressional delegation on nonjusticiability, stating that while the nondelegation doctrine is “a fundamental element of our constitutional system, it is not an element readily enforceable by the courts” and that because no law can be completely precise and therefore some policy judgments must be “left to the officers executing the law and the judges applying it, the debate over unconstitutional delegation becomes a debate not over a point of principle but over a question of degree. . . .”, explaining why the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law.”<sup>360</sup> Justice Scalia’s dissent in *Mistretta* “reflects what might be the most deferential approach to the nondelegation doctrine in the whole United States Reports.”<sup>361</sup> Justice Scalia did object, however, to delegation of the legislative power to determine appropriate sentences to an independent commission that performed no executive function and so the delegation was not ancillary to any Executive power.<sup>362</sup>

In *Whitman v. American Trucking Association*,<sup>363</sup> Justice Scalia, writing for a unanimous Court, repeated his assertion that the Court has “almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment” Congress can delegate to agencies.<sup>364</sup> His opinion discussed limitations of the nondelegation doctrine, stating “It is true enough that the degree of agency discretion that is acceptable varies according to the scope of the power congressionally conferred.”<sup>365</sup> However, his discussion of the nondelegation doctrine and its limitations is based on Supreme Court precedent from the last century and not on originalist sources.<sup>366</sup>

Other Justices have recently fired originalist shots across the bow at congressional delegations in various concurring or dissenting opinions, with Justice Thomas firing the first shot in

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<sup>360</sup> *Mistretta v. United States*, 488 U.S. 361, 415–16 (1989) (Scalia, J., dissenting).

<sup>361</sup> *Kelley*, *supra* note 241, at 2116.

<sup>362</sup> *Mistretta*, 488 U.S. at 420 (Scalia, J., dissenting) (“The lawmaking function of the Sentencing Commission is completely divorced from any responsibility for execution of the law or adjudication of private rights under the law.”).

<sup>363</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001).

<sup>364</sup> *Id.* at 474 (quoting his own dissent in *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

<sup>365</sup> *Id.* at 475.

<sup>366</sup> *Id.* at 472–76.

2001, writing separately in *American Trucking Association* to say that “[o]n a future day . . . I would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of separation of powers.”<sup>367</sup> Justices Thomas<sup>368</sup> and Gorsuch have led the charge. They now may be joined by Justices Kavanaugh<sup>369</sup> and Alito.<sup>370</sup> Justice Thomas’s originalist discussion of nondelegation has been the most lengthy. Some argue that Justice Thomas’s originalism seems driven by his policy preferences, including the argument that “. . . Justice Thomas’ frequent resort to history is almost certainly a function of his Federalist Society political and jurisprudential views . . . .”<sup>371</sup> He has been clear as to what he considers the source of the nondelegation doctrine, stating, “I locate that principle in the Vesting Clauses of Articles I, II, and III—not in the Due Process Clause.”<sup>372</sup>

In his concurrence in *Association of American Railroads*, Justice Thomas laid out an extended history of the nondelegation doctrine and its roots, tracing its origins to Greek and Roman law and the concept of the rule of law, with stops at Bracton, Locke, and Blackstone.<sup>373</sup> He recounts the power of English kings to issue royal proclamations and King Henry VIII prevailing on Parliament to pass the Act of Proclamations in 1539, giving his proclamations the force and effect of an Act of Parliament. By basing much of the discussion on the English history and multiple citations of one of his own previous concurring opinions, Justice Thomas’s concurrence perhaps indicates how little

<sup>367</sup> *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring).

<sup>368</sup> *See, e.g., Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2216 (2020) (Thomas, J., concurring) (“The Constitution does not permit the creation of officers exercising ‘quasi-legislative’ and ‘quasi-judicial powers’ in ‘quasi-legislative’ and ‘quasi-judicial agencies.’ No such powers or agencies exist. Congress lacks the authority to delegate its legislative power . . . Nor can Congress create agencies that straddle multiple branches of Government.” (citations omitted)).

<sup>369</sup> *See Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., dissenting) (“I write separately because Justice GORSUCH’s scholarly analysis of the Constitution’s nondelegation doctrine in his *Gundy* dissent may warrant further consideration in future cases . . . Like Justice Rehnquist’s opinion 40 years ago, Justice GORSUCH’s thoughtful *Gundy* opinion raised important points that may warrant further consideration in future cases.”).

<sup>370</sup> *See Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019) (Alito, J., concurring).

<sup>371</sup> Neil M. Richards, *Clio and the Court: A Reassessment of the Supreme Court’s Uses of History*, 13 J.L. & POL. 809, 884–85 (1997).

<sup>372</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1248 (2018) (Thomas, J., dissenting). Interestingly, Justice Gorsuch concurred in *Dimaya*, also on originalist grounds but finding they led him to a different conclusion than Justice Thomas’s conclusion.

<sup>373</sup> *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 575 U.S. 43, 70–74, 86 (2015) (Thomas, J., concurring) (“We should return to the original meaning of the Constitution: The Government may create generally applicable rules of private conduct only through the proper exercise of legislative power. I accept that this would inhibit the Government from acting with the speed and efficiency Congress has sometimes found desirable.”).

evidence there is of original intent at the Founding. The concurrence does cite to Madison regarding the importance of keeping the powers separate, but also as to the difficulty of doing so, in that “classifying governmental power is an elusive venture.”<sup>374</sup>

Justice Thomas’s concurrence was the most extensive attempt by an originalist Justice to justify the nondelegation doctrine and seems a failure as an originalist project. The concurrence points to no direct statements by framers or ratifiers or other evidence sufficient to prove that, as a group, they intended that the nondelegation doctrine be part of the Constitution, nor does it point to any original meaning of words in the Constitution that would mandate or indicate a bar on delegation. Moreover, the concurrence ignores that the nondelegation doctrine and the related non-encroachment doctrine were rejected when they were proposed for the Constitution or the Bill of Rights, respectively.

