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## **“The People Surrender Nothing”: Social Compact Theory, Republicanism, and the Modern Administrative State**

*Joseph Postell\**

The famous administrative law scholar and professor, Louis Jaffe, wrote that “delegation of ‘lawmaking’ power is the dynamo of modern government.”<sup>1</sup> The various agencies of the modern administrative state are routinely granted broad mandates to enact rules that carry the force of law.<sup>2</sup> This fact has generated a constitutional controversy for the past several decades, in which it is asserted that only Congress, and not regulatory agencies, may exercise legislative powers.<sup>3</sup> The importance of this controversy to the modern administrative state is clear: if the Constitution forbids Congress from delegating legislative power to administrative agencies, and agencies today exercise legislative power, much (but not all) of the modern administrative state is unconstitutional.

Scholars on both sides of the issue recognize the ramifications. Even though the Supreme Court has shown little interest in reopening the debate over the delegation of legislative power to administrative agencies, scholars have published dozens of articles on the nondelegation doctrine in recent years.<sup>4</sup> If modern history is any indication, there is little prospect that attention to the nondelegation doctrine in scholarship and literature will subside in the near future.

Yet important and inaccurate myths about the nondelegation doctrine still prevail in spite of this ongoing scholarly attention. This Article aims to establish the proper foundation for the nondelegation principle. While this principle is typically linked to the theory of the separation of powers, the true foundation of the nondelegation principle is the idea of the social compact and the related theory of republican government. To the extent that the modern administrative state transfers legislative powers to administrative officers who are not vested with those powers by the people through their Constitu-

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\* Assistant Professor of Political Science, University of Colorado-Colorado Springs. Thanks to D. Scott Broyles, Eric Claeys, Jason D. Hilton, Philip Hamburger, Frederick Hessick, Gary Lawson, Tiffany Miller, Ronald Pestritto, Philip Pucillo, and David J. Shaw for comments and suggestions.

1. Louis L. Jaffe, *An Essay on the Delegation of Legislative Power: I*, 47 COLUM. L. REV. 359, 359 (1947).

2. See PHILIP HAMBURGER, *IS ADMINISTRATIVE LAW UNLAWFUL?* 2 (2014).

3. See *id.* at 3.

4. Travis Mallen, *Rediscovering the Nondelegation Doctrine Through a Unified Separation of Powers Theory*, 81 NOTRE DAME L. REV. 419, 419 (2005) (observing in 2005 that “[i]n the last decade, no fewer than fifty articles have been published on the subject” of nondelegation).

tion, and who are not elected by the people either directly or indirectly, it violates these cardinal principles of American constitutionalism.

The Article's argument proceeds in four parts. Part I provides an overview of the scholarly arguments in defense of the nondelegation doctrine. It describes three arguments in favor of the nondelegation doctrine: the separation of powers, political accountability, and constitutional text. Part II argues that social compact theory – not separation of powers, accountability, or constitutional text – is the true foundation of the nondelegation principle. Part III connects the theory of the social compact to the basic principles of republican government, which require that legislative powers are exercised by the representatives of the people chosen through elections. Part IV concludes by tentatively discussing the implications of this argument for contemporary administrative government.

### I. COMPETING FOUNDATIONS OF THE NONDELEGATION DOCTRINE

Defenders of the nondelegation doctrine generally offer one of three arguments: the separation of powers, public accountability, or the text of the U.S. Constitution.<sup>5</sup> The most common argument invokes the separation of powers.<sup>6</sup> This position holds that Congress cannot delegate power to administrative agencies because the legislative, executive, and judicial powers must remain separate.<sup>7</sup> It is often argued that delegating legislative power to administrative agencies, which typically exercise executive and sometimes judicial powers, violates this principle.<sup>8</sup>

Examples of the separation of powers argument abound. For instance, Randolph May argues that “the public interest standard” typically inserted in regulatory statutes “is inconsistent with the separation of powers principles vindicated in our constitutional system through the nondelegation doctrine.”<sup>9</sup> Similarly, Travis Mallen writes, “The nondelegation doctrine is a function of separation of powers.”<sup>10</sup> Mallen's defense of the doctrine rests on what he calls the principle of “institutional competence,”<sup>11</sup> which argues that only the

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5. See Marci Hamilton, *Representation and Nondelegation: Back to Basics*, 20 CARDOZO L. REV. 807, 807 (1999); DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 9 (1993); Gary S. Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 335 (2002) [hereinafter Lawson, *Original Meaning*].

6. See Hamilton, *supra* note 5, at 807.

7. See *id.*

8. See *id.*

9. Randolph May, *The Public Interest Standard: Is It Too Indeterminate to Be Constitutional?*, 53 FED. COMM. L.J. 427, 429 (2001) (May's analysis of the nondelegation doctrine from the Framers' perspective consists of a discussion of how the Framers, primarily Madison, implemented the advice of Montesquieu with regard to dividing and separating powers).

10. Mallen, *supra* note 4, at 421.

11. *Id.* at 421–22, 432.

legislative branch is competent to legislate, and delegation of power “grants the Executive a power to act in a manner wholly divorced from the Executive’s independent institutional competencies.”<sup>12</sup> Marci Hamilton grounds her defense of the nondelegation doctrine in the fact that “the Framers’ debates focused on finding the appropriate balance of power” in the federal government.<sup>13</sup> Therefore, in a nondelegation inquiry, “the question to be asked is whether each branch is checking the others in ways that are constructive for effective government and for liberty.”<sup>14</sup> And delegation of power undermines the legislature’s ability to deliberate, as well as the executive’s capacity for “exercising decisive leadership” and checking “the legislature’s tendency to cabal.”<sup>15</sup> Martin Redish argues that “[t]he system of separation of powers was established in order to prevent undue accretion of political power in one branch. Abandonment of the nondelegation doctrine effectively permits the executive branch to accumulate an almost unlimited amount of power.”<sup>16</sup>

The link between nondelegation and the separation of powers also appears in Supreme Court opinions. In *Loving v. United States*, the Court engaged in an extensive discussion of Montesquieu and the separation of powers in the context of a delegation challenge, noting that “[a]nother strand of our separation-of-powers jurisprudence, the delegation doctrine, has developed to prevent Congress from forsaking its duties.”<sup>17</sup> Justice Thomas, the member of the Supreme Court who seems most interested in enforcing the nondelegation principle, announced in *Whitman v. American Trucking Ass’n* that he “would be willing to address the question whether our delegation jurisprudence has strayed too far from our Founders’ understanding of *separation of powers*.”<sup>18</sup> More recently, in 2015, Justice Thomas argued in a concurring opinion:

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12. *Id.* at 432.

