

A Purple Garment for Their Nakedness: Wilson, Hegel, and The Non-Delegation Doctrine

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INTRODUCTION

When Congress enacted the Sex Offender Registration and Notification Act (“SORNA”) in 2006, it delegated to the Attorney General the authority to “specify the applicability” and “prescribe rules” for the registration of pre-Act offenders.¹ Likewise, when Congress enacted the Sentencing Reform Act of 1984, it delegated to the United States Sentencing Commission the authority to create sentencing guidelines.² These are just two examples of the kind of Congressional delegation of authority that has become commonplace in modern America. Under the current framework, a delegation of Congress’ authority is acceptable as long as Congress provides an “intelligible principle” to guide the agency’s discretion.³

The framers of the United States Constitution would likely be surprised by this trend. Their view, commonly referred to as the

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¹ Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109–248, 120 Stat. 587.

² See *Mistretta v. United States*, 488 U.S. 361, 361 (1989).

³ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 409 (1928).

“non-delegation doctrine,” was that Congress cannot delegate its legislative power to anyone else.⁴ In practice, this doctrine means that the important policy choices should be made by Congress.⁵

Since 1935, the non-delegation doctrine has largely been ignored.⁶ However, in the 2019 case, *Gundy v. United States*, three dissenting justices appeared to be in support of reviving the non-delegation doctrine.⁷ A fourth justice signaled in his concurrence that he would also be willing to reconsider the non-delegation doctrine,⁸ and the most recent addition to the court is likely to be on board with doing so as well.⁹ This renewed interest in the delegation debate means that the Supreme Court may soon consider what a revived non-delegation doctrine would look like in practice. Congress will face significant questions about how to proceed if it is forced to take a more active role in legislation.

⁴ See U.S. CONST. art. I, § 1 (separating the legislative, executive, and judicial functions of government). See also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1239 (1994) [hereinafter *Rise and Rise*].

⁵ See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 685–86 (1980) (Rehnquist, J., dissenting) (“[The nondelegation doctrine] ensures to the extent consistent with orderly governmental administration that important choices of social policy are made by Congress, the branch of our Government most responsive to the popular will.”).

⁶ See *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 352, 352–53 (1974) (“The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes. . . .”).

⁷ See *Gundy v. United States*, 139 S. Ct. 2116, 2131, 2140 (2019) (Gorsuch, J., dissenting) (maintaining that the delegation in *Gundy* was unconstitutional in violation of the non-delegation doctrine). Justice Gorsuch noted that he “would not wait” to revisit the non-delegation doctrine. *Id.* at 1232.

⁸ *Id.* at 2130–31. Justice Alito concurred in the judgment but noted that the Court's rejection of the non-delegation doctrine contradicts the Constitution's clear position that Congress cannot delegate its powers to another branch. He stated that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.” *Id.*

⁹ See *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., dissenting in denial of certiorari) (“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. Justice Gorsuch's opinion built on views expressed by then-Justice Rehnquist some 40 years ago in *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U. S. 607, 685–686 (1980) (Rehnquist, J., concurring in judgment). In that case, Justice Rehnquist opined that major national policy decisions must be made by Congress and the President in the legislative process, not delegated by Congress to the Executive Branch.”).

This article seeks to fill a gap in the scholarly literature by illuminating the fundamentally un-American roots of delegation. While many have critiqued the negative effects of delegation, few have traced the philosophical foundations of delegation back in history. Those who have tend to focus on the English historical angle rather than continental European contributions. Overlooked has been the direct pathway from German philosopher G.W.F. Hegel through U.S. President Woodrow Wilson and into the American republic. This article unpacks that critical piece of history. In doing so, it provides the necessary impetus for Congress to reclaim legitimacy as the most powerful branch of government.¹⁰ Congress must recognize that delegation is rooted in philosophical tenets that are contrary to those upon which the American Constitution was built. Recognizing the fundamental conflict between the philosophies underlying the delegation debate may provide the necessary spark for Congressional revitalization.

This article begins by examining the philosophical roots of the American constitutional order, which are found in the writings of English philosopher John Locke, French thinker Baron de Montesquieu, and others.¹¹ Second, this article contrasts those roots with the philosophical foundations of the progressivism that toppled the non-delegation doctrine.¹² These foundations include the writings of German philosopher George Wilhelm Friedrich Hegel and his influence on Woodrow Wilson, James Landis, Frank Goodnow, and the other architects of the American administrative state.¹³ Third and finally, this article examines the implications of this contrast for the future of the non-delegation doctrine.¹⁴

I. THE LOCKEAN ROOTS OF THE NON-DELEGATION DOCTRINE

The American Constitution established a system in which the government's powers were separated into three branches—legislative, executive, and judicial.¹⁵ In doing so, the framers drew

¹⁰ See THE FEDERALIST NO. 51 (James Madison) (Gideon ed., 2001) (“In republican government, the legislative authority necessarily predominates.”).

¹¹ See *infra* Part I.

¹² See *infra* Part II.A.

¹³ See *infra* Part II.B.

¹⁴ See *infra* Part III.

¹⁵ U.S. CONST. art. I, § 1 (separating the legislative, executive, and judicial functions of government).

on a long tradition of political thought. For instance, the Romans had instituted a division of powers at the suggestion of Cicero, and the English monarch's powers were separate from the Parliamentary power during the sixteenth and seventeenth centuries.¹⁶ Many of the framers' contemporaries also advocated for a separated-powers government. Foremost among these was the eminent French philosopher Montesquieu, who popularized the separation of powers in his book *Spirit of the Laws*.¹⁷ Montesquieu argued that the separation of powers was necessary to limit the corrupting nature of power.¹⁸ Renowned legal theorist William Blackstone echoed Montesquieu's sentiments, noting that a tyrannical government was one in which "the right of both making and of enforcing the laws[] is vested in one and the same . . . body of men" and that "wherever these two powers are united together, there can be no public liberty."¹⁹ Drawing on this foundation, the framers believed that the separation of powers was necessary in order to ensure that the government could not consolidate and enlarge its power.²⁰ They separated lawmaking from execution and adjudication in order to "promote accountability and the rule of law, and thereby to safeguard individual liberty."²¹

The government, however, was limited in an even more basic way: it could only utilize the powers that had been granted to it by the people. As was so memorably phrased in the Declaration of Independence, "[g]overnments . . . deriv[e] their just powers

¹⁶ See PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 381 (2014) (noting that John Locke recognized the king's separation from the Parliament).

¹⁷ CHARLES DE SECONDAT BARON DE MONTESQUIEU, THE SPIRIT OF THE LAWS bk XI, 172–74 (Thomas Nugent trans. 1752, Batoche Books 2001) (1748).

¹⁸ See Letter from Lord Acton to Archbishop Mandell Creighton (Apr. 5, 1887), in LECTURES ON MODERN HISTORY (John Neville Figgis & Reginald Vere Laurence eds., Acton–Creighton Correspondence ed., 1906) (1887). Montesquieu essentially echoed the words of Lord Acton: "Power tends to corrupt and absolute power corrupts absolutely." *Id.*

¹⁹ 1 WILLIAM BLACKSTONE, COMMENTARIES 129, 134, 137–38, 142, 146.

²⁰ See James Madison, *Notes for Speech on Constitutional Amendments*, I ANNALS OF CONG. 448–59, 467–68 (June 8, 1789) (Joseph Gales ed.) ("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.")

²¹ Neomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y.U. L. REV. 1463, 1465 (2015).

from the consent of the governed.”²² The framers distilled this concept from John Locke’s *Second Treatise of Civil Government*.²³ Locke’s “social compact” theory espoused the idea that citizens conveyed to the government certain powers and received in return the protection of their inalienable rights.²⁴ The American constitutional structure, in which the people grant to the government the power to preserve their basic rights, was premised in large part on this theory.²⁵ In other words, the U.S. Constitution was modeled after a Lockean conception of government “from which it was evident that legal obligation rests on consent and that binding laws have to be made by the society’s representative legislature.”²⁶ According to Locke, laws not made by society’s elected representatives are invalid because they lack “that which is absolutely necessary to its being a law, the consent of the society.”²⁷

This grant of power gives rise to a fiduciary relationship of sorts in which the government has an obligation to wisely utilize the powers entrusted to it by the people.²⁸ The existence of such a fiduciary relationship has obvious implications for how the government can use, change, or delegate the powers it is entrusted with. As stated by former U.S. Supreme Court Justice James Iredell, it means that “no power can be exercised but what is expressly given.”²⁹ In other words, the key concept underlying

²² THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

²³ See generally JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* (C.B. McPherson ed., Hackett Pub. 1980) (1690).

²⁴ *Id.* at §§ 95, 96.

²⁵ See GARY LAWSON ET AL., *THE ORIGINS OF THE NECESSARY AND PROPER CLAUSE 53* (2010) (“As elaborated by Locke, the terms of the social compact were that citizens conveyed to government certain powers (alienable rights) so those citizens could enjoy more fully the powers retained (inalienable rights). . . .”).

²⁶ HAMBURGER, *supra* note 16, at 23.

²⁷ LOCKE, *supra* note 23, at § 134.

²⁸ See Robert G. Natelson, *The Constitution and the Public Trust*, 52 *BUFF. L. REV.* 1077, 1083 (2004) (analyzing the wealth of founding-era evidence that the Constitution was indeed a fiduciary instrument in which the government was the agent, or trustee, of the people). See also LAWSON ET AL., *supra* note 25, at 53 (noting that, as a result of this social compact, “the government had a fiduciary obligation to manage properly what had been entrusted to it.”); GARY LAWSON & GUY SEIDMAN, *A GREAT POWER OF ATTORNEY: UNDERSTANDING THE FIDUCIARY CONSTITUTION* 48 (2017) (“[G]iven the text, structure, history, and background of the Constitution, there are good reasons for thinking the Constitution is some kind of fiduciary or agency document.”).

²⁹ Speech by Mr. James Iredell, in 4 *THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 148–49 (2d ed., Jonathan Elliot comp., Lenox Hill Pub. & Dist. Co. 1974) (1836).

the framers' sense of the government's fiduciary responsibility to the people was the idea that the power entrusted to a governmental agent could not be delegated away to another agent.

This fiduciary understanding of government also stems back to John Locke. Locke described the government's fiduciary responsibility to the people as a "trust" and the legislator's role as that of a "trustee."³⁰ Locke was echoing the Roman statesman Cicero, who wrote that "the administration of the government, like the office of a trustee, must be conducted for the benefit of those entrusted to one's care, not of those to whom it is entrusted."³¹ Locke went on to say that any laws made by those "whom the people have not appointed to do so" are invalid; the people can feel free to disobey them.³²

Numerous other legal sources echoed this understanding of the law. Founding-era legal scholar Matthew Bacon wrote that "[o]ne who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for this being a trust and confidence reposed in the party, cannot be assigned to a stranger. . . ."³³ Joseph Story and Samuel Livermore, two prominent early American legal thinkers, echoed Bacon's words almost identically.³⁴ Eighteenth-century British lawyer John Comyns stated that if an agent acted outside his authority the action was void.³⁵ Historian James Kent wrote in an 1827 legal commentary that "[a]n agent, ordinarily, and without express authority, has not power to employ a sub-agent to do the business, without the knowledge or consent of his principal. . . . [T]he agency is generally a personal trust and confidence which

³⁰ See LAWSON & SEIDMAN, *supra* note 28, at 39.

³¹ M. TULLIUS CICERO, *DE OFFICIIS*, bk. 1, § 85 (T.E. Page, Capps, & W.H.D. Rouse eds., Walter Miller trans., 1913).

³² LOCKE, *supra* note 23, at § 212. In fact, the idea that the legislature cannot "transfer the power of making laws to any body else" was one of Locke's four key points regarding the legislative power. *Id.* at § 142.

³³ 1 MATTHEW BACON, *A NEW ABRIDGEMENT OF THE LAW* 526 (John Bouvier ed., Philadelphia, T. & J.W. Johnson 1852) (1730).