The concurrence ignores the fact that, during the Constitutional Convention, the framers refused to give the judiciary the kind of policy-making power that the nondelegation doctrine would hand today’s Court. The concurrence does not seem to involve an even-handed attempt to conduct the kind of deep and difficult historical analysis Justice Scalia asserted originalism requires or to discern the intent of the framers. While quoting Locke and claiming his influence, the concurrence displays no apparent research to determine whether the framers or ratifiers were at all influenced by Locke or his nondelegation dictum while crafting and ratifying the Constitution. Instead, it appears to be an effort to turn thin, tenuous evidence into an argument to gain the policy result Justice Thomas prefers. The other originalists on the court, Justices Scalia and Alito, did not join the concurrence, possibly because they thought it went too far.<sup>375</sup>

Justice Gorsuch announced the libertarian motive underlying his dissent in *Gundy* with the first line: “The Constitution promises that only the people’s elected representatives may adopt new federal laws restricting liberty.”<sup>376</sup> Article I vests all legislative power in Congress,<sup>377</sup> but

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<sup>374</sup> *Sessions*, 138 S. Ct. at 1245–46.

<sup>375</sup> Cass R. Sunstein & Adrian Vermeule, *The New Coke: On the Plural Aims of Administrative Law*, 2015 SUP. CT. REV. 41, 63 (“[I]t is significant that neither Justice Scalia nor Justice Alito joined Justice Thomas’s concurrence in the judgment, with its startlingly broad criticism of nondelegation.”).

<sup>376</sup> *Gundy v. United States*, 139 S. Ct. 2116, 2131 (2019).

does not single out those “restricting liberty.”<sup>378</sup> Justice Gorsuch quickly runs into the limits of the almost nonexistent evidence of a nondelegation doctrine at the Founding. His dissent reads like an originalist’s greatest hits of asserting what the Framers of the Constitution collectively believed,<sup>379</sup> knew,<sup>380</sup> insisted,<sup>381</sup> or understood,<sup>382</sup> all without proof of any such collective intent or understanding. The dissent states, “The framers understood, too”, that it would frustrate “the system of government ordained by the Constitution” if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its goals.<sup>383</sup> However, to make this argument, Justice Gorsuch cites *Marshall Field & Co.*, from 1892, which is hardly good evidence of what the Framers understood.<sup>384</sup> Justice Gorsuch asserts that the Framers “believed the new federal government’s most dangerous power was the power to enact laws restricting the people’s liberty.”<sup>385</sup> This proposition about the collective Framers’ belief would be impossible to prove, goes against common current originalist rejection of the Framers’ intent as the basis for an originalist understanding of the meaning of the Constitution, and is based on the writing of only one of the Framers, James Madison.<sup>386</sup>

Justice Gorsuch asserts that if Congress can delegate its legislative powers “to the executive branch, the ‘[v]esting [c]lauses, and indeed the entire structure of the Constitution,’ would ‘make no sense.’”<sup>387</sup> In making this assertion, Justice Gorsuch cites noted libertarian law professor Gary Larson, again showing Justice Gorsuch’s libertarian agenda not anchored in original sources.<sup>388</sup> Importing modern policy concerns into the Constitution through judicial interpretation is the very thing that originalism was originally designed to prevent. As Raoul Berger noted, “A common historicist fallacy is to import our twentieth-century conceptions into the minds of the Founders.”<sup>389</sup>

<sup>377</sup> U.S. CONST. art I.

<sup>378</sup> *Gundy*, 139 S. Ct. at 2116.

<sup>379</sup> *Id.* (“the framers believed.”).

<sup>380</sup> *Id.* (“[t]he framers knew, too.”).

<sup>381</sup> *Id.* (“the framers insisted.”).

<sup>382</sup> *Id.* (“The framers understood, too”).

<sup>383</sup> *Id.*

<sup>384</sup> *Id.* at 2133 (citing *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892)).

<sup>385</sup> *Id.* at 2134.

<sup>386</sup> *Id.* (citing THE FEDERALIST NO. 48, at 309–12 (James Madison)).

<sup>387</sup> *Id.* at 2134–35 (citing Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002)).

<sup>388</sup> *Id.*

<sup>389</sup> BERGER, *supra* note 6, at 306.

Justice Gorsuch boldly claims further knowledge of the Framers' understanding: "The framers knew, too, that the job of keeping the legislative power confined to the legislative branch couldn't be trusted to self-policing by Congress; often enough, legislators will face rational incentives to pass problems to the executive branch."<sup>390</sup> Justice Gorsuch provides absolutely no basis for this claim, which goes to the heart of whether the nondelegation doctrine even exists as a constitutional mandate<sup>391</sup> and which contradicts Madison's statement in Federalist 51 that the great security in preserving the separation of powers lies in the self-interest and ambition of the members of each branch. The dissent fails to mention that the Framers and the First Congress both rejected adding nondelegation or a similar non-encroachment doctrine to the Constitution.

Bork condemned judges inserting their own policy preferences into the Constitution based on claims that they "are supported, indeed compelled, by a proper understanding of the Constitution of the United States. Value choices are attributed to the Founding Fathers, not to the Court."<sup>392</sup> However, the dissent points to no convincing evidence that the framers shared the policy preferences that the nondelegation doctrine would achieve. As Mortenson and Bagley note, "None of the sources [in the dissent] address whether the Founders believed that a law passed by both houses of Congress and signed by the President was unconstitutional if it delegated too much authority or authority of the wrong kind."<sup>393</sup>

Justice Gorsuch then proceeds to construct his own test for impermissible delegation, even though he acknowledges that at least one of the Framers noted the difficulty of doing so, stating that "Madison acknowledged that 'no skill in the science of government has yet been able to discriminate and define, with sufficient certainty, its three great provinces—the legislative, executive, and judiciary.'"<sup>394</sup> Justice Gorsuch cobbles together his proposed test from various Court decisions. From the 1825 case, *Wayman v. Southard*, Justice Gorsuch gleaned the following rule: "First, we know that as long as Congress makes the policy decisions when regulating private conduct, it may authorize another branch to 'fill up the details.'"<sup>395</sup> From cases starting in 1813, Justice Gorsuch

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390 *Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019).

391 See Mortenson & Bagley, *supra* note 8, at 16–17.

392 Bork, *supra* note 325, *passim*.

393 See Mortenson & Bagley, *supra* note 8, at 16–17.

394 *Gundy*, 139 S. Ct. at 2135 (citing THE FEDERALIST NO. 37, at 227 (James Madison)).