13. Hamilton, *supra* note 5, at 810.

14. *Id.* at 818.

15. *Id.*

16. MARTIN REDISH, *THE CONSTITUTION AS POLITICAL STRUCTURE* 142 (1995). See also Ronald J. Krotoszynski, Jr., *Reconsidering the Nondelegation Doctrine: Universal Service, the Power to Tax, and the Ratification Doctrine*, 80 *IND. L.J.* 239, 260 (2005) (according to the Court, “Provided that Congress establishes an ‘intelligible principle’ that limits an agency’s decisionmaking power, the delegation does not violate the separation of powers”); *id.* at 265 (“As a formal matter, however, the nondelegation doctrine remains a part of the separation of powers doctrine.”); JOHN PRESTON COMER, *LEGISLATIVE FUNCTIONS OF NATIONAL ADMINISTRATIVE AUTHORITIES* 115 (photo. reprint 2003) (1927) (the view that the nondelegation doctrine is intertwined with separation of powers theory goes as far back as John Preston Comer’s *Legislative Functions of National Administrative Authorities*, originally published in 1927, which states that the nondelegation doctrine is argued “under the name of the separation-of-powers theory”).

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

18. *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (emphasis added).

We have too long abrogated our duty to enforce the separation of powers required by the Constitution. We have overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no home in our constitutional structure.<sup>19</sup>

Thus, the separation of powers argument is prominent in Supreme Court jurisprudence and legal commentary.

A second approach to defending the nondelegation doctrine invokes the principle of accountability. This position asserts that the delegation of legislative power to unelected and unaccountable bureaucrats undermines the accountability of government to the people and therefore the core democratic principles upon which the Constitution rests. David Schoenbrod has made this argument most forcefully. Focusing on the harmful effects of delegation on democracy and the policy problems that result from delegation, he writes, “Delegation can shield our elected lawmakers from blame for harming the public not only when a regulatory program . . . serves no legitimate public purpose, but also when a regulatory program should serve an important public purpose.”<sup>20</sup> Delegation, he continues, has “the political consequence of allowing officials to duck responsibility for costs” and “helps to insulate Congress and the White House from political accountability for supporting laws that are harmful to the broad public interest.”<sup>21</sup> This phenomenon of “blame-shifting” takes place because a law appears to bestow benefits such as clean air without any cost; the costs of acquiring clean air through government regulation follow years afterwards, and the public believes administrative agencies, not the legislature, produce it.<sup>22</sup> Furthermore, this argument runs, one cannot reply that agencies are accountable to the people because they are accountable to Congress, for “the agency is ordinarily unaccountable, except for egregious political sins, to most of Congress and therefore to most of the people.”<sup>23</sup> In other words, accountability to Congress only prevents egregious agency actions, while the rest of administrative policymaking flies under the radar.

The theme of delegation and democracy became more prominent in Schoenbrod’s subsequent work criticizing delegation of lawmaking power to agencies. Responding to the claims of some of his critics that delegation does not run afoul of the principle of democratic accountability, Schoenbrod writes, “The effort to square delegation with democracy is pervasively futile because the drive for delegation, from the beginning of the twentieth century,

19. *Dep’t of Transp. v. Ass’n of Am. R.R.s*, 135 S. Ct. 1225, 1254–55 (2015) (Thomas, J., concurring).

20. SCHOENBROD, *supra* note 5, at 9.

21. *Id.* at 10, 55. See also MORRIS P. FIORINA, *CONGRESS: KEYSTONE OF THE WASHINGTON ESTABLISHMENT* 37–47 (1989).

22. SCHOENBROD, *supra* note 5, at 82, 85–94.

23. *Id.* at 101.

stemmed from a desire to reduce government's accountability to ordinary voters."<sup>24</sup> He argues that "[f]rom its inception, the core purpose of delegation was to undercut democratic accountability."<sup>25</sup> Schoenbrod provides historical evidence that shows the progressives' rejection of democracy in favor of "elitist" rule by bureaucratic experts was the primary cause of the abandonment of the nondelegation doctrine in the twentieth century.<sup>26</sup> The entire purpose of the delegation of power was to undermine democratic accountability and to allow experts, not generalist politicians, to make policy.<sup>27</sup>

This emphasis on democratic accountability is characteristic of many scholars who defend the nondelegation doctrine.<sup>28</sup> Martin Redish's nondelegation principle of "political commitment" also rests upon the concept of democratic accountability, as well as separation of powers.<sup>29</sup> Redish argues that the nondelegation doctrine "embodies fundamental elements of American political theory – namely accountability and checking – which are seriously undermined by its abandonment."<sup>30</sup> According to Redish, the nondelegation doctrine is the principle that emerges where accountability and separation of powers principles converge.<sup>31</sup> It is here that Redish articulates the "political commitment" principle, which states that the best way to devise a principle for enforcing the doctrine is to "return to the first principles of our system of separation of powers by asking simply whether congressional legislation evinces a sufficient political commitment to enable the voters to judge their representatives."<sup>32</sup> Redish implies that accountability and separation of powers principles are inextricably linked, although it seems possible to imagine an accountable government where powers are combined or a government of separated powers which is nevertheless unaccountable to the people.<sup>33</sup>

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24. David Schoenbrod, *Delegation and Democracy: A Reply to My Critics*, 20 CARDOZO L. REV. 731, 732 (1999).

25. *Id.* at 734.

26. *Id.* at 733.

27. *Id.* at 733–34.