³⁴ See JOSEPH STORY, *COMMENTARIES ON THE LAW OF AGENCY AS A BRANCH OF COMMERCIAL AND MARITIME JURISPRUDENCE* § 13, at 11 (6th ed., Edmund H. Bennett rev., Boston, Little, Brown & Co. 1863); 2 SAMUEL LIVERMORE, *A TREATISE ON THE LAW OF PRINCIPAL AND AGENT AND OF SALES BY AUCTION* 298 (Baltimore, n. pub. 1818).

³⁵ See 1 JOHN COMYNS, *A DIGEST OF THE LAWS OF ENGLAND* 458 (London, Strahan & Woodfall 1780).

cannot be delegated.”³⁶ Locke addressed the issue head-on:

The power of the legislative, being derived from the people by a positive voluntary grant and institution, can be no other than what that positive grant conveyed, which being only to *make laws, and not to make legislators*, the legislative can have no power to transfer their authority of making laws and place it in other hands.³⁷ (emphasis added).

The legislative cannot transfer the power of making laws to any other hands; for it being but a delegated power from the people, they who have it cannot pass it over to others. The people alone can appoint the form of the commonwealth, which is by constituting the legislative, and appointing in whose hands that shall be. And when the people have said we will submit to rules, and be governed by laws made by such men, and in such forms, nobody else can say other men shall make laws for them; nor can the people be bound by any laws but such as are enacted by those whom they have chosen and authorized to make laws for them.³⁸

[N]or can any edict of any body else, in what form soever conceived, or by what power soever back, have the force and obligation of a law, which has not its sanction from that legislative which the public has chosen and appointed: for without this the law could not have that would is absolutely necessary for its being a law, the consent of the society.³⁹

In other words, Locke viewed the grant of legislative power to the legislative branch as something that could not be given away to another branch because it was already delegated and entrusted to the legislative branch by the people.⁴⁰ That entrustment was important because it made sure that the citizens had a “standing rule to live by,” rather than the “inconstant, uncertain, unknown, arbitrary will of another

³⁶ 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 495 (New York, O. Halsted 1827).

³⁷ LOCKE, *supra* note 23, at § 141.

³⁸ *Id.*

³⁹ *Id.* at § 134.

⁴⁰ See HAMBURGER, *supra* note 16, at 381. Locke maintained that “the people’s delegation of legislative power to the legislative body precluded it from transferring its power.” *Id.* Hamburger also references the writings of American military officer George Gilmer, who stated that “[t]he legislature cannot transfer the power of making laws to any other hands; for it being a delegated power from the people, they who have it cannot pass it over to others.” *Id.* at 384. This fiduciary relationship was based on the Latin phrase *potestas delegate non potest delegare*—“that delegated power cannot be further delegated.” *Id.* at 386.

man.”⁴¹

The framers built this concept into the fabric of the American Constitution.⁴² The Supreme Court has long recognized that the principle of nondelegation “is rooted in the principle of separation of powers that underlies our tripartite system of Government.”⁴³ The framers understood that in a constitutional system, “Congress generally cannot delegate its legislative power to another Branch.”⁴⁴ Thomas Jefferson stated the “laws forbid the . . . transfer of [elected representatives] powers into other hands and other forms, without consulting the people.”⁴⁵ In *Federalist No. 10*, James Madison explained that one of the defining characteristics of republics was their “delegation of the government . . . to a small number of citizens elected by the rest.”⁴⁶ Alexander Hamilton warned in *Federalist No. 78* that “every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void” and that liberty “would have everything to fear from [the] union” of any of the branches.⁴⁷ This view was in line with the “settled agency law [of] the eighteenth century,” which held that “delegated discretionary powers in an agency instrument . . . could not be subdelegated absent a specific authorization in the instrument.”⁴⁸ Since the Constitution did not contain any such authorization,

⁴¹ LOCKE, *supra* note 23, at § 22.

⁴² See LAWSON & SEIDMAN, *supra* note 28, at 48.

⁴³ *Mistretta v. United States*, 488 U.S. 361, 371 (1989).

⁴⁴ *Id.* at 371–72 (citing *Field v. Clark*, 143 U.S. 649, 692 (1892)); U.S. CONST. art. I, § 1.

⁴⁵ THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 132 (Boston, Lilly & Wait 1832) (1785).

⁴⁶ THE FEDERALIST, *supra* note 10, NO. 10, at 46 (James Madison). It is interesting to note that Madison states that these powers are delegated to representatives that are “elected.” *Id.* Since administrative agency officials are not elected, Madison’s words would appear to have implications for whether and how that power can be delegated. See also HAMBURGER, *supra* note 16, at 385 (noting that this statement shows that the delegation of Congressional authority violates not only the American constitution, but republican government as a whole).

⁴⁷ THE FEDERALIST, *supra* note 10, NO. 78, at 403 (Alexander Hamilton). The similarities between this statement and Locke’s statement (quoted above) are striking. See also THE FEDERALIST, *supra* note 10, NO. 47 (James Madison) (stating that, regarding the separation of powers, “[n]o political truth is certainly of greater intrinsic value, or is stamped with the authority of more enlightened patrons of liberty.”).

⁴⁸ Gary Lawson & Steven Calabresi, *The Depravity of the 1930s and the Modern Administrative State*, 94 NOTRE DAME L. REV. 821, 855 (2019).

“[m]embers of Congress must personally exercise their delegated legislative power, just as stewards or guardians must personally exercise the authority with which they have been entrusted.”⁴⁹ The Constitution, in other words, creates “a network of agents” who “are empowered to manage some portion of the affairs of the principal, We the People (and its posterity), to the extent and the forms specified in the instrument.”⁵⁰

The early state constitutions also reflected this norm of non-delegation. The Massachusetts Constitution of 1780 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; to the end it may be of a government of laws, and not of men.⁵¹

The Virginia Constitution of 1776 stated that “[t]he legislative, executive, and judiciary department . . . shall be separate and distinct, so that neither exercise the powers properly belonging to the other.”⁵² The Georgia and Vermont Constitutions used similar language.⁵³

The presumption of non-delegation was also borne out in the courts. In the seminal case of *Marbury v. Madison*, the U.S. Supreme Court made it unmistakably clear that a Congressional delegation of legislative power to another branch or entity would be antithetical to the Constitution’s design.⁵⁴

The powers of the Legislature are defined and limited; and that those limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may at any time be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished if those limits do not confine the persons on whom they

⁴⁹ *Id.*

⁵⁰ LAWSON & SEIDMAN, *supra* note 28, at 54.

⁵¹ MASS. CONST. art. XXX, pt. I. See LOCKE, *supra* note 23, at §141. The words of the Massachusetts Constitution harken back to Locke’s notion that liberty required a “standing rule to live by” rather than the “inconstant, uncertain, unknown, arbitrary will of another man.” *Id.*

⁵² VA. CONST. § 3 (1776).

⁵³ GA. CONST. art. I (1777); VT. CONST. ch. II, § 6 (1777).

⁵⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176–77 (1803).

are imposed, and if acts prohibited and acts allowed are of equal obligation.⁵⁵

Likewise, in *Calder v. Bull*, the Supreme Court channeled John Locke when it noted that “an act of the legislature . . . contrary to the great first principles of the social compact, cannot be considered a rightful exercise of legislative authority.”⁵⁶ In *Fletcher v. Peck*, the Court wrote that “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society.”⁵⁷ The Court held in the 1813 case of *Cargo of the Brig Aurora v. United States* that Congress cannot delegate its power to make laws regulating private conduct.⁵⁸ In the 1825 case of *Wayman v. Southard*, the Supreme Court examined whether state legislatures could regulate federal courts located within that state.⁵⁹ Congress had delegated the authority to regulate those federal courts to the federal courts themselves, so the case was essentially concerned with whether that delegation was constitutional.⁶⁰ The Court held that state legislatures could not regulate federal courts located within their state borders and that Congress’ delegation to the federal courts was not unconstitutional.⁶¹ Chief Justice John Marshall’s opinion explicitly assumed the legitimacy of the nondelegation doctrine because of its grounding in the separation of powers: “It will not be contended that Congress can delegate to the Courts, or to any other tribunals, powers which are strictly and exclusively legislative.”⁶² Similarly, in *Marshall Field & Co. v. Clark*, the Supreme Court held that a Congressional delegation of authority to the President to set tariff rates under the Tariff Act of 1890 was not a violation of the non-delegation doctrine because the only authority it conferred was discretionary power to effectuate the law, not a legislative power to create the law.⁶³ The Court

⁵⁵ *Id.*

⁵⁶ *Calder v. Bull*, 3 U.S. (1 Dall.) 386, 388 (1798).

⁵⁷ *Fletcher v. Peck*, 10 U.S. (1 Cranch) 87, 136 (1810).

⁵⁸ *Cargo of the Brig Aurora v. United States*, 11 U.S. (1 Cranch) 382, 386–87 (1813).

⁵⁹ *Wayman v. Southard*, 23 U.S. (1 Wheat.) 1 (1825).

⁶⁰ *Id.* at 2.

⁶¹ *Id.* at 50.

⁶² *Id.* at 42.

⁶³ *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). This particular delegation of authority was acceptable in light of the fact that the President was “the mere agent of lawmaking.” *Id.* at 693. See Margaret H. Lemos, *The Other*

reiterated that “Congress cannot delegate legislative power to the president,” calling this “a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.”⁶⁴

To the framers—following in Locke’s footsteps—it was unmistakably clear that “[i]f the separation of powers mean[t] anything at all, it mean[t] that one branch of government [could] not permit its powers to be exercised substantially by another branch.”⁶⁵ This principle was expressly established in the Constitution when the framers wrote that Congress has “all” legislative power.⁶⁶ Indeed, it would be contradictory for the framers to have limited the powers of each branch if “these limits may, at any time, be passed by those intended to be restrained.”⁶⁷ Taken together, all of these writings and statements suggest that the original public meaning of the Constitution included a

Delegate: Judicially Administered Statutes and the Nondelegation Doctrine, 81 S. CAL. L. REV. 405, 407 (2008) (“While Congress is free to seek help from the other branches, there is a core of legislative power that Congress cannot give away without violating the constitutional separation of powers.”).

⁶⁴ *Marshall Field*, 143 U.S. at 692 (“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.”).

⁶⁵ Ronald J. Pestritto, *The Birth of the Administrative State: Where It Came From and What It Means for Limited Government*, THE HERITAGE FOUNDATION, FIRST PRINCIPLES SERIES, No. 16, 3–4 (2007). See also THE FEDERALIST, *supra* note 10, No. 47 (James Madison) (“The accumulation of all powers legislative, executive and judiciary in the same hands . . . may justly be pronounced the very definition of tyranny.”).

⁶⁶ U.S. CONST. art. I, § 1. See THE FEDERALIST, *supra* note 10, No. 75 (Alexander Hamilton). In *Federalist No. 75*, Alexander Hamilton echoed this conception of the legislative branch saying “[t]he essence of the legislative authority is to enact laws.” *Id.* at 388. See also *Dep’t of Transp. v. Assoc. of Am. R.Rs.*, 575 U.S. 43, 67 (2015) (Thomas, J., concurring) (“The Constitution does not vest the Federal Government with an undifferentiated ‘governmental power.’ Instead, the Constitution identifies three types of governmental power and, in the Vesting Clauses, commits them to three branches of Government. . . . These grants are exclusive.”); HAMBURGER, *supra* note 16, at 401–02 (“[W]ith the word *all*, the Constitution expressly bars the subdelegation of legislative powers.”).