395 *Id.* at 2136 (citing *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)).

concluded: “Second, once Congress prescribes the rule governing private conduct, it may make the application of that rule depend on executive fact-finding.”<sup>396</sup> And as a last part of the test for permissible delegation Justice Gorsuch added: “Third, Congress may assign the executive and judicial branches certain non-legislative responsibilities.”<sup>397</sup> This part of the test is intended to deal with occasions where Congress’s legislative authority “overlaps with authority the Constitution separately vests in another branch.”<sup>398</sup>

In his dissent, Justice Gorsuch condemns what he calls the “mutated version of the ‘intelligible principle’ remark” as having “no basis in the original meaning of the Constitution in history, or even in the decision from which it was plucked.”<sup>399</sup> However, he would replace more than a century of what he labels “the intelligible principle misadventure”<sup>400</sup> with his own brand-new nondelegation test with no foundation in the original meaning of the Constitution and cobbled together from such sources as his reading of older Supreme Court cases on nondelegation. Justice Gorsuch would judicially amend the Constitution not only to include a nondelegation doctrine, but also one with the specific terms that he himself has newly created. The first originalists would likely look on such judicial activism with dismay.

Justice Gorsuch might argue that he would not change the meaning of the Constitution with his new rules on nondelegation, but rather merely its application. He has written, “Originalism teaches only that the Constitution’s original *meaning* is fixed; meanwhile, of course, new *applications* of that meaning will arise with new developments and new technologies.”<sup>401</sup> However, his creation of his own nondelegation test gets that statement exactly backwards. Justice Gorsuch would base a new meaning of the Constitution on the old judicial applications. Justice Gorsuch might assert that Supreme Court decisions well after the Founding have liquidated the meaning of the nondelegation doctrine. However, it is contradictory to assert as Justice Gorsuch said that “the Constitution’s meaning was fixed at its ratification. . .”<sup>402</sup> and that court decisions decades or even centuries later can fix the original meaning of the Constitution where it is vague.

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<sup>396</sup> *Id.* at 2136–37 (citing *Cargo of the Brig Aurora v. United States*, 11 U.S. (7 Cranch) 382, 388 (1813) and *Miller v. Mayor of New York*, 109 U.S. 385, 393 (1883)).

<sup>397</sup> *Id.* at 2137.

<sup>398</sup> *Id.*

<sup>399</sup> *Id.*

<sup>400</sup> *Id.* at 2141.

<sup>401</sup> NEIL M. GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 111 (2019).

<sup>402</sup> *Id.* at 110.

While these Justices have cast their nondelegation discussions in originalist terms, it is difficult to determine what form of originalism they appear to be following. They do not specify what sources they view as trustworthy to determine the original meaning. They do not discuss the original meaning of the word “vest” and what that meaning says about the permissibility of legislative delegation. Instead, they too often engage in a primitive and discredited form of originalism in which they merely cherry-pick statements of Locke and their favored Founding Era sources and announce what the Founders understood.

Bork noted that originalism requires courts to stay their hands for “entire ranges of problems and issues” as courts “will say of particular controversies that no provision of the Constitution reaches the issues presented, and the controversies are therefore not for judges to resolve.”<sup>403</sup> Here, there is no provision that contains a nondelegation doctrine or determines when it should apply. Therefore, under the original originalist approach, originalist judges should stay their hand.

#### B. The Academic Debate over Originalists' Claims of Nondelegation at the Founding

Legal scholars have also extensively analyzed an originalist approach to the nondelegation conundrum, with a fierce debate among academics as to whether Congress delegating rule-making authority was considered constitutional at the Founding, and if so, how much, when, and why. In the course of this debate, academics have recently unearthed a trove of new evidence about legislative delegation at the Founding.

Posner and Vermeule fired the first salvo in 2002 with an article arguing against the nondelegation doctrine by listing a number of early statutes that provide for delegation of discretionary rule-making power to the Executive Branch, including statutes regarding military pensions,<sup>404</sup> trade with Indian tribes,<sup>405</sup> patents,<sup>406</sup> acquiring land on the Potomac for the Capitol,<sup>407</sup> giving the mitigating or remitting fines and forfeitures,<sup>408</sup> and paying

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<sup>403</sup> BORK, *supra* note 292, at 163.

<sup>404</sup> Act of Sept. 29, 1789, 1 Stat. 95. *See also* Act of March 3, 1791, 1 Stat. 218 (reauthorizing pensions “under such regulations as the President of the United States may direct”).

<sup>405</sup> Act of July 22, 1790, 1 Stat. 137, 137.

<sup>406</sup> Act of Apr. 10, 1790, 1 Stat. 109, 110.

<sup>407</sup> Act of July 16, 1790, 1 Stat. 130, 130.

<sup>408</sup> *See* Kenneth Culp Davis, *A New Approach to Delegation*, 36 U. CHI. L. REV. 713, 719 (1969) (citing Act of May 26, 1790, 1 Stat. 122, 123).



wounded or disabled military.<sup>409</sup> The argument is that if such laws were passed in America's infancy, clearly the Founding generation did not think delegating legislative power was a problem. In discussing such Federalist-era delegations, Jerry Mashaw exclaimed, "[s]ome of these delegations were so broad that one might wonder whether a twenty-first-century court would be able to find any standards guiding the exercise of administrative authority."<sup>410</sup>

These statutes, along with numerous others added by various researchers,<sup>411</sup> have become a battleground on which originalists' claims of nondelegation at the Founding have been fought. New evidence of delegation at the Founding has been discovered by Chabot and Parrillo. Chabot uncovered previously overlooked evidence of delegation debates in a 1790 act on handling the public debt<sup>412</sup> which gave members of the Executive Branch broad discretion to buy national debt<sup>413</sup> despite the fact that such policy decisions "had enormous implications for the national economy and private creditors" and could "jeopardize the United States' ability to obtain future credit."<sup>414</sup> Chabot notes that while Congress repeatedly delegating broad powers, there was discussion of limiting the amount to be borrowed and there were "no records of qualified objections suggesting that Congress could not delegate power to resolve important questions."<sup>415</sup>

Parrillo analyzed The Direct Tax Legislation of 1798 and found that it contained extensive delegation of rulemaking power that affected private property and was enacted without constitutional objection.<sup>416</sup> The legislation provided federal boards in each of the state's vast discretionary powers and, Parrillo argues, "left the principles and methods of valuation open and allowed the federal boards in the individual states to fill the gap."<sup>417</sup> Whittington and Iuliano extended the history of delegation into the nineteenth and early twentieth centuries, finding only rare invalidation of legislation on a nondelegation basis in state courts and almost none in federal courts.<sup>418</sup>

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409 Act of Apr. 30, 1790, ch. 10, § 11, 1 Stat. 119, 121.