28. *Id.* at 759. While Schoenbrod is only one of many defenders of the nondelegation doctrine who cites accountability as a primary concern, he does not view "democratic accountability" as a sufficient argument to defend the nondelegation doctrine as a principle of constitutional law, stating that "[t]he argument that the Constitution forbids delegation is based upon the text and context of the Constitution, the understandings of the Framers, and the judicial interpretations closest in time to the Constitution's adoption. . . . The point is that the democracy-based argument is not the primary argument for the claim that the Constitution forbids delegation, but rather one of the reasons why the Framers intended the Constitution to forbid delegation. It is the proponents of delegation who have placed critical reliance on democracy." *Id.*

29. REDISH, *supra* note 16, at 136.

30. *Id.*

31. *Id.* at 135–62.

32. *Id.* at 154.

33. *Id.*

Under Redish's political commitment principle, "a reviewing court would ask itself whether the voters would be placed in a substantially better position to judge their representatives by learning whether they had voted for or against the challenged legislation."<sup>34</sup> If the answer is "no," then the legislation probably violates the nondelegation doctrine.<sup>35</sup> Thus, for Redish, the clue to enforcing the nondelegation doctrine is accountability – namely, whether a legislator could be held accountable by voters based on the legislation that was enacted.<sup>36</sup> As with the separation of powers defense of the nondelegation doctrine, the political accountability argument is widespread, but Redish and Schoenbrod offer perhaps the most developed accountability arguments in legal scholarship.<sup>37</sup>

A third argument for the nondelegation doctrine is textually based in Article I, Section 1 of the U.S. Constitution, which declares that "[a]ll legislative powers herein granted shall be vested in a Congress."<sup>38</sup> The use of the word "shall" implies a constitutional obligation that Congress alone exercises the legislative powers enumerated in Article I. Yet because, as Gary Lawson has observed, "the Constitution contains no express provision forbidding delegation,"<sup>39</sup> more analysis is needed to enforce the nondelegation principle than mere reliance on Article I's Vesting Clause.

Nondelegation defenders respond that there is nothing in Congress's enumerated powers to support the delegation of legislative power from Congress to administrative agencies.<sup>40</sup> Gary Lawson and Douglas H. Ginsburg have offered the two most prominent examples of this defense of the nondelegation doctrine.<sup>41</sup> This argument proceeds in three steps. First, because the Constitution creates a government of limited and enumerated powers, the power to delegate must be based on some positive enumeration of power to

34. *Id.* at 154–55.

35. *Id.* at 155.

36. *Id.* at 154–55.

37. See also Alexander Bickel, *Congress, the President, and the Power to Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971) (Bickel states that the nondelegation doctrine "is concerned . . . with the sources of policy," especially "the crucial joinder between power and broadly based democratic responsibility, bestowed and discharged after the fashion of representative government. Delegation without standards short-circuits the lines of responsibility that make the political process meaningful.").

38. U.S. CONST. art. I, § 1.

39. Patrick Garry, *Accommodating the Administrative State: The Interrelationship Between the Chevron and Nondelegation Doctrines*, 38 ARIZ. ST. L.J. 921, 926 (citing Lawson, *Original Meaning*, *supra* note 5, at 238).

40. Gary Lawson, *Discretion as Delegation: The "Proper" Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235, 238 (2005) [hereinafter Lawson, *Discretion*].

41. See *id.*; see also Douglas Ginsburg, *Legislative Powers: Not Yours to Give Away*, HERITAGE FOUND., <http://www.heritage.org/research/reports/2011/01/legislative-powers-not-yours-to-give-away> (last visited Oct. 20, 2016).

Congress.<sup>42</sup> Lawson argues, "Congress, as with all federal institutions, can only exercise those powers conferred upon it by the Constitution. That is what is meant by 'enumerated powers.'"<sup>43</sup> Second, there is no such grant of authority to delegate explicitly set forth in the text of the Constitution.<sup>44</sup> As Lawson writes, "Obviously, if the Constitution expressly said, 'Congress may delegate legislative power,' that would be the end of the story."<sup>45</sup> But "[t]here is no express delegation clause," and therefore, "[t]he question is whether the power to delegate can be found in some subtler form."<sup>46</sup>

Third, these scholars argue, there is no ground for delegation in the Necessary and Proper Clause because delegation is neither necessary nor proper.<sup>47</sup> In Lawson's view, "[S]tatutes vesting undue discretion in executive (or any other) actors exceed Congress's enumerated power under the Sweeping Clause of Article I."<sup>48</sup> They "are either not necessary, not proper, or both. . . . [T]hey are not 'proper' when they charge the President with excessive discretion. . . . That is what the traditional nondelegation doctrine rests upon, and it is right."<sup>49</sup> Therefore, this third argument for the nondelegation doctrine boils down to the text of the Constitution and the understanding of the Constitution as establishing a limited government. As Lawson argues, "The central question with respect to the nondelegation doctrine is therefore: can laws conferring discretion on executive actors ever fail to be 'necessary and proper for carrying into Execution' federal powers?"<sup>50</sup> This analysis places great demands on courts tasked with determining what constitutes excessive executive discretion, but Lawson notes that many other tests for constitutionality require similar judicial judgment.<sup>51</sup>

Ginsburg's analysis proceeds similarly. In explaining Article I, Section 1 of the Constitution, Ginsburg writes that "[t]he Constitution declares that the Congress may exercise only those legislative powers 'herein granted.' That the power assigned to each branch must remain within that branch, and may be expressed only by that branch, is central to the theory."<sup>52</sup> Moreover, "This basic principle is enforced by the Constitution's scheme of enumerated powers."<sup>53</sup> Thus, Ginsburg – like Lawson – starts by citing the Constitution's text as the ground of the nondelegation doctrine and proceeds to argue that the doctrine of enumerated powers supports his reading of the text.<sup>54</sup> He

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42. Lawson, *Discretion*, *supra* note 40, at 238.

43. *Id.*

44. Lawson, *Original Meaning*, *supra* note 5, at 345.

45. *Id.*

46. *Id.*

47. *See id.* at 334–45; *see also* Lawson, *Discretion*, *supra* note 40, at 237.