⁶⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803). If Congress could pass off its legislative power to the executive branch, the “vesting [c]lauses, and indeed the entire structure of the Constitution,” would “make no sense.” Gary Lawson, *Delegation and Original Meaning*, 88 VA. L. REV. 327, 340 (2002). See Aaron Nielson, *Erie as Nondelegation*, 72 OHIO ST. L.J. 239, 263 (2011) (“It is fanciful to think that this allocation of powers is unimportant in the constitutional scheme. The nondelegation doctrine is therefore based on the commonsensical premise that the Constitution’s formal structure must be respected.”).

Lockean norm of non-delegation.⁶⁸

II. HEGEL, WILSON, AND THE DEATH OF THE NON-DELEGATION DOCTRINE

A. Hegel's Administrative Class

During the late nineteenth and early twentieth centuries, societies around the world began to change how they governed.⁶⁹ For a wide range of reasons, citizens began to call for the state to have a more active role in shaping society.⁷⁰ Governments responded by creating expert administrative bodies and giving them broad power to regulate society.⁷¹ Many felt that this kind of delegation to experts was “an indispensable aid to rational calculation in modern life.”⁷²

This trend was largely rooted in the work of German philosopher George Wilhelm Friedrich Hegel. Hegel espoused the view that history was oriented around the ultimate realization of human potential.⁷³ Underlying this view was the humanist assumption that humans had the ability to achieve such ultimate ends in the first place.⁷⁴ Hegel's extrapolation of this idea to a

⁶⁸ See DAVID SCHOENBROD, *POWER WITHOUT RESPONSIBILITY: HOW CONGRESS ABUSES THE PEOPLE THROUGH DELEGATION* 157 (1993) (“Making law was within the ordinary meaning of the legislative power at the time of the Constitution's adoption.”). See also U.S. CONST. amend. X. The Framers' understanding of non-delegation is reflected in the broader structural framework of the Constitution. For instance, the Tenth Amendment states that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” *Id.* In other words, even at a broad structural level, the states couldn't delegate to the federal government the powers that they were entrusted under the Constitution, and the federal government's enumerated powers could not be pawned off onto the states. Each of the two realms had their own responsibilities. This showcases the Framers' understanding of non-delegation in action on a macro-level.

⁶⁹ See Peter Lindseth, *The Paradox of Parliamentary Supremacy: Delegation, Democracy, and Dictatorship in Germany and France, 1920s–1950s*, 113 *YALE L. J.* 1341, 1343 (2004).

⁷⁰ See *id.* at 1348. See also HAMBURGER, *supra* note 16, at 462.

⁷¹ See Lindseth, *supra* note 69, at 1344.

⁷² ROBERT DAHL & CHARLES LINDBLOM, *POLITICS, ECONOMICS, AND WELFARE* 73 (1953).

⁷³ See GEORGE WILHELM FRIEDRIECH HEGEL, *LECTURES ON THE PHILOSOPHY OF WORLD HISTORY* 63 (H.B. Nisbet trans., Cambridge Univ. Press 1975).

⁷⁴ See GEORGE WILHELM FRIEDRIECH HEGEL, *ELEMENTS OF THE PHILOSOPHY OF RIGHT* § 260, at 74 (Allen W. Wood ed., H.B. Nisbet trans., Cambridge Univ.

societal scale enabled him to justify an administrative bureaucracy that would see above the supposedly unrefined masses to achieve these higher ideals.⁷⁵ He was part of a “cultural tradition that viewed the bureaucratic class as a sort of *pouvoir neutre* above social and political divisions in society”⁷⁶ and which “sought to harness the power of government, the mystique of science and the rule of experts to . . . bring [society], willing or not, to a higher state of being.”⁷⁷ In other words, Hegel believed that the political realm had to be subordinated to an organized intelligence, or bureaucracy that could create ultimate economic and social conditions.⁷⁸ (Other members of this cultural tradition include Voltaire⁷⁹ and John Stuart Mill⁸⁰). Hegel optimistically pictured administrators as trustworthy experts who “would identify with the state and its elevated moral aims in opposition to the narrow private interests of society.”⁸¹ He believed that they would rely solely on rationality and be immune from the desire for political power.⁸² As a result, Hegel disliked the separation of powers because its exclusive grants of power made it difficult to justify giving authority to administrative experts.

Press 1991) (“The principle of modern states has enormous strength and depth because it allows the principle of subjectivity to attain fulfilment in the self-sufficient extreme of personal particularity . . .”).

⁷⁵ See JAMES J. SHEEHAN, *GERMAN HISTORY 1770–1866*, at 430–33 (Oxford Univ. Press 1989). See also Blake Emerson, *Administrative Answers to Major Questions: On the Democratic Legitimacy of Agency Statutory Interpretation*, 102 MINN. L. REV. 2019, 2061–62 (2018).

⁷⁶ Lindseth, *supra* note 69, at 1346.

⁷⁷ CHARLES KRAUTHAMMER, *THE POINT OF IT ALL* 262 (2018).

⁷⁸ See JOHN MARINI, *UNMASKING THE ADMINISTRATIVE STATE* 226 (2019).

⁷⁹ See MARQUIS DE CONDORCET, *SKETCH FOR A HISTORICAL PICTURE OF THE PROGRESS OF THE HUMAN MIND*, 304–05 (London, J. Johnson 1795).

⁸⁰ See JOHN STUART MILL, *De Tocqueville on Democracy in America [I]*, in *ESSAYS ON POLITICS AND SOCIETY* 86 (J.M. Robson ed., Univ. of Toronto Press 1977) (arguing that to overlook the possibility of evils within the government does not do to serve the purposes of democracy). But see THOMAS SOWELL, *A CONFLICT OF VISIONS* 171 (rev. ed. 2007) (discussing Mill’s statement that “moral-intellectual pioneers” had a right “to be exempted from the social pressures of mass opinion.”). The incongruity between these sentiments and the fundamental tenants of the American democratic order are hard to miss.

⁸¹ HAMBURGER, *supra* note 16, at 448. See also Pestritto, *supra* note 65, at 6.

⁸² See MARINI, *supra* note 78, at 8.

*B. Woodrow Wilson, John Landis, and the Hegelian Roots of
Delegation in America*

It did not take long for Hegel's ideas to cross the Atlantic. When they did, they found a home in U.S. President Woodrow Wilson. In his 1887 article *The Study of Administration*⁸³ and his 1918 book *The State: Elements of Historical and Practical Politics*, Wilson wholeheartedly⁸⁴ embraced an administrative model of governance in express reliance on Hegel and other German writers.⁸⁵ However, Wilson's writings display thinking that is fundamentally at odds with the Lockean roots of the American Constitution and the framers' understanding that Congress cannot delegate its power to another branch.

For instance, Wilson argued that administrative questions were separate from constitutional questions and should therefore be unfettered by the political branches.⁸⁶ "The field of administration," he wrote, "[i]s removed from the hurry and strife of politics."⁸⁷ This distinction between administrative and constitutional issues was Wilson's justification for borrowing the German administrative methodology in the first place.⁸⁸ It

⁸³ See Woodrow Wilson, *The Study of Administration*, 2 POL. SCI. Q., no. 2, 197, 197–222 (1887).

⁸⁴ See *id.* at 202 ("[W]e must Americanize [administration], and that not formally, in language merely, but radically, in thought, principle, and aim as well.").

⁸⁵ See *id.* at 201–02 ("But where has this science grown up? Surely not on this side the sea . . . It has been developed by French and German professors, and is consequently in all parts adapted to the needs of a compact state, and made to fit highly centralized forms of government . . ."). See also Ronald Pestritto, *The German Stamp on Wilson's Administrative Progressivism*, THE AMERICAN MIND (May 22, 2019), <https://americanmind.org/post/the-german-stamp-on-wilsons-administrative-progressivism/> [<https://perma.cc/A7CG-YQLB>]. Wilson also attributes his perspective to Hegel's *Philosophy of Right* in *The Study of Administration*. Wilson, *supra* note 83, at 199. See also MARINI, *supra* note 78, at 225–26 (noting that Wilson discarded the founders' principles as "obsolete" and relied on Hegel's conclusion that the modern state was the key driver of progress); RONALD PESTRITTO, WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM 9 (2005) (describing how, in writing *The State*, Wilson—in his words—"wore out a German dictionary.").

⁸⁶ See WOODROW WILSON, THE STATE: ELEMENTS OF HISTORICAL AND PRACTICAL POLITICS, 613–15 (Boston, D.C. Heath & Co. rev. ed. 1898) [hereinafter THE STATE] (comparing the separate "Ministrant" and "Constituent" functions).

⁸⁷ Wilson, *supra* note 83, at 209.

⁸⁸ See *id.* at 210 ("Administrative questions are not political questions. Although politics sets the tasks for administration, it should not be suffered to

enabled him to say that the two were sufficiently different that the former could not possibly threaten the latter.⁸⁹ Wilson therefore saw no problems with keeping administrative experts completely “removed from the common political life of the people.”⁹⁰ After all, he wrote, all of the “eminent German writers insist upon it,” so the distinction “between administration and politics is . . . too obvious to need further discussion.”⁹¹

Channeling Hegel’s view of the administrative bureaucracy as a “*pouvoir neutre* above social and political divisions in society,”⁹² Wilson argued that administrative decision-making is “instrumental to the possibly changing purposes of a wisely adapting convenience”⁹³ because of its expertise.⁹⁴ Just like Hegel, Wilson assumed that “a secure position in the bureaucracy, with tenure and good pay, would relieve the civil servant of his natural self-interestedness, thereby freeing him of his particularity and allowing him to focus solely on the objective good of society.”⁹⁵ This sentiment is contrary to the framers’ acceptance of humanity’s inability to remove its natural self-interested strain, which led them to structure a government in which ambition would counteract ambition through the separation of powers.⁹⁶ Wilson, however, believed that a neutral class of administrators could leave humanity’s flaws behind in the entirely separate realm of politics.

Wilson openly admitted that his proposal would require delegating power to administrators.⁹⁷ This viewpoint directly contradicts the separated-powers framework that underpins the

manipulate its offices. This is distinction of high authority; eminent German writers insist upon it.”).

⁸⁹ *Id.* at 211.

⁹⁰ Wilson, *supra* note 83, at 217.

⁹¹ Wilson, *supra* note 83, at 210–11.

⁹² Lindseth, *supra* note 69, at 1346. It is interesting to note that Wilson’s view may actually suggest that the administrative state is *outside* the bounds of the Constitution. See HAMBURGER, *supra* note 16, at 29 (arguing that administrative power is “a reversion to the sort of power that constitutional law most centrally prohibits.”).

⁹³ Wilson, *supra* note 83, at 211.

⁹⁴ See Pestritto, *supra* note 65, at 8 (“Wilson’s argument for freeing administrators from close political control was grounded in the characteristic Progressive confidence in the expertness and objectivity of the administrative class.”).

⁹⁵ *Id.*

⁹⁶ See THE FEDERALIST, *supra* note 10, No. 51.

⁹⁷ See THE STATE, *supra* note 86, at 569 (“Legislation and administration ought under every well-devised system to go hand-in-hand.”).

American Constitution, which does not include administrators or an administrative branch.⁹⁸ Wilson did not flinch, stating “[t]he study of administration . . . is closely connected with the study of the proper distribution of constitutional authority . . . Montesquieu did not, I am convinced, say the last word on this head.”⁹⁹ This is nothing less than an explicit admission that the creation of a Hegelian administrative bureaucracy would require the redistribution of constitutional authority in a way that actively disregards the framework of the Constitution.¹⁰⁰ In other words, Wilson believed that the administrative state should replace the Lockean social compact upon which the American constitutional system was based, and he justified this belief through the supposed necessity of expert organization.¹⁰¹

Perhaps most concerning of all, Wilson bemoaned the constant political “tinkering” associated with a constitutional republic.¹⁰² In his view, the legislative process was “slow” and “full of compromises”¹⁰³ whereas administration was “removed from the hurry and strife of politics” and separate from “the debatable ground of constitutional study.”¹⁰⁴ He felt that the constitutional structure was full of “[o]ld principles” that were far too “clumsy and ill considered” for the modern age.¹⁰⁵ The separation of

⁹⁸ See MONTESQUIEU, *supra* note 17.