410 Mashaw, *supra* note 122, at 1339–40.

411 See Nicholas R. Parrillo, *supra* note 142 (manuscript at 14–16). See also Mortenson & Bagley, *supra* note 8, at 332–66.

412 Parrillo, *supra* note 142 (manuscript at 31) (citing Act of Aug. 12, 1790, ch. 47, 1 Stat. 186).

413 *Id.* (citing Act of Aug. 12, 1790, ch. 47, 1 Stat. 186 §§ 1–2).

414 *Id.* (manuscript at 32).

415 *Id.* (manuscript at 35).

416 See *generally id.*

417 *Id.* (manuscript at 54).

418 See Whittington & Iuliano, *supra* note 221, at 379.

Jennifer Mascott, in an article about early customs law, provides a useful window into how Congress and the Executive Branch maintained the separation of Legislative and Executive powers in practice immediately following the Founding, showing they could do so without the judicial maintenance of a constitutional bar on delegation.<sup>419</sup> After extensively scouring the debates over early customs law and the establishment of the Department of the Treasury for evidence of discussion on delegation, Mascott does not mention any instance where any member claimed that the Constitution limited Congress's power to delegate its legislative powers. Instead, what she reports is members scrupulously protecting the power of the House, which would render a court-enforced nondelegation doctrine unnecessary.<sup>420</sup>

Originalist defenders of nondelegation often deal with these early statutes with the claim that they include a smaller delegation of legislative power than Congress might have made,<sup>421</sup> are simply examples of Congress inconsistently following the nondelegation doctrine,<sup>422</sup> or constitute exceptions to that doctrine.<sup>423</sup> And from Congress's early delegations, some would construct a rule limiting Congress now to delegating legislative power only in the same ways it did in its early existence. It is difficult to justify a claim that somehow the Constitution prohibits Congress from making any delegations now that are not similar to delegations it made in the early years of the Republic, especially given how dramatically changed the country and its government are. Holding today's Congress to the delegations it made in its early years is an odd form of estoppel, that by delegating only in the manner it deemed necessary at the

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<sup>419</sup> See Jennifer Mascott, *Early Customs Laws and Delegation*, 87 GEO. WASH. L. REV. 1388, 1394 (2019).

<sup>420</sup> *Id.* at 1441 (citing DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS OF THE UNITED STATES OF AMERICA (4 Mar. 1789–3 Mar. 1791), reprinted in 10 DEBATES IN THE HOUSE OF REPRESENTATIVES lxi, lxi–lxiv (Charlene Bangs Bickford et al. eds., 1992) at 756). While one member stated that he took improving the revenue “to be the peculiar business of the federal legislature,” in the end, the House voted to empower the Secretary of Treasury to “digest and prepare plans for the improvement and management of the revenue.” Act of Sept. 2, 1789, ch. 12, 1 Stat. 65.

<sup>421</sup> See Wurman, *supra* note 66, at 23–24.

<sup>422</sup> See *id.* at 23.

<sup>423</sup> 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. L. REV. 265, 271–72 (2001) (“I argue that the nondelegation doctrine probably does not apply to various matters. . . . Thus, the formalist nondelegation doctrine can explain the exceptions for foreign and military affairs, some of the early delegations and traditional practices that appear to assume the constitutionality of delegations, such as annual appropriations and the conferral of military discretion.”).

beginning of the Republic, Congress should now be constitutionally estopped from delegating in any other manner. Estoppel, however, is typically not applied against the United States, as “the interest of the citizenry as a whole in obedience to the rule of law is undermined.”<sup>424</sup>

Those attacking the idea of nondelegation at the Founding have employed more theoretical tools in addition to pointing out all of the times Congress in its first years delegated its legislative power. Posner and Vermeule claim that any bar on delegation was strikingly limited: “Neither Congress nor its members may delegate to anyone else the authority to vote on federal statutes or to exercise other de jure powers of federal legislators.”<sup>425</sup> In other words, Congress may delegate legislative powers so long as it does not allow federal agencies to vote on federal statutes. This is akin to the idea, expressed by Madison in Federalist 47, that a legislature cannot delegate its whole power of legislation, though it may give what Madison called a “partial agency” and so gain control through a more limited legislative delegation. Hence no delegation of legislative power to agencies is barred unless Congress allows them to act as legislators. Posner and Vermeule build their argument on earlier work by Harold J. Krent<sup>426</sup> and Kenneth Culp Davis.<sup>427</sup> Posner and Vermeule’s article was criticized by Larry Alexander and Saikrishna Prakash, who dispute this view of delegation, though do not seek to prove that the conventional nondelegation doctrine is enshrined in the Constitution.<sup>428</sup> They argued, instead, that the legislative power at issue in the nondelegation doctrine is much broader than just the power to vote on legislation or act as a member of Congress. As noted by Mortenson and Bagley, Alexander and Prakash’s “evidence was heavy on citations to theorists like Locke, Montesquieu, and Blackstone, but light on concrete evidence from the Founding.”<sup>429</sup>

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424 *Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 60 (1984).

425 Posner & Vermeule, *supra* note 17, at 1723.

426 *Id.* at 1735 n.51; *see also* Harold J. Krent, *Delegation and Its Discontents*, 94 COLUM. L. REV. 710, 738–39 (1994) (gathering early statutes that provide for delegation by Congress and noting “[i]n addition, the early history of the republic furnishes scant support for vigorous enforcement of a nondelegation doctrine.”).

427 Posner & Vermeule, *supra* note 17, at 1735 n.51; *see also* Davis, *supra* note 408, at 719–20 (1969) (“Not only is delegation without meaningful standards a necessity for today’s governments at all levels but such delegation has been deemed a necessity from the time the United States was founded, as anyone can quickly confirm by examining the statutes enacted by the 1st Congress, which was made up largely of the same men who wrote the Constitution.”).