48. Lawson, *Discretion*, *supra* note 40, at 237.

49. *Id.*

50. *Id.* at 241–42.

51. Lawson, *Original Meaning*, *supra* note 5, at 353–95.

52. Ginsburg, *supra* note 41.

53. *Id.*

54. *Id.*



adds, “Nor can the Congress confer such a lawmaking power [on the President or the courts] by statute, for the simple reason that the Congress has no enumerated power to create lawmakers.”<sup>55</sup> If there were an enumerated power to delegate legislative power, under this analysis, it would be acceptable for Congress to delegate legislative power.

This third argument on behalf of nondelegation, therefore, is not grounded in core principles like separation of powers or democratic accountability. Rather, it is based on the original meaning of the constitutional text. As Lawson writes, the purpose of his work is to show “that the traditional nondelegation doctrine, at least in its most general guise, has a solid constitutional grounding.”<sup>56</sup> If the text of the Constitution were changed, this objection to delegation would vanish, as it is based merely on the positive language of the Constitution.

## II. SOCIAL COMPACT THEORY AND NONDELEGATION

Each of the three predominant arguments in favor of the nondelegation doctrine is flawed. However, this does not mean that the opponents of the nondelegation doctrine are correct. There is a solid foundation for the nondelegation doctrine, but it is found in social compact theory, rather than the separation of powers, accountability, or mere adherence to the text of the Constitution. While defenders of nondelegation are correct, they tend to rest their arguments on false foundations. This Part shows that defenders of the doctrine have failed to adequately explain the Founders’ doctrine and seeks to unite the argument for the nondelegation doctrine on different footing.

### A. *Deficiencies in Current Defenses of the Nondelegation Doctrine*

Those who connect the nondelegation doctrine to the Constitution’s separation of powers are understandably misled by the example of the American experience. In our modern administrative state, Congress typically transfers its power to administrative agencies in which legislative and executive powers are combined.<sup>57</sup> Such a practice violates Montesquieu’s famous maxim that “[w]hen the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.”<sup>58</sup> Thus, as a practical matter, the delegation of legislative power to the executive *in the American experience* has resulted in a violation of the separation of powers. Hence, as we

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55. *Id.*

56. Lawson, *Discretion*, *supra* note 40, at 236.

57. Lawson, *Original Meaning*, *supra* note 5, at 358.

58. 1 BARON DE MONTESQUIEU, *Of the Laws Which Establish Political Liberty with Regard to the Constitution*, in *THE SPIRIT OF THE LAWS* 149, 151–52 (Franz Neumann ed., Thomas Nugent trans., 1949).

have seen, many defenders of the nondelegation doctrine point to the separation of powers as the principle behind the doctrine.

However greatly the modern administrative state violates the separation of powers in practice, it is still true that not all delegations of power *in theory* violate the separation of powers. Consider a simple example of a delegation of legislative power to an administrative body that only promulgates rules, which are then executed by a different agency. This would not violate the need for separation of powers, but it would violate the nondelegation doctrine. In theory, Congress might create an agency and grant it purely legislative powers, preserving a separation of powers, despite the delegation of legislative power. Therefore, not all delegations of power violate the separation of powers, which means that the nondelegation doctrine cannot be justified simply on the basis of the separation of powers. In fact, the principle of separation of functions in administrative law is designed to preserve delegation without violating the separation of powers maxim.

The argument that the nondelegation doctrine is derived from principles of democratic accountability is also subject to several objections. First, democratic accountability is not explicitly enumerated as a constitutional principle.<sup>59</sup> The Framers' theories of electoral representation and consent of the governed do not translate universally into greater democratic accountability. The requirement that government be responsive to the people is part of the Founders' principle of representation, but this requirement is also limited by the same principle. Representation, as the next Part notes, was frequently defended on the grounds that it would make lawmakers *less* accountable to the impulses of the public.<sup>60</sup> To argue against the delegation of legislative power on the grounds that it renders government unaccountable creates confusion about the extent of democratic accountability in the Founders' own scheme of representation. The Framers intended representation to be a middle ground between direct or pure democracy and a government that did not provide for the consent of the governed.<sup>61</sup> In general, the Framers held pure democracy in contempt and emphasized the usefulness of representation as a way to "refine and enlarge the public views," rather than blindly follow them.<sup>62</sup>

Moreover, arguments against the delegation of legislative power based on principles of democratic accountability suggest that the problem could be solved, or at least its effects mitigated, by simply rendering administrative rulemaking more accountable. In fact, this has been one of the primary tasks of administrative law over the past fifty years. Put simply, if the delegation of legislative power renders government less accountable, the solution may

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59. See THE FEDERALIST NO. 63, at 424–25 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter MADISON, FED. 63] (explaining the republican principle of responsibility as "sometimes necessary as a defense to the people against their own temporary errors and delusions").

60. *Id.*

61. *Id.*

62. *Id.*

not be to abandon the delegation of legislative power but to “democratize” the administrative state through various legal doctrines, granting power to individuals to participate in and influence the administrative process.

The textualist argument for the nondelegation doctrine, which maintains that the theory of a limited constitution of enumerated powers (coupled with the correct analysis of the “Sweeping Clause”) prevents the delegation of legislative power, is more defensible but ultimately insufficient. In fact, Lawson acknowledges this, writing that “[i]t would take a better philosopher than I to show that as a matter of normative political theory,” the nondelegation doctrine is defensible.<sup>63</sup> His aim, in his words, is “more modest” – namely, “to establish . . . that the Constitution prohibits the kind of delegation of legislative authority that is at the heart of modern administrative governance.”<sup>64</sup> As he admits, “[T]o show that a practice is identifiably unconstitutional is not to show, as a matter of political theory, that it ought to be abandoned.”<sup>65</sup> In short, by relying simply on the text of the Constitution, this position fails to provide a robust normative defense to those who would ask why the Framers might have included a nondelegation principle in the Constitution they drafted and ratified. The textual basis for the nondelegation doctrine is a product of the theory behind it, the true ground of the nondelegation doctrine, which is the Founders’ principle of the social compact.