⁹⁹ Wilson, *supra* note 83, at 213. In saying thus, Wilson was, of course, bemoaning Montesquieu’s historic promotion of the separation of powers as a method for preserving public liberty. *Id.* See MONTESQUIEU, *supra* note 17.

¹⁰⁰ See MARINI, *supra* note 78, at 58 (“The proponents of the administrative state have viewed separation of powers as an antiquated relic guaranteed to ensure deadlock.”).

¹⁰¹ *Id.* at 226.

¹⁰² See Wilson, *supra* note 83, at 205. Wilson argued that constitutions are concerned with “who shall make the law, and what shall the law be?”, while administration is concerned with “how law should be administered with enlightenment, with equity, with speed, and without friction.” *Id.* at 198–99.

¹⁰³ *Id.* at 208.

¹⁰⁴ *Id.* at 209–10 (explaining that the goal is to give constitutional power to administrative agencies in order to avoid the “confusion and costliness of empirical experiment.”). *But see* *New State Ice Co. v. Leibmann*, 285 U.S. 262, 387 (1932) (Brandeis, J., dissenting) (directly contradicting Wilson is Justice Louis Brandeis’ famous characterization of the American political process as an “experiment.”).

¹⁰⁵ Woodrow Wilson, *Democracy and Efficiency*, ATLANTIC MONTHLY (Mar. 1901), <https://www.theatlantic.com/magazine/archive/1901/03/democracy-and-efficiency/520041/> [<https://perma.cc/6HRX-WLBL>] [hereinafter *Democracy and Efficiency*]. Wilson argued that the republic contained “serious flaws . . . in pure and efficient local government . . . and in well-considered schemes of administration.” *Id.*

powers, as he saw it, was “an antiquated relic guaranteed to ensure deadlock.”¹⁰⁶ In short, he advocated for a wholesale replacement of the legislative process with an administrative class. “Administration cannot wait upon legislation, but must be given leave, or take it, to proceed without specific warrant. . . .”¹⁰⁷

These sentiments are concerning on multiple levels. First, it is worrisome that Wilson, as the President of a constitutional republic, would characterize constitutional study as a “debatable” pursuit. Second, Wilson appears to have missed the fact that the American legislative process was *designed* to be slow and full of compromises.¹⁰⁸ Third, Wilson’s belief that administration should replace legislation—even to the extent of actively *taking* power from the legislature—reveals the radical goal underpinning his lofty rhetoric. Fourth and finally, Wilson’s elitist disdain for representative government¹⁰⁹—and its Hegelian roots¹¹⁰—are unmistakable, “[t]he bulk of mankind is rigidly unphilosophical, and nowadays the bulk of mankind votes.”¹¹¹ It would be difficult to find a more accurate representation of Hegel’s idea that

¹⁰⁶ MARINI, *supra* note 78, at 58. See also GEORGE WILL, *THE CONSERVATIVE SENSIBILITY* 58 (2019) (“Because progressivism had such high hopes for power, and because progressives had an urgent desire to free power from institutional circumscriptions, this desire translated into impatience with the constitutional architecture through which Founders codified their prudence about power and human nature.”).

¹⁰⁷ Pestritto, *supra* note 65, at 8.

¹⁰⁸ See *THE FEDERALIST*, *supra* note 10, NO. 47 (James Madison). See also John F. Manning, *Lawmaking Made Easy*, 10 *GREEN BAG* 2D 191, 198–99 (2007) (“Even the quickest look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking. . . . The cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the ‘more is better’ attitude that has come to be almost an unconscious assumption of public law.”).

¹⁰⁹ See *Democracy and Efficiency*, *supra* note 105 (noting that Wilson valued “a trained and thoroughly organized administrative service instead of administration by men privately nominated and blindly elected.”).

¹¹⁰ See CONDORCET, *supra* note 79, at 189. These beliefs are also attributable to Voltaire and Rousseau. Voltaire wrote that administrators were “truly enlightened philosophers” who were “strangers to ambition.” *Id.* See JEAN-JACQUES ROUSSEAU, *THE SOCIAL CONTRACT* 106 (Rose M. Harrington trans., New York, G. P. Putnam’s Sons 1893). Hegel’s sentiments also aligned closely with those of Jean-Jacques Rousseau, who wrote in *The Social Contract* that “the best and most natural arrangement is for the wisest to govern the multitude.” *Id.*

¹¹¹ Wilson, *supra* note 83, at 209. See also Christopher DeMuth, *Can the Administrative State be Tamed?* 8 *J. LEGAL ANALYSIS* 121, 162 (2016) (“Woodrow Wilson progressivism was a forthright attack on parochial, uninformed legislative process and outmoded constitutional strictures, and a program to replace them with scientific expertise and politically neutral administrative discretion.”).

progress is only achievable through the expertise of an administrative bureaucracy or a more express repudiation of the political participation that the American Constitution was designed to preserve.¹¹²

Wilson was unafraid to state the quintessentially Hegelian proposition that intellectual elites would be better suited to govern than the American system of representative government because of their intellectual and moral superiority.

It is [the intellectual class] . . . peculiar duty to moderate the process in the interests of liberty: to impart to the peoples . . . our own principles. . . . This we shall do, not by giving them . . . the full-fledged institutions of American self-government, — *a purple garment for their nakedness*,— for these things are not blessings, but a curse . . . ; but by giving them . . . a government and rule which shall moralize them. . . . In other words, *it is the aid of our character they need, and not the premature aid of our institutions. Our institutions must come after the ground of character and habit has been made ready for them; as effect, not cause, in the order of political growth.*¹¹³

Wilson's disdain for representative government and his incredible faith in the moral correctness of the administrative class is staggering.¹¹⁴ His statement that the intellectual class should "moderate the process" in the interest of "liberty" foreshadows the casting-off of constitutional structure that occurs when power is delegated to administrators. He views the "institutions of American self-government" as a "curse" that should be replaced with "the aid of our character" – the "our" of course referring to himself and the other members of the

¹¹² See SOWELL, *supra* note 80, at 54. Wilson's sentiments here bring to mind Thomas Sowell's contrast between the constrained vision and the unconstrained vision in his seminal work *A Conflict of Visions*, in which he notes that this kind of elitism asserts "a superiority competent to override a democratic majority." *Id.* See also Lawson & Calabresi, *supra* note 48, at 821, 824 (noting that "progressives from the nineteenth century onward . . . [have] celebrate[d] the independence of the professionalized deep state, run by credentialed 'experts,' from political control.").

¹¹³ *Democracy and Efficiency*, *supra* note 105 (emphasis added).

¹¹⁴ See Philip Hamburger, *Administrative Discrimination*, THE AMERICAN MIND (Sept. 11, 2020), <https://americanmind.org/essays/administrative-discrimination/> [<https://perma.cc/58BS-CX48>] ("The administrative state was founded in America precisely to displace the voting power of the newly enfranchised masses with the administrative power of the knowledge class.").

intellectual class.¹¹⁵ More elitist or Hegelian sentiments could hardly be written. Most concerning of all, however, is the final sentence: “Our institutions must come after the ground of character and habit has been made ready for them; as effect, not cause, in the order of political growth.”¹¹⁶ This statement directly contradicts the design of the Constitution, which recognized that men are not angels¹¹⁷ and that a system of separated powers was the best way to manage the competing ambitions that threatened the survival of representative government.¹¹⁸ He argued that the “character and habit” of individual leaders – which, in his mind, were a group of “trained and thoroughly organized administrat[ors]” from the intellectual class of which he was a central part¹¹⁹—were more important than the structure of the government. Gone was the notion that “all men are created equal and should democratically govern themselves” through political processes and institutions.¹²⁰ In its place were “the modern descendants of Platonic philosopher kings, distinguished by their academic pedigrees rather than the metals in their souls—who should administer the administrative state as freely as possible from control by representative political institutions.”¹²¹

Many of Wilson’s colleagues also latched on to the German school of thought. John Dewey paraphrased Hegel and Wilson when he wrote in his 1908 book *Ethics* that “it is certain that the country has reached a state of development, in which . . . individual achievements and possibilities require new civic and political agencies if they are to be maintained as realities.”¹²² Therefore, “[o]rganized social planning . . . is now the *sole* method of social action by which liberalism can realize its professed aims.”¹²³ Herbert Croly, in calling for an administrative organization of society, echoed Wilson’s disdain for the American voting public. He wrote that “the average American individual is

¹¹⁵ See *id.* (“Being appreciative of their knowledge, and distrustful of a diverse people, they have gradually moved legislative power out of Congress and into administrative agencies—to be exercised, in more genteel ways, by persons like . . . themselves.”).

¹¹⁶ *Democracy and Efficiency*, *supra* note 105.

¹¹⁷ See THE FEDERALIST, *supra* note 10, NO. 51.

¹¹⁸ See *id.*

¹¹⁹ *Democracy and Efficiency*, *supra* note 105.

¹²⁰ Lawson & Calabresi, *supra* note 48, at 829.

¹²¹ *Id.*

¹²² JOHN DEWEY & JAMES HAYDEN TUFTS, ETHICS 472 (1908).

¹²³ JOHN DEWEY, LIBERALISM AND SOCIAL ACTION 54–55 (G. P. Putnam’s Sons 1935) (emphasis added).

morally and intellectually inadequate to a serious and consistent conception of his responsibilities as a democrat.”¹²⁴ Political scientist Frank Goodnow, in direct opposition to the framers’ Lockean notion of political accountability through elected representatives, embraced Hegel’s humanist assumption that administrators’ focus on objective “truth” could overcome the “polluted” nature of the political realm.¹²⁵ Goodnow’s view was based on his baseline assumption that the citizens’ rights were granted to them by the government.¹²⁶ It is impossible to miss the fact that this view is the exact inverse of the Lockean “social compact” theory on which the Constitution was built, in which the citizens grant certain powers to the government in return for protection of their inalienable rights.¹²⁷ Likewise, James Landis’ 1938 book *The Administrative Process* argued that giving Congress’ power to administrative agencies was justified based on the “inadequacy of a simple tripartite form of government to deal with modern problems.”¹²⁸ Landis felt that the modern age was advanced enough that it “no longer dare[d] to rely for its administration upon the casual office-seeker.”¹²⁹ These quotes are particularly revealing, for they show that Hegel’s justification for an administrative bureaucracy—the ability of experts to see above the masses to achieve the greater ideals of humanity—was the foundation for American proponents of administration as well.¹³⁰ Underlying Landis’ statement is the elitist assumption

¹²⁴ HERBERT CROLY, *THE PROMISE OF THE AMERICAN LIFE* 276 (Macmillan Co. 1911).

¹²⁵ See FRANK GOODNOW, *POLITICS AND ADMINISTRATION* 82 (1914). Whether history has in fact shown us the exact opposite is highly debatable. This view parallels that of English philosopher William Godwin, who argued that the intellectual expert class would be the “guides and instructors” of the rest of society. See 1 WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 69 (London, G.G.J. and J. Robinson 1793).

¹²⁶ See FRANK GOODNOW, *THE AMERICAN CONCEPTION OF LIBERTY AND GOVERNMENT* 11 (1916).

¹²⁷ See HAMBURGER, *supra* note 16, at 355 (noting that the delegation of Congressional authority to agencies “inverts the relationship between the people and their government, reducing the people to servants and elevating government as their master.”).

¹²⁸ JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* 1 (1938). See also *Rise and Rise*, *supra* note 4, at 1231 (noting that “Landis’s classic exposition of the New Deal model of administration, fairly drips with contempt for the idea of a limited national government subject to a formal, tripartite separation of powers.”).

¹²⁹ LANDIS, *supra* note 128, at 154.