428 Alexander & Prakash, *supra* note 132, at 1328.

429 Mortenson & Bagley, *supra* note 8, at 285.

Mortenson and Bagley argued that Legislative and Executive power was defined much differently in the Founding Era, and what we would consider a delegation of legislative power to federal agencies would not have been considered that back then.<sup>430</sup> Mortenson and Bagley assert that legislative power was defined more broadly and simply at the Founding and was, as Montesquieu explained, “no more than the general will of the state.”<sup>431</sup> They also state that Executive power was defined much more thinly then, simply as “the narrow but potent authority to carry out projects defined by a prior exercise of the legislative power.”<sup>432</sup> In other words, the ability to create rules that governed private behavior could be part of the legislative power if it were done in the creation of a plan or policy and also part of the Executive power if it were used at the direction of Congress to carry out legislative instructions.<sup>433</sup> Any particular act can be either legislative, if it is done in the creation of a plan or issuing instructions to the Executive Branch, or Executive, if it is done by the Executive Branch to implement those instructions, Mortenson and Bagley argued.<sup>434</sup>

To make their case, originalist defenders of the nondelegation doctrine should present convincing evidence from the Founding that nondelegation was widely discussed and that the Framers and ratifiers of the Constitution understood that it included the doctrine, at least implicitly. To the extent that originalists depend on Locke's Second Treatise as justification for nondelegation, they should acknowledge and address the historians' accounts of how Locke's influence plummeted as soon as the Revolutionary War started, and that Locke's influence in America after that has been discounted generally by those who have studied it. And if they value the original meaning of the Constitution's terms, they should wrestle with the original meaning of the word “vest,” which is crucial to an analysis of Congress's ability to delegate the legislative power with which it is vested. Such efforts, however, have not yet been made.

Also worrisome is the fact that the various originalist defenders of the nondelegation doctrine use radically different methods of originalism and different bases and evidence for their claims of nondelegation at the Founding, even switching

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<sup>430</sup> *Id.* at 294.

<sup>431</sup> *Id.* (citing 1 M. de Secondat, Baron de Montesquieu, *The Spirit of Laws* bk. XI, ch. VI, at 201 (London, printed for T. Evans & W. Davis 1777)).

<sup>432</sup> *Id.* at 315.

<sup>433</sup> *Id.*

<sup>434</sup> *Id.*

regularly where nondelegation could be found in the Constitution. However, one senses a joy from originalists in this debate, in that the opponents of nondelegation seem to be taking originalist claims and methods seriously to argue in such detail over evidence of delegation at the Founding. Wurman seems especially happy that Mortenson and Bagley are arguing over the doctrine on originalist turf, and hence “at least recognizing that originalist work is possible.”<sup>435</sup>

Wurman, in his article arguing for nondelegation at the Founding, indicates that he is more an original intent originalist than an original meaning originalist, stating that “originalists usually look to text, structure, intent, and early historical practice to ascertain the likely original meaning, or the range of plausible meanings, of a particular constitutional provision.”<sup>436</sup> Wurman also asserts “intended meaning is often good evidence of the actual textual meaning.”<sup>437</sup> He does not in his article attempt to discern the original meaning of the Constitution’s words.

Wurman’s article section on “The Positive Evidence of a Nondelegation Doctrine: Explicit Statements and Arguments” is stunning on what it omits: any mention of discussion by the Framers or ratifiers at the time the Constitution was drafted and ratified.<sup>438</sup> One would think that if the Constitution embodied the nondelegation doctrine as a fundamental principle, the Framers and ratifiers would have discussed that at some length. If they did not, as Wurman’s silence indicates, that is strong evidence that they did not intend the Constitution to contain a nondelegation doctrine.<sup>439</sup> By comparison, when Wurman discusses other related topics such as Institutionalism and the Separation of Powers, his text is chock-a-block with references to the Federalist, indicating that these topics were in fact widely discussed at the Founding.<sup>440</sup> Wurman acknowledges that it is impossible to conclusively prove nondelegation at the Founding, stating “To be sure, the history is a bit messy, precluding any kind of categorical conclusion.”<sup>441</sup> Instead of discussing evidence from the

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<sup>435</sup> Wurman, *supra* note 66, at 5.

<sup>436</sup> *Id.* at 10–11.

<sup>437</sup> *Id.* at 9 n.26.

<sup>438</sup> *Id.* at 14–29.

<sup>439</sup> See John Harrison, *Judicial Interpretive Finality and the Constitutionality Text*, 23 CONST. COMMENT. 33, 33 (2006) (“Elephants leave traces when they pass by. That is true about the Constitution as it is elsewhere . . . . One way to tell whether the Constitution adopts a principle is thus to look for its traces, and one way to do that is to ask: If the framers had planned to include the principle, or had assumed that other decisions they had made entailed the principle, where would it manifest itself?”).

<sup>440</sup> Wurman, *supra* note 66, at 3–38.

<sup>441</sup> *Id.* at 1.

Founding about the intent of the Framers and/or ratifiers or the original public meaning of the Constitution when ratified, Wurman instead points to “three key episodes”<sup>442</sup> as evidence of a nondelegation doctrine: (1) debates over a non-encroachment amendment as part of the Bill of Rights that did not pass Congress, (2) the establishment of the post roads, and (3) the Alien Friends Act. He asserts that these debates and events provide evidence of a nondelegation doctrine, but instead the non-encroachment amendment was rejected and, as demonstrated by Mortenson and Bagley, the other debates show that Congress did delegate despite a few scattered objections.<sup>443</sup>

Aaron Gordon published an originalist defense of nondelegation in 2019,<sup>444</sup> and responded directly to the Mortenson and Bagley article in 2020 with similar arguments. In his 2019 article, Gordon undercuts the idea that original meaning originalism can answer whether the nondelegation doctrine exists. He states, “vague language” of the Constitution is “arguably susceptible to equally plausible readings both supporting and undermining the Nondelegation Doctrine” and so skips “textual and syntactic hyper-analysis . . .”<sup>445</sup> Gordon forgoes any theoretical justification of the original sources he relies on, other than noting that original meaning originalism does not lead to any settled answer and that other scholars and jurists cite similar materials.<sup>446</sup>

Gordon presents as evidence of nondelegation at the Founding matters discussed previously that do not demonstrate nondelegation at the Founding, such as the debunked great influence of Locke on the Framers of the Constitution, the pre-Revolutionary Otis pamphlet urging Parliament to recognize colonial legislatures and Adams’ citing it as an influence on the Revolution, and the nondelegation amendment rejected in the Convention. To that, Gordon adds (1) nondelegation references in American editions of Rutherford’s *Institutes of Natural Law* that were published after the Constitution was ratified; (2) Hamilton’s discussions in the Federalist

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<sup>442</sup> *Id.* at 26.