### *B. The Social Compact: The True Ground of the Nondelegation Doctrine*

The Framers of the Constitution repeatedly referred to the idea of the social compact, and nearly every major Founder subscribed to the principle.<sup>66</sup> Social compact theory maintains that sovereignty – the power to create and establish governments and to vest them with power – resides in the people alone.<sup>67</sup> Governments derive their just powers from the consent of the governed, who must agree to vest the government with its powers.<sup>68</sup> Furthermore, social compact theory holds that the sovereignty of the people is inalienable.<sup>69</sup> That is, the people may not transfer their power and responsibility to govern themselves to any other body. When they vest powers in a government, they are not giving their sovereignty away but merely delegating it

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63. Gary Lawson, *Delegation and the Constitution*, 22 REG. 23, 23–24 (1999) [hereinafter Lawson, *Delegation*], <http://object.cato.org/sites/cato.org/files/serials/files/regulation/1999/7/delegation.pdf>.

64. *Id.* at 24.

65. *Id.* at 23–24.

66. See Edward J. Erler, *From Subject to Citizens: The Social Compact Origins of American Citizenship*, in *THE AMERICAN FOUNDING AND THE SOCIAL COMPACT* 163, 163 (Ronald J. Pestritto & Thomas G. West eds., 2003).

67. *Id.*

68. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

69. Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1454 (1987).

to a trustee who acts on their behalf. Those officers who hold government power, consequently, are merely the temporary holders of power, rather than the new owners of the powers vested in them. The people, as the sole fountain of authority, delegate power to the government, but only in a limited way, connected to the specific ends for which the people designate that power to be exercised.

The nondelegation doctrine follows directly from the theory of a social compact. According to social compact theory, only those who possess political power may delegate it.<sup>70</sup> Since the representatives of the people never own the powers they exercise – because the people cannot alienate those powers – they may not delegate those powers. John Locke linked the two ideas explicitly in his assertion of the nondelegation principle.<sup>71</sup> In his words, the legislative power is “sacred and unalterable in the hands where the community [has] once placed it.”<sup>72</sup> “The power of the Legislative,” he continued, is “derived from the People by a positive voluntary Grant and Institution” and “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>73</sup> Because legislative power is “but a delegated power from the people, they who have it cannot pass it over to others.”<sup>74</sup> This argument against the delegation of legislative power is based on the idea of the social compact. The social compact assumes that, because sovereignty is inalienable, the people can *only* transfer the power “to make laws, and not to make legislators.”<sup>75</sup> If the people were to give another body the power to make legislators, they would be acting contrary to the basic principles and purposes of government.<sup>76</sup> Just as the people can never transfer power over their natural rights to government, they also cannot transfer their sovereignty to government.<sup>77</sup>

In other words, according to social compact theory, only the people can delegate legislative power, and when legislative power is delegated by the people to their agents in the legislature, the legislature cannot delegate its powers away because legislative power was never fully alienated by the people. As Larry Alexander and Saikrishna Prakash explain,

[W]hen the legislature attempts to delegate lawmaking authority to a third party, the third party’s rules are nullities because the third party was not chosen by the people to exercise the legislative power, and the

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70. JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 141 (C.B. McPherson ed., 1980).

71. *Id.*

72. *Id.* at 134.

73. *Id.* at 141.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

people (according to Locke) never authorized a further delegation of legislative power to others.<sup>78</sup>

Alexander and Prakash are correct, but Locke's prohibition on delegation is even stronger than they suggest. According to Locke and social compact theory, the people *cannot* authorize a further delegation of legislative power to others, because only those who possess legislative power fully may delegate it, and only the people can fully possess legislative power.

One might respond to this argument by using the analogy of a gift. When one gives a gift, the recipient is not prohibited from giving the gift to another. Why should we understand political power differently? The answer is that, unlike a gift, political power always resides in the people and cannot be given away or transferred to others. It may only be delegated. That delegation creates a principal-agent or trustee relationship, which forbids the further delegation of power. Only principals may delegate power, and the representatives of the people cannot become principals since they never fully possess power.

The Founders' agreement with this position is implied in *Federalist* 84.<sup>79</sup> In that essay, Alexander Hamilton defended the omission of a bill of rights in the original Constitution because "bills of rights are in their origin, stipulations between kings and their subjects[,] reservations of rights *not surrendered* to the prince."<sup>80</sup> In other nations, bills of rights were necessary to specify the particular powers that the people retained.<sup>81</sup> The presumption in those nations was that the government possessed sovereignty, and the government's political powers were unlimited except as to what was expressly enumerated in the bill of rights.<sup>82</sup> The foundation for this presumption was the principle that sovereignty rested in the government and not in the people; thus, the people were only entitled to the rights that were stipulated in the bill

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78. Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. CHI. L. REV. 1297, 1322 (2003). Alexander and Prakash accurately address the nondelegation doctrine at least in part by discussing the Founders' social compact theory. *Id.* Yet they also claim that "[w]e have *not* sought to prove that the conventional nondelegation doctrine is the one enshrined in the Constitution." *Id.* at 1328 (emphasis added). They do not claim to show that "the Constitution enshrines Locke's view about the limits on legislative power." *Id.* at 1323. The aim of this Article, in part, is to show that the Founders *did* agree with Locke's formulation and *did* enshrine it in the Constitution. Another author who notes the social compact argument on behalf of the nondelegation doctrine is Patrick Garry. See Patrick Garry, *Accommodating the Administrative State*, 38 ARIZ. ST. L.J. 921, 927 (2006). Yet Garry only devotes three sentences to the concept, as it is only peripherally related to the thesis of his article. *Id.*

79. THE FEDERALIST NO. 84, at 587 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

80. *Id.*

81. *Id.*

82. *Id.*

of rights, the rights that the government had agreed to reserve for the people.<sup>83</sup>

But a bill of rights, Hamilton argued, is unnecessary in a government based on the principles of the *Declaration of Independence*.<sup>84</sup> Bills of rights, he explained, "have no application to constitutions professedly founded upon the power of the people, and executed by their immediate representatives and servants. *Here, in strictness, the people surrender nothing, and as they retain everything, they have no need of particular reservations.*"<sup>85</sup> In governments founded upon the power of the people – that is, through a social compact – sovereignty must be understood differently. Hamilton argued that the people never actually give away power to the government.<sup>86</sup> In delegating power to the government, the people are always understood to retain their sovereignty. They surrender nothing and retain everything.