¹³⁰ See Lawson & Calabresi, *supra* note 48, at 821, 829 (“Woodrow Wilson’s

that modern times required something more than the Constitution's system of representative government and separated powers: experts.¹³¹ Wilson himself did not hesitate to state exactly that: "Expert organization [has] become imperative."¹³²

Therefore, it was not too far of a leap in reasoning to argue that these experts must be delegated authority to do their all-important task of achieving ultimate social outcomes through administration. However, in order to do so, Wilson and his Hegelian cohort needed to find a way around the pesky limitations of the Constitution.¹³³ The Constitution's separation of powers stood in the way of the future they envisioned in which Congress would delegate to administrators the authority to deal with modern problems.¹³⁴ A subdued non-delegation doctrine

Progressives . . . believed . . . that there were 'experts' . . . who should administer the administrative state as freely as possible from control by representative political institutions.").

¹³¹ See MARINI, *supra* note 78, at 8–9, 13 (arguing that delegation to the administrative state has made American society dependent on a bureaucracy that is convinced that experts can solve the country's problems. Marini states that this development has replaced the "sovereignty of the people" with the "sovereignty of the government."). See also Philip Hamburger, *How Government Agencies Usurp Our Rights*, CITY JOURNAL (Winter 2017), <https://www.city-journal.org/html/how-government-agencies-usurp-our-rights-14948.html> [<https://perma.cc/LX9N-4UYB>] ("Late-nineteenth-century American progressives had an elitist disdain for representative government and individual claims of rights, and they adopted German ideas about administrative power to avoid republican institutions and the procedural rights protected in the courts.").

¹³² *Democracy and Efficiency*, *supra* note 105. See also Woodrow Wilson, *Socialism and Democracy* (August 22, 1987) ("Many affairs of life which were once easily to be handled by individuals have now become so entangled amongst the complexities of international trade relations, so confused by the multiplicity of news-voices, or so hoisted into the winds of speculation that only powerful combinations of wealth and influence can compass them."); Aaron L. Nielson, *Visualizing Change in Administrative Law*, 49 GA. L. REV. 1, 10 (2015) ("Progressives, exemplified by Woodrow Wilson, wanted agencies to be able to make policy outside of traditional political systems, which they felt were too backwards to serve the needs of modern society. So, progressives sought something new: 'a nonpartisan, expert bureaucracy.'").

¹³³ See Lindseth, *supra* note 69, at 1345.

¹³⁴ See Pestritto, *supra* note 65, at 4–5 ("The range of activities they wanted the government to regulate was far too broad for Congress to handle under the original vision of legislative power. Instead, to varying degrees, the fathers of progressive liberalism envisioned a delegation of rulemaking, or regulatory, power from congressional lawmakers to an enlarged national administrative apparatus, which would be much more capable of managing the intricacies of a modern, complex economy because of its expertise and its ability to specialize.").

proved to be just what they needed,¹³⁵ because it allowed them to take responsibility from Congress and give it to administrative agencies without having to appear as though they were violating the Constitution's structure.¹³⁶ In fact, Landis believed that the combination of the legislative and executive powers was one of the key advantages of the administrative bureaucracy,¹³⁷ giving him additional justification for the "practical pressures" that he felt required Congress to delegate its power to agencies.¹³⁸

In summary, Wilson, Landis, and others used Hegelian notions of "progress through administrative expertise" to justify the delegation of authority from Congress to unelected administrators and to avoid dealing with the separated-powers framework embedded in the Constitution. By characterizing administration and constitutional law as two separate fields, they were able to skirt the accountability of the political system,¹³⁹ justify their elitist disdain for political process, and defend their reliance on the "dominant knowledge class."¹⁴⁰ And by adopting the Hegelian humanist view that administrative civil servants could remove themselves from the political fray in order to objectively pursue the highest ends for humanity,¹⁴¹ they were

¹³⁵ See Cass R. Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 316 (2000) ("Rather than invalidating federal legislation as excessively open-ended, courts hold that federal administrative agencies may not engage in certain activities unless and until Congress has expressly authorized them to do so."); Pestrutto, *supra* note 65, at 5 ("The fulfillment of progressive liberalism's administrative vision, therefore, required the evisceration of the non-delegation doctrine and the adoption of combination of functions as an operating principle for administrative agencies.").

¹³⁶ See GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW*, 134–40 (6th ed. 2012) (discussing the functions and constitutionality of a nondelegation clause. Stating that "the nondelegation doctrine is initially grounded in the principle of enumerated powers as it applied to Articles II and III of the constitution.").

¹³⁷ See LANDIS, *supra* note 128, at 5.

¹³⁸ See *id.* at 28, 50, 68 (In light of the current dearth of transparency in the administrative state, as well as the well-entrenched Congressional pastime of shoving the blame for decisions onto unelected bureaucrats, it is particularly hilarious that Landis felt that another benefit of the administrative system was the fact that "a finger can be publicly pointed at a particular man or men who are charged with the solution of a particular question.").

¹³⁹ See Pestrutto, *supra* note 65, at 6.

¹⁴⁰ HAMBURGER, *supra* note 16, at 496 (Hegel and Wilson's disdain for views of everyday citizens and their enamored view of the intellectual class' administrative capacity fit neatly in Thomas Sowell's "unconstrained" vision, which sees a "profound inequality between the conclusions of 'persons of narrow views' and those with 'cultivated' minds."). See SOWELL, *supra* note 80, at 41.

¹⁴¹ See HEGEL, *supra* note 74. See also CONDORCET, *supra* note 79, at 198

able to justify delegating Congressional authority to administrators.¹⁴²

C. The Death of the Non-Delegation Doctrine

Based on the writings of John Locke and others, the framers believed that the Constitution's grants of power to each branch of government were nondelegable.¹⁴³ Over time, however, pressure from Hegelian notions of administrative power eroded this framework.¹⁴⁴ Progressives like Woodrow Wilson, Frank Goodnow, John Dewey, and James Landis embraced Hegel's humanist ideal that neutral administrators could rationally create ultimate human ends, and they justified delegating power to such administrators based on the supposed necessity of achieving these ends through the expertise of the administrative class.¹⁴⁵ Since then, the delegation of Congress' legislative authority to administrative agencies has been the unspoken rule of American law-making. The non-delegation doctrine is now dismissed as a largely defunct ideal that is never achieved in practice.¹⁴⁶

Starting in the late nineteenth and early twentieth century, the non-delegation doctrine began to lose ground to Hegelian notions of administrative superiority. The non-delegation doctrine was dealt a major blow by the 1928 case of *J.W. Hampton, Jr., & Co. v. United States*, in which the Supreme Court held that Congress did not violate the non-delegation doctrine when it delegated to the United States Tariff Commission the authority to set import tariffs under the Tariff Act of 1922.¹⁴⁷ The Court stated that Congress could, "within

(noting that Voltaire wrote that administrators, like philosophers, were "truly enlightened" and "strangers to ambition.").

¹⁴² See Pestrutto, *supra* note 65, at 6.

¹⁴³ See *supra* Part I.

¹⁴⁴ See *supra* Part II.A.

¹⁴⁵ See MARINI, *supra* note 78, at 236, 238–40.

¹⁴⁶ See *Nat'l Cable Television Ass'n v. United States*, 415 U.S. 352, 352–53 (1974) ("The notion that the Constitution narrowly confines the power of Congress to delegate authority to administrative agencies, which was briefly in vogue in the 1930's, has been virtually abandoned by the Court for all practical purposes."). See also *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 84 (2015) (Thomas, J., concurring) ("Today, the Court has abandoned all pretense of enforcing a qualitative distinction between legislative and executive power.").

¹⁴⁷ See generally *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

defined limits,”¹⁴⁸ delegate authority to the executive to make regulations for the implementation of a statute because agencies exercise executive, not legislative, power while writing regulations.¹⁴⁹ The Court justified this declaration by vaguely referencing “the inherent necessities of the governmental coordination.”¹⁵⁰ In what became a monumental shift in the entire delegation debate,¹⁵¹ the Court stated that as long as Congress provides an “intelligible principle” to guide the agency’s discretion, a delegation of authority to the agency is permissible.¹⁵² In other words, if agencies are guided by “an intelligible principle” from Congress, they exercise executive power—not legislative power—when they write binding rules and regulations.¹⁵³

The non-delegation doctrine breathed its final breath in 1935, when the Court invalidated Congressional delegations of authority for the last time. There were two cases, both of which involved Congress giving almost unlimited discretion to another branch.¹⁵⁴ In *Panama Refining Co. v. Ryan*, the Supreme Court

¹⁴⁸ *Id.* at 406. These “defined limits” were not delineated by the Court, which simply stated that the appropriateness of such delegation shall depend on “common sense” and “inherent necessities.” *Id.* In this particular case, the Court felt that necessity required Congress to delegate to the Commission the authority to fix tariffs in light of Congress’ general rule that tariffs shall be fair and equitable. *Id.* at 407–08. As is the case with several other administrative law formulations, it is fair to question whether these two words carry anything more than a negligible amount of meaning in practice.

¹⁴⁹ *Id.* at 407.

¹⁵⁰ *Id.* at 406.

¹⁵¹ An article in *The Constitutional Review* stated that this case represented “the most dangerous advance in bureaucratic government ever attempted in America.” *Dep’t of Transp.*, 575 U.S. at 81 n.6 (quoting J.S. Cotton, *The General Welfare Clause*, 13 CONSTITUTIONAL REV. 98, 101 (1929)).

¹⁵² *Id.* at 409 (“If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.”). It is interesting to note that the opinion that created the “intelligible principle” test was penned by a former U.S. President. I make no claims about whether or to what extent this fact sheds any light on the test’s deferential posture toward delegating to the Executive Branch, but I do not deny that they may exist.

¹⁵³ This is a truly bizarre concept. How does one power of government morph into another just because the Court thinks that a particular principle is “intelligible” enough? This concept has never been explained by the Court or any of the defenders of delegation.

¹⁵⁴ See *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 474 (2001) (quoting *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935)) (“In the history of the Court we have found the requisite ‘intelligible principle’ lacking in only two statutes,

held that an executive order limiting petroleum transportation between states was unconstitutional because it violated the non-delegation doctrine.¹⁵⁵ It did so because, in enacting the order, the President used legislative power that was only supposed to be used by Congress.¹⁵⁶ In *A.L.A. Schechter Poultry Corporation v. U.S.*, the Supreme Court held that Congress' delegation of authority to the President to regulate industrial codes of conduct under the National Industrial Recovery Act was unconstitutional under the non-delegation doctrine because the delegation provided no standards for the President to use in doing so.¹⁵⁷

But *Panama Refining* and *Schechter Poultry* were the last of their kind.¹⁵⁸ *J.W. Hampton* had affected a seismic shift in American government. Delegation through "intelligible principles" became the rule rather than the exception. The intelligible principle test, which "has been practically toothless,"¹⁵⁹ "finds nearly all statutory standards to be 'intelligible,'" regardless of how vague or amorphous they may be.¹⁶⁰ The Court has admitted that it has consistently "found intelligible principles where less discerning readers find gibberish."¹⁶¹

Since 1935, there has not been a single case in which the Supreme Court has invalidated a use of authority under the non-delegation doctrine.¹⁶² These decisions have been based on the

one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

¹⁵⁵ See *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 433 (1935).

¹⁵⁶ *Id.*

¹⁵⁷ See *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 537-38 (1935) ("But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry.").

¹⁵⁸ See *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 674-75 (1980) (Rehnquist, J., concurring). In the words of former Chief Justice Rehnquist, "the principle that Congress could not simply transfer its legislative authority to the Executive fell under a cloud." *Id.*

¹⁵⁹ Rao, *supra* note 21, at 1512.

¹⁶⁰ See *id.* at 1508.

¹⁶¹ Lawson, *supra* note 67, at 329.