<sup>443</sup> Mortenson & Bagley, *supra* note 8, at 282.

<sup>444</sup> See Gordon, *supra* note 43, at 718.

<sup>445</sup> *Id.* at 733–34.

<sup>446</sup> *Id.* at 734–35 (“Historical materials from this period, to the extent they express views that were common and mostly uncontested at that time, are generally regarded as valid evidence of the Constitution’s original meaning, with an ideologically diverse array of commentators and jurists routinely citing sources from as late as the 1830s in making originalist arguments about constitutional provisions adopted prior to 1800, or sources similarly temporally removed from the adoption of whichever provision’s meaning is at issue.”).

about the President's pardon powers; and (3) Jefferson's complaints that Parliament had let the King decide when two wharves could be reopened.<sup>447</sup> Tellingly, Jefferson did not claim that such delegation to the unelected monarch was not permitted, but rather that if Parliament delegated its legislative powers too often to the King, it could lead to despotism.<sup>448</sup> In other words, Gordon presents no convincing evidence that the Framers of the Constitution, who had provided for an elected President as Executive, not an unelected monarch, intended that the Constitution include a nondelegation doctrine.

Gordon proposes his own version of the nondelegation doctrine, what he calls "a historically-grounded judicial test for identifying unconstitutional delegations: 'a statute unconstitutionally delegates legislative power when it 1) allows the agent . . . to issue general rules governing private conduct that carry the force of law and 2) makes the content or effectiveness of those rules dependent upon the agent's policy judgment, rather than upon a factual contingency.'"<sup>449</sup> Since Gordon is an originalist, one might think these rules would be what Gordon thinks the Constitution meant when ratified. However, his rules are all drawn from what Congress actually did after the Framing.

Gordon's 2020–2021 article presents a moving target, as it was last updated April 30, 2021. It argues with Mortenson and Bagley's definition of "legislative power," cites mid-nineteenth century treatises on agency<sup>450</sup> and argues that because Congress was an agent it could not delegate its powers, ignoring cases in the nation's first years indicating that a legislature and government officials could delegate some aspect of their powers.<sup>451</sup> Nonetheless, it adds little additional evidence of nondelegation at the Founding.

A much more ambitious originalist defense of the nondelegation doctrine has been mounted by Gary Lawson, beginning with an article published about the same time as Posner and Vermeule's and then in a another replying directly to their article. In his article, *Delegation and Original Meaning*, Lawson attempts a full originalist defense of the nondelegation doctrine and argues for its revival.<sup>452</sup> Lawson, to his credit, starts

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<sup>447</sup> *Id.* at 739–41.

<sup>448</sup> *Id.* at 741.

<sup>449</sup> *Id.* at 781.

<sup>450</sup> Gordon, *supra* note 181 (manuscript at 7).

<sup>451</sup> *Id.* at 3 (ignoring such cases as *Respublica v. Duquet*, 2 Yeates 493 (Pa. 1799) and *Hunt v. Burrell*, 5 Johns. 137 (N.Y. Sup. Ct. 1809)).

<sup>452</sup> Lawson, *supra* note 128, at 327.

with a blunt admission that “there is nothing in the Constitution that specifically states, in precise terms, that no other actor may exercise legislative power or that Congress may not authorize other actors to exercise legislative power.”<sup>453</sup>

Lawson states that the pertinent question is what the general public would have understood “if all relevant information and arguments had been brought to its attention” and “historical sources remain relevant and probative but are inconclusive.”<sup>454</sup> And because documents can have “meanings that are latent in their language and structure even if they are not obvious to observers at a specific moment in time . . . the role and relevance of historical sources is more attenuated.”<sup>455</sup> Original meaning originalism, then, puts Lawson in a tight box. Unless it can be shown that a fully informed public at the time would have understood that the Constitution contained a nondelegation doctrine, then it does not matter whether some Framers or other individuals at the time thought that or acted as if it did.

A discussion of whether a fully informed public would have understood that vesting legislative power in Congress limits its delegation should naturally turn on what such a hypothetical public would understand is meant by the term “vest.” Instead, Lawson relies on his assertion that powers vested cannot be delegated unless specifically permitted, ignoring that an informed public might well have concluded that “vesting” the legislative power in Congress implies that Congress can delegate those powers.

Lawson searches for possible clauses of the Constitution that would permit delegation, stating that a “number of modern scholars have indeed invoked [the Sweeping Clause of Article I] as a possible constitutional authorization to Congress to confer broad discretion on administrators.”<sup>456</sup> Lawson notes that the Sweeping Clause “requires all executory laws to be both ‘necessary’ and ‘proper,’ in the conjunctive” and asserts that the “term ‘proper’ would have been understood to describe “power that is ‘within the peculiar jurisdiction or responsibility of the relevant governmental actor.’”<sup>457</sup> Delegation of legislative power, if otherwise permitted, would clearly be within Congressional jurisdiction or responsibility, however. And so, Lawson states the

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<sup>453</sup> *Id.* at 335.

<sup>454</sup> *Id.* at 341 n.51.

<sup>455</sup> *Id.*

<sup>456</sup> *Id.* at 346.