Therefore, according to social compact theory, the people are the fountain of sovereignty and are unable to relinquish or alienate their sovereignty. Those who hold political power as representatives of the people are merely the trustees, rather than the possessors of power. And this argument was repeated throughout the founding period. For instance, James Burgh's *Political Disquisitions* affirmed that "[w]hen we elect persons to *represent* us in parliament (says a judicious writer) we must not be supposed to depart from the smallest right which we have *deposited* with them. We make a *lodgment*, not a *gift*; we *entrust*, but *part* with nothing."<sup>87</sup> Instead of thinking of political power as a gift, transferred out of the hands of the people and given away to public officers, Burgh and the Founders thought of political power as a lodgment, which officers were allowed to borrow but never to fully possess. Burgh asserts that the power of government "is only borrowed, delegated, and limited by the intention of the people."<sup>88</sup>

Several other Framers reiterated the basic social compact argument of *Federalist 84*. James Wilson, for instance, argued at the Pennsylvania Ratifying Convention that "the supreme, absolute and uncontrollable authority, *remains* with the people," regardless of whether they have delegated power to the government.<sup>89</sup> Wilson said, "I recollect no constitution founded on this principle: but we have witnessed the improvement, and enjoy the happiness, of seeing it carried into practice."<sup>90</sup> Beginning with this principle of sovereignty in the people, Wilson concluded that the supreme power

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83. *Id.*

84. *Id.*

85. *Id.* (emphasis added).

86. *Id.*

87. James Burgh, *Political Disquisitions*, in 1 THE FOUNDERS' CONSTITUTION: MAJOR THEMES 54, 55 (Philip B. Kurland & Ralph Lerner eds., 1987).

88. *Id.* at 54.

89. James Wilson, *Pennsylvania Ratifying Convention*, in 1 FOUNDERS' CONSTITUTION: MAJOR THEMES 61, 62 (Philip B. Kurland & Ralph Lerner eds., 1987).

90. *Id.*

*resides* in the PEOPLE, as the fountain of government; that the people have not – that the people mean not – and that the people ought not, to part with it to any government whatsoever. In their hands it remains secure. They can delegate it in such proportions, to such bodies, on such terms, and under such limitations, as they think proper. I agree with the members in opposition, that there cannot be two sovereign powers on the same subject.<sup>91</sup>

According to Wilson, the people are the “fountain” of governmental power – the only source of power is the people. Thus, there is only one sovereign power in a free society: the people. When they delegate power to government, they are not creating a sovereign power but merely delegating their sovereignty to be exercised by a trustee. Consequently, in the social compact, the people necessarily designate the government as the endpoint of the flow of power; the government cannot delegate that power on to another body. Only the possessors of power can delegate it.

James Otis argued that “supreme absolute power is *originally* and *ultimately* in the people; and they never did in fact *freely*, nor can they *rightfully* make an absolute, unlimited renunciation of this divine right. It is ever in the nature of the thing given in *trust* . . . .”<sup>92</sup> Like Wilson and Hamilton, Otis argued that the people are always the source of “supreme absolute power,” and that there can never be a renunciation of this sovereignty. Rather, the power delegated to government is “given in trust.” Because the government only holds political power in trust, it does not truly possess the power in total.

Social compact principles define both the relationship between the people and their representatives and the limits imposed upon the latter. These principles create a relationship of superior-subordinate when power is delegated from the sovereign people to their agents. The people, as sovereign, are superior to the government, which is their subordinate and trustee. Only one who possesses power (who is the sovereign) can delegate that power to an agent. To claim that Congress can delegate power is to also claim that Congress is the sovereign – not the people. It would assume, contrary to the principles of the Founders, that governments possess power rightfully by nature, rather than by consent. In short, the people would be unjustly deprived of their sovereignty if their subordinate and trustee delegated power to another entity. It is worth noting that this view of the social compact comports with the basic principles of agency law during the founding period and that early American statements on the nondelegation doctrine linked the principle to agency law rather than separation of powers, democratic accountability, or mere constitutional text.<sup>93</sup>

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91. *Id.*

92. James Otis, *The Rights of the British Colonies Asserted and Proved*, in 1 THE FOUNDERS’ CONSTITUTION: MAJOR THEMES 52, 52 (Philip B. Kurland & Ralph Lerner eds., 1987).

93. *See, e.g.*, JOSEPH STORY, COMMENTARIES ON THE LAW OF AGENCY § 14 (1839).

In short, according to the Framers' political philosophy, the people are the only rightful source of sovereignty, and they cannot relinquish their sovereignty. The people delegate authority to the government to act for the sake of the public good, but they surrender nothing. The government never possesses power but only holds it as a delegate in trust. Therefore, the government cannot delegate the power that is given to it by the people, for it is not possible to delegate something that one does not possess in the first place. If it were maintained that Congress may delegate the power granted to it by the people, that position would be irreconcilable with the clear view of the Founders that the people are the only rightful source of sovereignty and thus the only proper source of delegated power. Accordingly, the theory of the social compact, and not the idea of the separation of powers, is the rightful starting point for grasping the theory of the nondelegation doctrine.

Understanding the connection between social compact theory and nondelegation enables us to understand the nondelegation principle implicit in the constitutional text. The Vesting Clause of Article I clearly states that "the legislative powers herein granted shall be vested in a Congress."<sup>94</sup> This language prohibits Congress from transferring legislative power to an authority that is not the Congress. Clearly, in short, the constitutional text supports this reading of the Founders' political theory, but only after beginning with that theory can we discern the meaning of the Constitution's text.