¹⁶² See, e.g., *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23, 32-33 (2008) (holding that Congressional delegation to the Secretary of the Interior the responsibility to acquire land for Indian tribes under the Indian Reorganization Act did not violate the non-delegation doctrine because it "contain[ed] an intelligible principle . . ."); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457 (2001) (holding that Congress' delegation to the Environmental

Wilsonian justification that Congress' lack of sufficient expertise means that it must, out of necessity, delegate its authority to agencies.¹⁶³ The existence of such a necessity was often premised—explicitly or implicitly—on the Hegelian argument that administrative actors were better suited to act in the public interest because of their objectivity, neutrality, and expertise.¹⁶⁴ The Court's language clearly reflects this:

[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.¹⁶⁵

As a result, the standard for what Congress must do when enacting legislation fell from writing the law to merely “delineat[ing] the general policy” and leaving the rest to the agency.¹⁶⁶ The scope of delegation ballooned, leading to grants of agency discretion as amorphous and malleable as “fair and reasonable,” or in accordance with “the public convenience and

Protection Agency (EPA) Administrator of the authority to set air quality standards under the Clean Air Act in the interest of “public health” was not unconstitutional under the non-delegation doctrine because Congress’ provided an “intelligible principle” by which the Administrator could exercise his or her delegated authority); *Touby v. United States*, 500 U.S. 160, 169 (1991) (holding that Congressional delegation of the authority to add new drugs to the list of controlled substances to the Attorney General did not violate the non-delegation doctrine because it provided an “intelligible principle” to guide the agency’s discretion); *Lichter v. United States*, 334 U.S. 742, 783 (1948) (upholding Congressional delegation of authority to recapture “excessive profits”); *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 104–05 (1946) (upholding the validity of Congress’ delegation to the Securities and Exchange Commission (SEC) the authority to modify the structure of holding companies and stating that Congressional delegations of authority are acceptable where it would be “unreasonable and impracticable to compel Congress to prescribe detailed rules . . .”); *Nat’l Broad. Co. v. United States*, 319 U.S. 190, 225–26 (1943) (upholding Congress’ delegation to the Federal Communications Commission (FCC) of the authority to regulate airwaves due to the existence of an “intelligible principle.”).

¹⁶³ See *Indus. Union Dep’t, AFL-CIO*, 448 U.S. at 627. See also MARINI, *supra* note 78, at 48 (“Bureaucratic rule is defended as essential to solving, in a nonpolitical way, the problems of modern technical, or rational, government and society.”).

¹⁶⁴ See *supra* Part II.A. For an example of this playing out in the courts, see *also Nat’l Cable Television Ass’n v. United States*, 415 U.S. 336, 341 (1974).

¹⁶⁵ *Mistretta v. United States*, 488 U.S. 361, 372 (1989).

¹⁶⁶ *Am. Power & Light Co. v. SEC*, 329 U.S. 90, 105 (1946).

necessity.”¹⁶⁷ One example of this kind of delegation is the well-known Dodd-Frank Wall Street Reform and Consumer Protection Act, which was passed in response to the 2008 financial crisis.¹⁶⁸ The Act is full of vague goals like ensuring that “all consumers have access to markets for consumer financial products and services . . . [that are] fair, transparent, and competitive.”¹⁶⁹ The legislators who read this passage—if they read it at all—could never have known that this language was authorizing federal bureaucrats to micromanage overdraft fees. But that’s what it did. Another example is *Yakus v. United States*, in which the Supreme Court upheld Congress’ broad delegation of the authority to fix wartime commodity prices to the Price Administrator under the Emergency Price Control Act of 1942.¹⁷⁰ Channeling James Landis, the Court noted that Congress should be free to avoid the “rigidity” of the political process.¹⁷¹ It would be difficult to imagine a statement more removed from the framers’ Lockean sense of the government’s fiduciary responsibility to the people *through* the carefully designed rigidity of the political process.¹⁷²

Glimmers of life occasionally flickered through the shroud that had enveloped the non-delegation doctrine. In *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, the Supreme Court held that the Secretary of Labor had exceeded his authority under the Occupational Safety and Health Act of 1970 (OSHA) to create working condition standards.¹⁷³ While the majority did not focus on the delegation issue, Justice Rehnquist’s concurrence argued that Congress’ delegation of

¹⁶⁷ DeMuth, *supra* note 111, at 6.

¹⁶⁸ See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, 124 Stat. 1376 (July 21, 2010).

¹⁶⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111–203, §1021(a), 124 Stat. 1376, 1979–88 (July 21, 2010).

¹⁷⁰ *Yakus v. United States*, 321 U.S. 414, 422 (1944).

¹⁷¹ *Id.* at 426.

¹⁷² See *Mistretta v. United States*, 488 U.S. 361 (1989). The Supreme Court held that Congress’ delegation to the United States Sentencing Commission of the authority to create sentencing guidelines under the Sentencing Reform Act of 1984 did not violate the non-delegation. *Id.* at 412. The Court stated that the non-delegation doctrine does not prevent Congress from obtaining assistance from the other branches of government. *Id.* at 372. Where exactly the line is between “obtaining assistance” and “delegating authority to fill in the details,” however, would seem to present a puzzling exercise in semantics for even the most astute observer.

¹⁷³ See *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 662 (1980).

authority to the Secretary of Labor was invalid under the non-delegation doctrine because it gave the Secretary unbridled discretion.¹⁷⁴ Rehnquist reasoned that the issue in *Industrial Union* – whether and how to regulate toxic substances – was “quintessentially one of legislative policy.”¹⁷⁵ Therefore, this delegation violated John Locke’s principle that “legislatures are to make laws, not legislators.”¹⁷⁶ Rehnquist criticized the legislators for avoiding a difficult policy choice,¹⁷⁷ reminding them that “[i]t is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.”¹⁷⁸

Justice Rehnquist also dissented in *American Textile Manufacturers Institute, Inc. v. Donovan*, in which the Supreme Court upheld a delegation of power to the Secretary of Labor to promulgate safety standards that “most adequately assure[], to the extent feasible, on the basis of the best available evidence,” that no employee will be harmed.¹⁷⁹ Justice Rehnquist’s dissent, arguing that this delegation violated the nondelegation doctrine, observed that the language “to the extent feasible” can lead to a “remarkable range of interpretations.”¹⁸⁰ In his view, Congress had abdicated its responsibility to make a difficult “policy choice.”¹⁸¹ Justice Rehnquist’s lonely dissents aside, however, the non-delegation doctrine seemed to have been pronounced sufficiently dead after *J.W. Hampton*.

The non-delegation doctrine was momentarily resuscitated in the 2019 case of *Gundy v. United States*.¹⁸² This case involved the applicability of the Sex Offender Registration and Notification Act (SORNA).¹⁸³ Congress had delegated the authority to specify

¹⁷⁴ *Id.* at 672 (Rehnquist, J., concurring).

¹⁷⁵ *Id.* at 686.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 687 (“It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge.”).

¹⁷⁸ *Id.* (“If we are ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions, these are surely the cases in which to do it.”).

¹⁷⁹ *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 541 (1981) (Stewart, J., dissenting).

¹⁸⁰ *Id.* at 544 (Rehnquist, J., dissenting).

¹⁸¹ *See id.* at 546.

¹⁸² *See generally* *Gundy v. United States*, 139 S. Ct. 2116 (2019).

¹⁸³ *Id.* at 2121.

this applicability to the Attorney General, and Herman Gundy challenged that delegation as a violation of the non-delegation doctrine.¹⁸⁴ In line with its approach since the 1930s, the Supreme Court disagreed with Gundy.¹⁸⁵ However, three dissenting justices appeared to be in support of a revival of the nondelegation doctrine,¹⁸⁶ with a fourth justice suggesting likewise in his concurrence.¹⁸⁷ The most recent addition to the Court is likely to be in agreement as well.¹⁸⁸ These developments suggest that the Supreme Court may soon consider what a revived non-delegation doctrine would look like in practice.

III. REBUTTING HEGEL: THE FUTURE OF THE NON-DELEGATION DOCTRINE

With the renewal of the non-delegation debate in *Gundy*, commentators continue to debate the advantages and disadvantages of the current delegation framework. Many esteemed legal minds have analyzed the shortcomings of the “intelligible principle” test,¹⁸⁹ exposing it for the judicially

¹⁸⁴ *Id.* at 2122.

¹⁸⁵ *Id.* at 2130.

¹⁸⁶ *Id.* at 2132–48 (Gorsuch, J., dissenting). Justice Gorsuch, with Justice Thomas and Chief Justice Roberts, maintained that the delegation in *Gundy* was unconstitutional in violation of the non-delegation doctrine. (“If the separation of powers means anything, it must mean that Congress cannot give the executive branch a blank check to write a code of conduct governing private conduct for a half-million people.”). *Id.* at 2144. Justice Gorsuch also noted that he “would not wait” to revisit the non-delegation doctrine. *Id.* at 2131.

¹⁸⁷ *Id.* at 2130 (Alito, J., concurring). Justice Alito concurred in the judgment but noted that the Court’s rejection of the non-delegation doctrine contradicts the Constitution’s clear position that Congress cannot delegate its powers to another branch. *Id.* at 2131. He stated that “[i]f a majority of this Court were willing to reconsider the approach we have taken for the past 84 years, I would support that effort.”

¹⁸⁸ See *Paul v. United States*, 140 S. Ct. 342, 342 (2019).

¹⁸⁹ Commentators have pointed out that the intelligible principle test is “so ephemeral and elastic” that it can be warped to fit any preferred policy agenda. See David Schoenbrod, *The Delegation Doctrine: Could the Court Give it Substance?*, 83 MICH. L. REV. 1223, 1231 (1985); Bernard Schwartz, *Of Administrators and Philosopher-Kings: The Republic, the Laws, and Delegations of Power*, 72 NW. U. L. REV. 443, 446 (1977) (“[T]he requirement of defined standards has . . . become all but a vestigial euphemism.”). As a result, the bar of Congressional legislative responsibility has been lowered to a “ludicrously low standard.” See HAMBURGER, *supra* note 16, at 378. In practice, a judge can find an intelligible principle anywhere he or she wants to. As Hamburger points out, the intelligible principle requirement is based on the assumption that “where Congress provides such guidance, the agencies are merely filling in details and thus are not making, but merely executing the law. On this fiction, the Court

unmanageable mush that it is.¹⁹⁰ Many other scholars have proposed permutations of the non-delegation doctrine that could be utilized in today's context.¹⁹¹ This article, however, seeks to provide a possible impetus for reviving the legitimacy of Congress by exposing the explicitly un-American historical roots of delegations. It aims to support the reinvigoration of the non-delegation doctrine by showing that, at its roots, the current framework is fundamentally opposed to the philosophical tenets on which the Constitution was built. In laying the foundations for the modern delegation trend, Woodrow Wilson relied on Hegelian norms of administrative superiority that directly contradict the Lockean notions of non-delegation and fiduciary

can pretend that Congress is not delegating legislative power." *Id.* But of course, agencies *are* using legislative power. Justice White even admitted as much in his dissent in *INS v. Chadha*, 462 U.S. 919, 985 (1983) (White, J., dissenting) "[B]y virtue of congressional delegation, legislative power can be exercised by independent agencies." Justice Gorsuch recognized the same in his dissent in *Gundy v. United States*, 139 S. Ct. 2116, 2139–40 (2019) (Gorsuch, J., dissenting). "This mutated version of the 'intelligible principle' remark has no basis in the original meaning of the Constitution, in history, or even in the decision from which it was plucked. Judges and scholars representing a wide and diverse range of views have condemned it as resting on 'misunderst[ood] historical foundations.' They have explained, too, that it has been abused to permit delegations of legislative power that on any other conceivable account should be held unconstitutional. Indeed, where some have claimed to see 'intelligible principles' many 'less discerning readers [have been able only to] find gibberish.'" Even Justice Douglas, one of the fathers of the administrative state, came to criticize excessive congressional delegations in the period when the intelligible principle 'test' began to take hold." (internal footnotes omitted). *See also* Dep't of Transp. v. Ass'n of Am. R.Rs., 575 U.S. 43, 85 (2015) (Thomas, J., dissenting) ("[T]he intelligible principle test now requires nothing more than a minimal degree of specificity in the instructions Congress gives to the Executive when it authorizes the Executive to make rules having the force and effect of law.").