<sup>457</sup> *Id.* at 347 (quoting Gary Lawson & Patricia B. Granger, *The “Proper” Scope of Federal Power: A Jurisdictional Interpretation of the Sweeping Clause*, 43 DUKE L.J. 267, 291 (1993)).



question is whether a “fully informed eighteenth-century audience would have viewed a statute purporting to authorize an executive agent to make laws as ‘improper’ . . .”<sup>458</sup>

Lawson does not provide a full answer that question in this article, stating that “it is impossible to give full treatment here to the extensive textual, structural, and historical arguments that justify this conclusion.”<sup>459</sup> Instead, he argues that because of the structure of the Constitution, the Sweeping Clause would not be understood to permit delegation, as it “incorporates the basic constitutional structure; it does not offer a vehicle for circumventing it.” Lawson relies on his understanding of the Constitution rather than on good evidence of what a hypothetical fully informed public would have understood.

Lawson returned to this issue in 2005 and agreed that delegation would be authorized by the Necessary and Proper Clause if it matched Madison’s requirement that to be “necessary” there must be a definite connection between a law’s means and its ends and they must be linked “by some obvious and precise affinity.”<sup>460</sup> Lawson acknowledged that this would provide for legislative delegation so long as Congress shows such delegation is connected to Congress’s legislative ends.<sup>461</sup> Lawson strained to find some additional meaning in the word “proper” to hang the nondelegation doctrine on, but largely fails.

In the end, Lawson was reduced to finding the nondelegation doctrine inherent in the structure of the Constitution, not justified by any of the express terms thereof or what a fully informed public would have understood from specific provisions in the Constitution. He states that the Nondelegation Doctrine “is not a principle expressly stated in the Constitution, but it is a better inference from the overall structure of the Constitution than is the contrary principle.”<sup>462</sup> And so, Lawson would have us infer the nondelegation doctrine not from original meaning but from our current understanding of the Constitution. Aaron Gordon, in his originalist defense of nondelegation, stated that “a grandiose, abstract case for the Nondelegation Doctrine based on arguments from constitutional

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<sup>458</sup> *Id.* at 350.

<sup>459</sup> *Id.* at 346.

<sup>460</sup> *Id.* at 448.

<sup>461</sup> Gary Lawson, *Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 248 (“If Congress wants to vest discretion in the President, Congress had better be prepared to show in a direct and immediate fashion how the precise scope and character of that discretion is important to the execution of federal powers.”).

<sup>462</sup> *Id.* at 263.

structure and accountability would be worthless unless buttressed by a wealth of historical sources. . .” demonstrating that the founders would have thought that inappropriate delegation by Congress would be unconstitutional.<sup>463</sup> Lawson, however, provided no such historical sources.

Post-*Gundy*, but before the Mortenson and Bagley article, Lawson again discussed possible sources for the nondelegation doctrine in both a 2017 book with Guy Seidman<sup>464</sup> and a 2019 article about *Gundy*.<sup>465</sup> In his article, Gary Lawson acknowledged that he had previously asserted that the nondelegation doctrine resided in the Vesting Clauses, and at other times, in the Sweeping Clause.<sup>466</sup> However, he stated that he had recently come to a different conclusion, laid out in both the book and article, which will be discussed jointly here, that both of his previous lines of argument are “subsumed under and superseded by a more fundamental consideration. . . The Constitution is a kind of agency, or fiduciary, instrument.”<sup>467</sup> And that because the different branches of government are fiduciaries with their powers delegated to them by the people, they cannot subdelegate their authority because there is no express authority to do so in the Constitution, nor is there, Lawson claimed, custom or strict necessity which could justify such subdelegation.<sup>468</sup> Furthermore, as agents, the powers of Congress and the Executive Branch must be strictly construed.<sup>469</sup> And based on this agency analysis, Lawson boldly asserted, “The rule against subdelegation of legislative authority is among the clearest constitutional rules one can imagine.”<sup>470</sup>

A fundamental weakness in this argument, which seems a constitutional application of the *Delegata* maxim, is the dearth of evidence that the Constitution is essentially an agency or fiduciary instrument, or should be construed as such. Even Lawson noted the many alternative views as to what the Constitution is most like, including a “‘superstatute,’ a ‘compact,’ a ‘treaty,’ a ‘corporate charter’” and numerous others.<sup>471</sup> Given this wide range of

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<sup>463</sup> Gordon, *supra* note 181 (manuscript at 53).

<sup>464</sup> See generally GARY LAWSON & GUY SEIDMAN, “A GREAT POWER OF ATTORNEY” UNDERSTANDING THE FIDUCIARY CONSTITUTION 1 (2017).

<sup>465</sup> See generally, e.g., Lawson, *supra* note 26, at 31; LAWSON & SEIDMAN, *supra* note 464, at 1.

<sup>466</sup> Lawson, *supra* note 26, at 43.

<sup>467</sup> *Id.*

<sup>468</sup> *Id.* at 44.

<sup>469</sup> LAWSON & SEIDMAN, *supra* note 464, at 105.

<sup>470</sup> *Id.* at 117.

<sup>471</sup> *Id.* at 2 (citations omitted).

possibilities, why should we base our interpretation of the Constitution on Lawson's recent understanding that it is an agency or fiduciary agreement?

Lawson and Seidman's reply is that "the agency-law character of the Constitution" was "so obvious to the founding generation that it scarcely bore mention."<sup>472</sup> The Constitution as agency arrangement was mentioned at least once in the Founding Era,<sup>473</sup> but this rare mention does not the Constitution an agency agreement make.

As Justice Scalia said, the greatest defect of originalism is the difficulty of applying it correctly and plumbing the original meaning of the Constitution's now ancient text.<sup>474</sup> The difficulty and complexity of the historical and theoretical research that the dueling nondelegation scholars have engaged in is staggering. They have argued at great length and discord about the meaning of arcane texts by writers few lawyers and judges have even heard of. Reading their lengthy and contentious articles, one might think that whether the nondelegation doctrine even exists somehow turns on how to interpret the writings of eighteenth-century English natural law theorist Thomas Rutherford, whose *Institutes of Natural Law* with its lectures on Grotius is likely missing from most judges' chambers. Surely, the Framers did not intend that American lawyers and judges would in perpetuity require a deep understanding of Rutherford's and Locke's writings in order to know something as crucial and straightforward as whether Congress can delegate some rule-making power to federal agencies and how much. The purpose of having a written Constitution is, at least according to some originalists, to have a clear, public, and compact description of the basic rules governing the United States. Originalism would instead turn the Constitution into an inscrutable document that could be understood only with a post-graduate education in seventeenth- and eighteenth-century English and European legal and political theory and English history since the Magna Carta of 1215, with a special emphasis on the proclamations of Henry VIII circa 1539.