In recent years, scholars have come closer to unearthing the social compact foundations of the nondelegation doctrine.<sup>95</sup> Most prominent among these scholars is Philip Hamburger, who argues,

[T]he difficulty is not delegation, but subdelegation. By means of the Constitution, the people delegate power to government. Accordingly, when Congress purports to give its legislative power to the executive, the question is not whether the principal [i.e., the people] can delegate the power, but whether the agent [i.e., Congress] can subdelegate it.<sup>96</sup>

Hamburger emphasizes the principal-agent relationship that undergirds social compact theory. The people are the principal, and the government the agent. Only principals may delegate, and since the people do not alienate their power, the government cannot become a principal and therefore may not further delegate.<sup>97</sup> Although Hamburger does not discuss delegation in terms of social compact theory, his framing of the debate as an issue of subdelegation is perfectly compatible with the analysis of social compact theory in this Part, which attempts to explain more fully the roots of the principal-agent relationship between the people and the government in terms of popular sovereignty. Social compact theory also adds an important corollary to the prin-

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94. U.S. CONST. art. I, § 1.

95. See generally Lawson, *Delegation*, *supra* note 63.

96. HAMBURGER, *supra* note 2, at 377.

97. *Id.*



principal-agent theory undergirding the nondelegation doctrine. According to agency law, an agent may subdelegate power but only if it is explicitly authorized by the principal. Social compact theory declares, however, that the people may never alienate their sovereignty, and therefore they may never authorize the government to subdelegate the powers they vest in it. Therefore, a close examination of the Framers' understanding of the social compact enables us to see the question of delegation as an issue of fundamental principle, rather than a mere legal arrangement between a principal and an agent, and it also illustrates the Framers' own commitment to this principle in their own words.<sup>98</sup>

### III. REPUBLICANISM, REPRESENTATION, AND NONDELEGATION

While the nondelegation doctrine was primarily grounded in the theory of the social compact, it is also buttressed by a related principle: republicanism.<sup>99</sup> There was a broad consensus during the framing and ratification of the Constitution that it established a republic, rather than a democracy. Two of the most famous *Federalist* essays, numbers 10 and 39, addressed the centrality of republicanism to the defenders of the Constitution. In *Federalist 10*, Madison distinguished between a republic and a "pure democracy" and explained the advantages of the former over the latter.<sup>100</sup> He was even more emphatic in *Federalist 39*, proclaiming that "no other form [than a republic] would be reconcilable with the genius of the people of America; with the fundamental principles of the revolution; or with that honorable determination, which animates every votary of freedom, to rest all our political experiments on the capacity of mankind for self-government."<sup>101</sup> Madison admitted in his public defense of the Constitution that unless it set up a republic, "its advocates must abandon it as no longer defensible."<sup>102</sup>

But this claim raised an immediate question: what does it mean to establish a republican form of government? How should we define a republic? Madison admitted that political theorists had not come to a consensus on its

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98. Hamburger does note that the issue of subdelegation was an issue of fundamental principle in his analysis. For instance, he writes that it "turned on the central question of modern government, whether power arises from the people or from government." *Id.* at 385.

99. As Hamburger explains, "Considered from a slightly different angle, the people's delegation of legislative power to their elected legislature was the very nature of republican government." *Id.* He goes on, "[T]he principle of delegation and its implications for subdelegation are the foundation of republican government and constitutional limits." *Id.* at 402.

100. THE FEDERALIST NO. 10, at 62 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter MADISON, FED. 10].

101. THE FEDERALIST NO. 39, at 250 (James Madison) (Jacob E. Cooke ed., 1961) [hereinafter MADISON, FED. 39].

102. *Id.*

essential characteristics.<sup>103</sup> "Were an answer to this question to be sought," he explained, "in the application of the term by political writers . . . no satisfactory one would ever be found."<sup>104</sup> So Madison offered his own definition. Earlier, in *Federalist 10*, he called a "Republic . . . a Government in which the scheme of representation takes place."<sup>105</sup> By representation he meant "the delegation of the Government . . . to a small number of citizens elected by the rest."<sup>106</sup> Hamilton used the same language in the previous essay, calling "the representation of the people in the legislature by deputies of their own election" one of the great improvements in modern political science.<sup>107</sup>

In short, elected representation in the legislature characterizes republican governments. Madison argued that "[t]he elective mode of obtaining rulers is the characteristic policy of republican government" for maintaining the wisdom and virtue of their officers.<sup>108</sup> Madison offered his most systematic definition of republicanism in *Federalist 39*. There, he wrote:

[W]e may define a republic to be, or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people; and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it. . . . It is *sufficient* for such a government that the persons administering it be appointed, either directly or indirectly, by the people; and that they hold their appointments [during pleasure, for a limited period, or during good behavior.]<sup>109</sup>

In this convoluted definition, Madison twice explains that a republican government's powers must be "derived" from the "great body" of the citizenry.<sup>110</sup> While his meaning is not entirely clear, it seems that he was referring either to the original establishment of the government through a social compact, or to the regular filling of government offices through election, or both. In any of these interpretations, however, the connection between the people and their officers is paramount. A republican government receives its powers from the people. Either to confirm or to clarify this point, Madison explicitly says that "the persons administering it [must] be appointed, either directly or indirectly, by the people."<sup>111</sup> The connection between the people and their

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103. *Id.*

104. *Id.*

105. MADISON, FED. 10, *supra* note 100, at 62.

106. *Id.*

107. THE FEDERALIST NO. 9, at 51 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

108. THE FEDERALIST NO. 57, at 384 (James Madison) (Jacob E. Cooke ed., 1961).

109. MADISON, FED. 39, *supra* note 101, at 250.

110. *Id.*

111. *Id.*

rulers, through elections, is central to Madison's definition of republicanism, both in *Federalist 39* and throughout *The Federalist* essays.<sup>112</sup>

The modern administrative state is predicated in part upon the idea of a neutral civil service, which derives its powers not from the people through elections but from an impartial examination that measures its competence to administer a specific program or statute. To the extent that the officials who serve in the bureaucracy are making laws, their activities are not only incompatible with the theory of a social compact, but also with the basic principle of republicanism, which demands that power is derived from the people through elected representatives.