¹⁹⁰ *See* SCHOENBROD, *supra* note 68, at 115. *See also* Rao, *supra* note 21, at 1508 (noting that the intelligible principle test "finds nearly all statutory standards to be 'intelligible.'").

¹⁹¹ *See, e.g.,* Peter Aranson, Ernest Gellhorn, & Geln O. Robinson, *A Theory of Legislative Delegation*, 68 CORNELL L. REV. 1 (1982); C. Boyden Gray, *The Search for an Intelligible Principle: Cost-Benefit Analysis and the Nondelegation Doctrine*, 5 TEX. REV. L. & POL. 1 (2000); A. J. Kritkos, *Resuscitating the Non-Delegation Doctrine: A Compromise and an Experiment*, 82 MO. L. REV. 441 (2017); Gary Lawson, *Discretion as Delegation: The Proper Understanding of the Nondelegation Doctrine*, 73 GEO. WASH. L. REV. 235 (2005); Thomas W. Merrill, *Rethinking Article I, Section 1: From Delegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097 (2004); Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002); Jeffrey A. Wertkin, *Reintroducing Compromise to the Nondelegation Doctrine*, 90 GEO. L.J. 1055 (2002).

responsibility that underpin the Constitution. In short, the ideas supporting delegation based on an “intelligible principle” are antithetical to the school of thought that built the American Constitution. This is critically important for Congress to understand and may provide a much-needed impetus for Congress to begin reclaiming its legitimacy.

A. The Negative Impact of the Modern Delegation Norm on Congressional Legitimacy

In 2016, Senator Mike Lee of Utah created the Article I Project in an attempt to restore Congressional vitality.¹⁹² He challenged Congress to make laws itself rather than delegating its responsibility away to agencies. Only nine members of Congress showed any interest.¹⁹³ Senator Lee’s project highlighted the unfortunate reality that “most Members of Congress are uninterested in . . . reclaiming their Article I powers.”¹⁹⁴

Why is this? Because legislation is “hard, often thankless work.”¹⁹⁵ It requires one to face the contentious, difficult issues head-on and work through them in order to achieve compromise. One “must listen to colleagues with differing” viewpoints and forge agreements that may not be perfect for either side.¹⁹⁶ One must also be able to explain this process and its necessary limitations to “single-minded donors and supporters.”¹⁹⁷ Legislating is difficult work because it requires Congress to face the difficult issues and make the hard choices.

But the framers knew legislation would be difficult. In fact, they *intentionally designed* it to be difficult.¹⁹⁸ “Even the quickest

¹⁹² See MIKE LEE U.S. SENATOR FOR UTAH, ARTICLE ONE PROJECT, <https://www.lee.senate.gov/public/index.cfm/article-one-project> [<https://perma.cc/F87P-44T5>] (last visited Jan. 21, 2021).

¹⁹³ See CHRISTOPHER DEMUTH, THE ADMINISTRATIVE STATE: CONGRESS AS COCONSPIRATOR 5 (BRADLEY SYMPOSIUM, HERITAGE FOUNDATION 2018).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* See also Christopher DeMuth, *Congress Incongruous*, L. & LIBERTY (Aug. 3, 2015), <https://lawliberty.org/forum/congress-incongruous/> [<https://perma.cc/5MXK-SV9A>] (“[The legislature’s] primary assignment is to negotiate and horse-trade with other representatives of similar, differing, and conflicting interests and values, leading to collective decisions that no one is entirely happy with or, quite frequently, to no decision at all.”).

¹⁹⁷ DEMUTH, *supra* note 193, at 5.

¹⁹⁸ See Manning, *supra* note 108, at 202 (“Madison and Hamilton . . . explicitly recognized . . . [what] the structure makes obvious: bicameralism and presentment make lawmaking difficult *by design*.”). See also Nielson, *supra*

look at the constitutional structure reveals that the design of bicameralism and presentment disfavors easygoing, high volume lawmaking.¹⁹⁹ The Constitution deliberately contains “hurdles”²⁰⁰—such as the requirement of bicameralism and presentment—that are intended to steer between the Scylla of hasty legislation and the Charybdis of centralized power. Alexander Hamilton wrote in *Federalist No. 73* that “[t]he oftener the measure is brought under examination, the greater the diversity in the situations of those who are to examine it[, and] the less must be the danger of those errors which flow from want of due deliberation.”²⁰¹ Indeed, the very fact that Congress contains members from throughout the country is evidence that the difficulties of resolving competing viewpoints through an arduous legislative process was a central component of the Constitution’s framework.²⁰²

The constrained nature of the legislative process is “a bulwark of limited government”²⁰³ that was viewed by the framers as a valuable feature, not something to be lamented and evaded.²⁰⁴ Their view mirrored that of Locke, who saw the cumbersome nature of the legislative process as a *benefit* for legislation.²⁰⁵ The very burdens that Hegel and Wilson disdained are actually “important guarantor[s] of . . . liberty, because they ensure that national governmental power may not be brought to bear against

note 67, at 264 n.139 (noting that “Congress . . . is built to encourage unrestrained debate”); DeMuth, *supra* note 196, at 20 (“Congress’[] inefficient structure and procedures are themselves vehicles of limited government.”).

¹⁹⁹ Manning, *supra* note 108, at 198. Manning goes on to say that “[t]he cumbersomeness of the [constitutional] process seems obviously suited to interests that contradict the ‘more is better’ attitude that has come to be almost an unconscious assumption of public law.” *Id.* at 199.

²⁰⁰ See Rao, *supra* note 21, at 1477.

²⁰¹ THE FEDERALIST, *supra* note 10, No. 73, at 381 (Alexander Hamilton).

²⁰² See Rao, *supra* note 21, at 1465 (“The vesting of this power in a multimember legislature reflects a fundamental commitment to republican government and the representation of diverse interests in the lawmaking process.”).

²⁰³ DeMuth, *supra* note 111, at 173.

²⁰⁴ See *Dep’t of Transp. v. Ass’n of Am. R.Rs.*, 575 U.S. 43, 61 (2015) (Alito, J., concurring) (noting that “[i]t would dash the whole scheme if Congress could give its power away to an entity that is not constrained by those checkpoints.”). See also *Gundy v. United States*, 139 S. Ct. 2116, 2134 (2019) (Gorsuch, J., dissenting) (noting that because the framers viewed an “excess of law-making” as a serious threat to the legitimacy of the government, they “went to great lengths to make lawmaking difficult”).

²⁰⁵ See LOCKE, *supra* note 23, at §§ 143, 160.

individuals without a consensus, established by legislative agreement on relatively specific words.”²⁰⁶ Delegation, on the other hand, incentivizes legislators to “preserve the status quo rather than engage in arduous legislative work that may prove fruitless.”²⁰⁷ It enables “lawmaking on the cheap” that avoids the process of bicameralism and presentment in order to create results in the name of efficiency.²⁰⁸

The framers, however, weren’t concerned with efficiency. They were concerned with accountability.²⁰⁹ Making the laws is the task of Congress precisely *because* they are elected and accountable to the people. This accountability was central to the proper functioning of the government because it prevented laws from being passed without the consent of the people’s representatives. In fact, one of the framers’ primary doubts about the new republic was that an “excess of law-making” could be “the disease to which our governments are most liable.”²¹⁰ This concern stemmed from their (notably non-Hegelian) recognition that men are *not* angels²¹¹ and that it is unrealistic to “imagine that [one] can arrange the different members of a great society.”²¹² It is evidenced by the splitting of the legislative branch into two houses so as to enable multiple stages of review for every issue.²¹³ It would hardly have been logical for them to do so if their primary goal was an efficient administrative government. In sum, the American constitutional structure was

²⁰⁶ Sunstein, *supra* note 135, at 320.

²⁰⁷ Joseph Postell, *The Legislative Politics of Legislative Delegation* 24 (Ctr. for the Study of the Admin. State, Working Paper No. 19-03, 2019), <https://administrativestate.gmu.edu/wp-content/uploads/sites/29/2019/02/Postell-Working-Paper-19-03.pdf> [<https://perma.cc/YNL2-GFAA>].

²⁰⁸ See Manning, *supra* note 108, at 198–99.

²⁰⁹ See *Dep’t of Transp.*, 575 U.S. at 86–87 (Thomas, J., concurring) (noting that efficiency was not the goal of the framers).

²¹⁰ THE FEDERALIST, *supra* note 10, NO. 62, at 321 (James Madison). See also NEIL GORSUCH, A REPUBLIC, IF YOU CAN KEEP IT 84–85 (2019) (noting that the Code of Federal Regulations contains well over 175,000 pages—and counting. Justice Gorsuch also describes how agencies are now promulgating regulations at a rate exceeding their ability to actually know what those regulations say.); DeMuth, *supra* note 111, at 174 (“Excessive law, litigation, and regulation is ‘the American illness.’”).

²¹¹ See THE FEDERALIST, *supra* note 10, NO. 62 (James Madison).

²¹² ADAM SMITH, THEORY OF MORAL SENTIMENTS 343 (Bohn’s Standard Library Ed., 1853) (1759).

²¹³ See U.S. CONST. art. I, § 1. It stands to reason that if the Framers had been concerned with efficient decision-making without the laborious political process, the division of Congress into two houses would not have been done.

built as a response to the very human tendencies whose existence Hegel denied so that the government would be forced to make the hard choices in a transparent, accountable way. Delegation enables legislators to avoid their responsibility to make the hard choices and has led to a Congress that is “terrified about being held accountable for anything on any subject.”²¹⁴

Along with its role in neutering Congress, delegation also contributes to the political polarization and lack of civility that permeates the United States today.²¹⁵ If Congress can pass its fiduciary responsibility for legislation onto administrators, the primary location for nationally-relevant decisions becomes the federal courts, who are faced with trying to resolve the problems stemming from the resultant rules, as well as the President, who appoints the members of the federal judiciary. “When courts are viewed as political bodies, we may expect judicial confirmations that are increasingly bitter.”²¹⁶ The furious passions surrounding recent judicial nominations therefore cannot come as a surprise. The practical consequence is that the election of the President – who appoints both federal judges and agency officials – and the appointment of federal judges have become a polarized pandemonium. Delegation not only delegitimizes Congress but also “leads to a kind of hyper-presidentialism . . . [that] raises the stakes in presidential elections to levels that the original constitutional design never contemplated . . . [and] lead[s] to an ‘us vs. them’ mentality in presidential elections from which nothing good can come.”²¹⁷ The reality is that “Congress passing the buck does not stop the fights but rather displaces them to other venues, such as hearings over the confirmation of judicial nominees.”²¹⁸ Americans have recognized that the true creator of laws is no longer Congress but the courts, and they have responded by placing their hopes in the courts and the president who appoints judges to those courts. In this manner, societal polarization is an inevitable consequence of delegation.

²¹⁴ Senator Josh Hawley, User Clip of Senate Session, Part 2, June 16, 2020 (6:53), <https://www.c-span.org/video/?c4887276/user-clip-sen-hawley-speech-june-16-2020> [<https://perma.cc/S8SX-2YWX>].

²¹⁵ See GORSUCH, *supra* note 210, at 31.

²¹⁶ ROBERT BORK, *THE TEMPTING OF AMERICA* 11 (1990).

²¹⁷ Lawson & Calabresi, *supra* note 48, at 855.

²¹⁸ David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 *HARV. J. LAW & PUB. POL’Y* 214, 242 (2020).