The dueling scholars' debate is filled with accusations of misunderstanding and mistakes in the other side's historical and theoretical analysis, with claims such as "that their misreading of European delegation theory becomes the Constitution's

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<sup>472</sup> *Id.* at 7.

<sup>473</sup> *Id.* at 3 (citing 4 THE DEBATE IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, 148–49 (Jonathan Elliot ed., 2nd ed. 1907)).

<sup>474</sup> Scalia, *supra* note 2, at 856.

delegation theory, without consideration of what the Constitution actually said.”<sup>475</sup> Further examples abound. “It is hard to overstate the ahistoricity of this claim.”<sup>476</sup> “The historical and logical infirmities in Mortenson and Bagley’s analysis are many. . .”<sup>477</sup> No doubt I have made errors in my historical analysis in this Article, since I have not been trained as a historian, but should the meaning of the Constitution be determined by the results of historical research that almost all lawyers and judges and even legal scholars are likely to get at least somewhat wrong? Some originalist Justices and scholars argue that Locke’s views on nondelegation and the separation of powers were an important influence on the framers and are central element of the existence of the nondelegation doctrine as an element of the Constitution. Yet those who would rely on Locke’s influence on the framers do not provide sufficient historical evidence regarding whether Locke’s views on delegation actually influenced the Framers or ratifiers, despite the decades of historians’ study and analysis of the rise and fall of Locke’s influence.<sup>478</sup>

Justice Scalia noted the little time and less than ideal environment and personnel that members of the Supreme Court have for an “entirely accurate historical inquiry . . .”<sup>479</sup> Justice Thomas’s and Gorsuch’s opinions demonstrate how insurmountable that challenge is. Justice Scalia tellingly did not share their views on nondelegation and might well have not agreed with their historical analysis.

## V. CONCLUSION

The history of the nondelegation doctrine can perhaps be best viewed as a conversation between James Madison and Justice Antonin Scalia from centuries apart. Madison feared that Congress would usurp the powers of the Executive and Judicial branches and so become tyrannical. He was willing to hand over some legislative power and oversight to the executive and judicial

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<sup>475</sup> HAMBURGER, *supra* note 119, at 383.

<sup>476</sup> Mortenson & Bagley, *supra* note 8, at 297.

<sup>477</sup> Gordon, *supra* note 181 (manuscript at 2).

<sup>478</sup> Mortenson and Bagley do spot the issue in a footnote and cite to a blog post that discusses it. Mortenson & Bagley, *supra* note 8, at 289 n.66 (citing Richard Primus, *John Locke, Justice Gorsuch, and Gundy v. United States*, BALKINIZATION (July 22, 2019), <https://balkin.blogspot.com/2019/07/john-locke-justice-gorsuch-and-gundy-v.html> [<http://perma.cc/2EMD-78BT>]). Philip Hamburger cites to the work of historians in a “brief sampling of the scholarship” on Locke’s influence, but does not tell readers what he learns from it, other than that Locke’s *Two Treatises* was “a crucial text for early Americans.” Hamburger, *supra* note 117, at 98 n.44.

<sup>479</sup> Scalia, *supra* note 2, at 861.

branches to weaken the national legislature in order protect the powers of the executive and judicial branches. He therefore advocated this sharing of some legislative power with members of the other branches so that, acting in concert, they could defend their branches from encroachment by Congress. Madison would have given the Council of Revision, made up mostly of judges, great ability to set the nation's policy through its revisionary power.

Justice Scalia, on the other hand, feared that creating a robust nondelegation doctrine would allow the Supreme Court to usurp legislative powers from Congress. Justice Scalia expressed fear that an invigorated nondelegation doctrine would allow the Court to seize too much control of policy decisions, decisions that should be made by Congress as a representative assembly and not by, as Justice Scalia put it, "a hermetically sealed committee of nine lawyers."<sup>480</sup> He recognized that the nondelegation doctrine is self-contradictory, in that the Court would be seizing legislative power in order to prevent Congress from exercising its own discretion and decide whether, when, and how much of its legislative power to delegate to federal agencies.<sup>481</sup> The Supreme Court, by creating an activist nondelegation doctrine, would make itself Congress's master by creating a rule that Congress is powerless to change.

Embracing a robust nondelegation doctrine would make the Court completely unconstrained, as it would be applying a self-fashioned doctrine completely absent from the Constitution, virtually absent at the Founding, and contrary to the practice of the First Congress. The Court would be seizing the power to determine such basic policy as the reach and function of the administrative state and the effectiveness of regulation of the environment, health care, financial services, and countless other policies that should be determined by the people's representatives in Congress, not by judges with the "fortitude" to seize power.

Under the guise of preventing the "tyranny" of delegation, the Court would be creating a government by judiciary, making The Court's Justices tyrants, the unassailable masters of the government, who in finding any messy evidence of some power in the tangled history of the Founding can construct rules not in the

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<sup>480</sup> *Id.*

<sup>481</sup> See Scalia, *supra* note 354, at 28 ("[T]o a large extent judicial invocation of the unconstitutional delegation doctrine is a *self-denying ordinance*—forbidding the transfer of legislative power not to the agencies, but to the courts themselves.").

Constitution's text to overrule Congress and the President on even the most important issues about the nation's policy and structure. Locke was concerned that Parliament as representative of the public would cede too much power to the unelected and virtually unremovable King. How ironic that an originalist Supreme Court might use Locke's words to strip legislative power from Congress and grant itself a non-constitutional, ill-defined, and unconstrained power to veto the nation's laws, no matter how longstanding, a terrifying power to be held by an unelected and virtually unremovable Court.

The Court may well not to take this step. The Justices might review the extensive evidence of delegation and the lack of evidence of a nondelegation doctrine at the Founding and conclude that neither the original intent of the framers or ratifiers nor the original meaning of the Constitution justifies such a far-reaching seizure of power over Congress by the Court, overturning centuries of precedent despite such grave doubt. The Court could reject the arguments of some originalists and go back to the original concepts that first animated originalism, that the Court should exercise judicial restraint and in doing so protect Congress's legislative powers. Only time will tell.