Defenders of the modern administrative state might respond by noting that because Madison's definition of republicanism allows for appointment of officers "directly or indirectly," and because administrators are indirectly appointed, the administrative state is compatible with republicanism. The first difficulty with this counterargument is that the people do not even indirectly appoint most administrative officers. While many officers in the top ranks of the bureaucracy are political appointees who possess an indirect election from the people, the overwhelming majority of agency officials – including many who exercise significant policymaking authority – are not.

Let us assume for argument's sake, however, that administrative officers are indirectly appointed. It might also be asserted that Madison's definition of republicanism, which allows for indirect appointment of officers, actually *sanctions* lawmaking by indirectly elected administrative officials. After all, Madison himself explains that republics have the advantage of representatives who can "refine and enlarge the public views" by filtering them through representatives who can resist public opinion.<sup>113</sup> In his most famous explanation of this feature of representation, Madison wrote that a Senate with long terms of office would provide "a defense to the people against their own temporary errors and delusions."<sup>114</sup> Similarly, Alexander Hamilton argued in *Federalist 71* that "[t]he republican principle demands, that the deliberate sense of the community should govern the conduct of those to whom they entrust the management of their affairs; but it does not require an unqualified complaisance to every sudden breeze of passion, or to every transient impulse" of public opinion.<sup>115</sup> Given that the Framers expected representatives to be able to resist, refine, and enlarge public opinion, perhaps their theory of republicanism has room for disinterested administrative officers who can make deci-

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112. *Id.* Of course, the people do not have to elect all government employees, either directly or indirectly. Those employees who do not exercise significant political authority are not "officers" and therefore can be appointed outside of the popular mechanisms required for appointment or election of those who do exercise political authority.

113. MADISON, FED. 10, *supra* note 100, at 62.

114. MADISON, FED. 63, *supra* note 59, at 425.

115. THE FEDERALIST NO. 71, at 482 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

sions on behalf of the people, even if the people are not involved in putting them into office.

However, this interpretation of republicanism is at odds with basic statements elucidating the Framers' own understanding of a republic. For Madison, republicanism demanded not only an electoral connection between the people and all political officers, but also that those who make the laws have a special, direct connection to the people through frequent elections. As he explained in *Federalist 52* in addressing the term lengths of members of the House of Representatives:

As it is essential to liberty that the government in general, should have a common interest with the people; so it is particularly essential that the branch of it under consideration, should have an immediate dependence on, & an intimate sympathy with the people. Frequent elections are unquestionably the only policy by which this dependence and sympathy can be effectually secured.<sup>116</sup>

Officers who reside in the legislative branch, unlike those in the executive or judiciary, must have an "immediate dependence on" the people for their power. While Madison indicated in *Federalist 39* that republicanism only requires either a direct or an indirect relationship between the people and their officers, in *Federalist 52*, he further specifies that lawmaking must be performed by those immediately dependent upon the people. This may explain why Madison advocated direct election of both the House of Representatives and the Senate at the Constitutional Convention, as well as why he only half-heartedly defended indirect election of U.S. Senators in *Federalist 62*.

Representatives in the legislature must not only be elected, but they also must be immediately dependent on the people in order to preserve liberty. Republicanism, in other words, demands an electoral connection between the people and all of their officers, and it also requires an immediate relationship between the people and those who exercise lawmaking authority. Administrative officers lack that connection. At the very least, they clearly lack an immediate connection to the people that is a necessary condition for lawmaking. The delegation of legislative power to administrative officers, therefore, violates not only social compact theory, but also republicanism.

#### IV. IMPLICATIONS

This Article argues that the nondelegation doctrine is a cardinal principle of American constitutionalism, and that it is derived not from the separation of powers, democratic accountability, or the text of the Constitution, but from social compact theory and republicanism. The modern administrative state, by vesting lawmaking powers in the hands of administrative officers

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116. THE FEDERALIST NO. 52, at 355 (James Madison) (Jacob E. Cooke ed., 1961).

who are not representatives of the people and who are not given legislative power by the people in the Constitution, threatens the social compact and the principle of republican government. But this is only true if administrative officers are exercising legislative power. How can we know whether the powers wielded by bureaucrats are legislative or executive?

The application of the theory discussed above is beyond the scope of this Article. One way to consider the implications of the theory is to see how it was applied in the early years of American history, in specific legislative debates and statutes. Another way is to examine various settled definitions of legislative power that have been offered by political theorists from the founding period. While the Framers knew that it was impossible to offer a fully satisfactory definition of law, they believed that the contours of legislative power could be defined in a way that distinguished it from executive and judicial power. Madison acknowledged in *Federalist 37* 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>117</sup> Yet he also affirmed that “[l]aw is defined to be a rule of action.”<sup>118</sup> Alexander Hamilton announced in *Federalist 75* that “[t]he essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society.”<sup>119</sup> In spite of the difficulty in distinguishing between legislative and executive power, the Framers attempted to provide guidelines that would at least allow for application of the nondelegation principle in clear cases. Madison himself would argue in a delegation debate in Congress in 1792 that while he “saw some difficulty in drawing the exact line between subjects of legislative and ministerial deliberations[,] . . . such a line most certainly existed.”<sup>120</sup>

This Article’s goal is modest – to establish that there is a nondelegation principle in the U.S. Constitution, and that it is ultimately derived not from separation of powers theory, accountability, or simply the text of the document, but that it flows from social compact theory and republicanism. It will always be difficult to determine when this principle is violated in practice. Applying the doctrine to specific cases will require practical judgment informed by constitutional history and clear definitions that distinguish legislative and executive power. But most fundamentally, it will require clarity about what the nondelegation principle says and why it is worth enforcing to preserve the sovereignty of the people and a republican form of government.

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117. THE FEDERALIST NO. 37, at 235 (James Madison) (Jacob E. Cooke ed., 1961).

118. *Id.*

119. THE FEDERALIST NO. 75, at 504 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

120. 3 ANNALS OF CONG. 700 (1792).