Delegation is an abdication of Congress' constitutional responsibility and a direct result of the Hegelian notion that the superior expertise of administrators justifies ignoring the political process. By embracing this notion, Congress has an excuse for not doing the hard work of legislation²¹⁹ and can pass off the hard choices on the convenient administrative "whipping boy."²²⁰ However, it is precisely *those* choices – the hard choices – that the Constitution requires Congress to make when it explicitly states that Congress shall have "all" legislative power.²²¹ (It is telling that even the absolute term "all" has been ignored, so powerful is the Hegelian necessity justification). Yet delegation through the amorphous labyrinth of "intelligible" principles allows legislators to duck their responsibility to make laws,²²² claim the credit for completing the task,²²³ and avoid accountability for their actions.²²⁴ And the prevalence of

²¹⁹ See Donald J. Kochan, *Strategic Institutional Positioning: How We Have Come to Generate Environmental Law Without Congress*, 6 TEX. A&M L. REV. 323, 329 (2019) ("[When] Congress is shielded from particularized accountability[,] . . . it is not forced to overcome gridlock and other barriers to legislation.").

²²⁰ See SCHOENBROD, *supra* note 68, at 82 ("Statutes that purport to give lawmaking power to an agency actually entail a sharing of lawmaking power among several groups, including the agency, the most powerful members of the legislative committees with jurisdiction over the agency, their counterparts in the White House, and concentrated interests [such as regulated industries]. Concurrently, political benefits accrue to legislators and the president. First, they can claim credit for the promised benefits of a regulatory program, yet shift blame for the disappointments and costs of the program to the agency. Second, with delegation they increase their opportunities to obtain campaign contributions and other favors from concentrated interests.").

²²¹ See U.S. CONST. art. I, § 1 (giving "all" legislative power to Congress). See also *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., dissenting) ("It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people.").

²²² See *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., dissenting) (noting that delegation allows "Congress [to] simply avoid[] . . . choice[s] which [are] both fundamental . . . and yet politically so divisive that the necessary decision or compromise [is] difficult, if not impossible, to hammer out in the legislative forge"). See also SCHOENBROD, *supra* note 68, at 158 ("[I]n the Court's hands, the intelligible principle test has meant that Congress can leave the hard choices to the agency.").

²²³ See Kochan, *supra* note 219, at 326 ("Congress sometimes embraces a larger administrative role because it can generate gains from passing broad legislation, while avoiding internalizing the costs of the law's application.").

²²⁴ This lack of accountability also destroys the fiduciary agency relationship established by the Lockean granting of powers to the government by the citizens. Delegation fundamentally reverses that relationship. See HAMBURGER, *supra* note 16, at 365. See also Manning, *supra* note 108, at 198–03 (arguing that delegation enables "lawmaking made easy" by disregarding the process of

delegation since Wilson's embrace of Hegelian theory in the early twentieth century strongly suggests that the rapid growth of delegation may have something to do with the simultaneous deflation of Congressional functionality.

B. Restoring Congressional Legitimacy

A wide range of commentators have proposed versions of the nondelegation doctrine that might be useful as theoretical frameworks,²²⁵ but less attention has been paid to what Congress itself can do. As Justice Rehnquist said in *Industrial Union*, the solution to the delegation problem is not for scholars to concoct a variety of complex proposals, but rather for Congress to simply "reshoulder" its constitutional burden.²²⁶ The central contradiction between the Lockean-Constitutional and Hegelian-Administrative frameworks provides support for the revival of the non-delegation doctrine, but it also informs how Congress can take control of its rightful role as the legislative branch.

Elected representatives must face the fact that delegation is based on a Hegelian notion of administrative superiority and Wilsonian elitist disdain for the voting public.²²⁷ Congress must confront its past capitulation to the temptation of delegation and the consequences of that delegation trend for American society.²²⁸ It will need the maturity to embrace the legislative task despite its difficulty, the humility to embrace the accountability it has long evaded, and the foresight to uphold the Constitution's Lockean structure despite the siren calls of Hegelian administrative elitism and Wilsonian delegatory ease. It is true that this will require more compromise, more hard choices, and

bicameralism and presentment).

²²⁵ See generally THE FEDERALIST NO. 51, *supra* note 10.

²²⁶ See also *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, J., concurring). See also Postell, *supra* note 207, at 4 ("Creating a Congress that is encouraged to retain its lawmaking power, through internal rules and structures that promote accountability, is a more effective strategy for limiting delegation than relying on judicial enforcement.").

²²⁷ See THE STATE, *supra* note 86, at 209.

²²⁸ See *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting) ("How tempting to create an expert . . . Commission . . . to dispose of such thorny, 'no-win' political issues. . ."). See also Lawson, *supra* note 67, at 340 (arguing that if Congress can delegate its power away, "[t]he Vesting Clauses, and indeed the entire structure of the Constitution, [would] make no sense otherwise.").

more fighting in Congress. But that is where the fights are supposed to happen—not in unaccountable administrative agencies.²²⁹ “The key is to attach members’ interests to their office, encouraging them to engage in serious deliberation, careful legislation, and effective oversight. . . .”²³⁰ If Congress truly values its fiduciary responsibility to the people and desires to function more effectively, it will “reshoulder” its constitutional task of making laws, not legislators.²³¹ Coming face to face with the fact that its delegation of authority is based on a school of thought that contradicts the philosophical foundations of the Constitution may provide the initial spark for such a re-shouldering.

This kind of Congressional action makes sense in light of fiduciary nature of the Constitution. “[A]s an agency instrument, the Constitution forbids delegation” of a branch’s power to another branch.²³² This principle is not explicitly stated in the Constitution, nor does it have to be; it is “built into the document by its fiduciary nature.”²³³ As described above, the fiduciary nature of the Constitution carries with it the assumption that the agent cannot “subdelegate the power to a sub-agent.”²³⁴ Since the legislative power is a delegated power from the people to the government, the fiduciary nature of the Constitution subjects it to the standard agency-law principle against sub-delegation of delegated authority.²³⁵ In sum, the very nature of the Constitution provides additional support for the non-delegation norm.

A common response to this argument is that delegation is necessary (or, to borrow a trendy phrase, “intelligible”) because the complexities of modern society make it impossible for Congress to make all of the necessary decisions.²³⁶ This

²²⁹ See Lawson, *supra* note 67, at 332.

²³⁰ Joseph Postell, *What’s the Matter with Congress?*, CLAREMONT REV. BOOKS, Spring 2018, at 56, 59 (reviewing RANDALL STRAHAN, *LEANING REPRESENTATIVES: THE AGENCY OF LEADERS THE POLITICS OF THE U.S. HOUSE*).

²³¹ *Indus. Union Dep’t, AFL-CIO v. API*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

²³² LAWSON & SEIDMAN, *supra* note 28, at 112.

²³³ *Id.*

²³⁴ HAMBURGER, *supra* note 16, at 380.

²³⁵ See LAWSON & SEIDMAN, *supra* note 28, at 112 (stating that “as an agency instrument, the Constitution forbids delegation of discretionary powers unless such delegation is . . . authorized by the Constitution. . . . The presumption is and must be that delegated power remains with the agent. . . .”).

²³⁶ See Phillip Wallach, *Congress Indispensable*, NAT’L AFF., Winter 2018, at

argument has maintained since the early twentieth century that most of today's problems are "technical . . . [and] administrative problems" requiring "very sophisticated judgments which do not lend themselves to the great sort of 'passionate movements' which have stirred this country so often in the past."²³⁷ The Supreme Court has repeatedly used this justification as the foundation for its upholding of delegations, as evidenced by *J.W. Hampton*, among others.²³⁸ It is based on the assumption that "the rule of law, separation of powers, and nondelegation . . . can and should be modified to bring [them] into accord with the realities of modern government."²³⁹ "Bureaucratic rule is defended as essential to solving, in a nonpolitical way, the problems of modern technical, or rational, government and society."²⁴⁰ The Supreme Court, in a revealing display of how far the nondelegation doctrine has fallen, has even stated that delegation is necessary to *preserve* the legitimacy of the legislative branch.²⁴¹ On several occasions, it has contradicted its commitment to the separation of powers by simultaneously justifying delegation based on the "inherent necessities of the governmental co-ordination."²⁴²

But this convenient *post hoc* justification falls short for several reasons. First, Wilson, Landis, and other proponents of

19, 20 ("Following Wilson and the Progressives of a century ago, [modern proponents of delegation] argue that our legislature's parochialism and myopia preclude it from engaging in the work of coherent problem-solving that citizens in our complex society clearly demand.").

²³⁷ John F. Kennedy, Remarks to Members of the White House Conference on National Economic Issues – May 21, 1962, 1962 PUB. PAPERS 420, 422 (1962).

²³⁸ See *J.W. Hampton, Jr. & Co. v. United States*, 276 U.S. 394, 406 (1928) ("The field of Congress involves all and many varieties of legislative action, and Congress has found it frequently necessary to use officers of the executive branch within defined limits, to secure the exact effect intended by its acts of legislation, by vesting discretion in such officers to make public regulations interpreting a statute and directing the details of its execution, even to the extent of providing for penalizing a breach of such regulations."). The Court justified this declaration by vaguely referencing the "inherent necessities of the governmental co-ordination." *Id.* at 406.

²³⁹ KENNETH CULP DAVIS, *ADMINISTRATIVE LAW: CASES, TEXT, PROBLEMS* 20 (6th ed. 1977). Landis unabashedly maintained that the necessity argument is a way to avoid the separation of powers.

²⁴⁰ MARINI, *supra* note 78, at 48.

²⁴¹ See *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 398 (1940) ("Delegation by Congress has long been recognized as necessary in order that the exertion of legislative power does not become a futility.").

²⁴² *Hampton*, 276 U.S. at 406.

delegation to administrative agencies have been chanting this refrain since the early twentieth century, an era in which no one could have possibly imagined the complexity of today's technical and administrative problems. Is it possible that the same delegation framework that is necessary today was also necessary in Wilson's time?²⁴³ How is it possible that the same argument—necessity—can apply to such a wide array of different fields, all scattered throughout different contexts and eras? Surely the definition of “necessity” is not static; but even if it is, how does one decipher whose definition of “necessity” is determinative? Second, James Madison suggested in *Federalist No. 44* that even a necessity argument based on emergency circumstances is not enough to establish a legitimate claim of rights.²⁴⁴ This concept was reflected in the Supreme Court's decision in *Schechter Poultry*, in which the court was urged to view the statute “in light of the grave national crisis.”²⁴⁵ However, the Court quickly dismissed this argument as “an attempt to justify action which lies outside the sphere of constitutional authority” because “[e]xtraordinary conditions do not create or enlarge constitutional power.”²⁴⁶ If an emergency therefore cannot justify using the necessity argument, how is it possible for today's delegation framework to exist indefinitely, regardless of whether there is an emergency or not?²⁴⁷ Third, this complexity-begets-necessity argument is ironic in light of the complexity of the metastasizing Code of Federal Regulations that makes it impossible for even the agency to know what rules it is enforcing.²⁴⁸ Fourth, the

²⁴³ See HAMBURGER, *supra* note 16, at 439 (“[O]bviously, the proof of a necessity in the 1880s would not be proof of any such necessity in the 1890s, let alone more than [a] century later.”).

²⁴⁴ THE FEDERALIST, *supra* note 10, No. 44, at 235 (James Madison) (suggesting that the “last resort” for “ultimate redress” of constitutional rights was “a remedy . . . obtained from the people, who can by the election of more faithful representatives, annul the acts of the usurpers.”).

²⁴⁵ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 528 (1935). This “necessity” argument was also used—on a much larger scale and with much more success—to justify the New Deal's massive expansion of administrative power. See Nielson, *supra* note 132, at 768 (“The shift towards the deliberative-constitutive paradigm was bolstered by the Great Depression. The nation, confronted with massive poverty, empowered President Franklin Roosevelt to try new things.”).

²⁴⁶ *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 528.

²⁴⁷ See HAMBURGER, *supra* note 16, at 422 (lamenting that although the “necessity” is “continuing and utterly mundane,” administrative law “seeks not a temporary, but a permanent power outside and above the law.”).

²⁴⁸ See GORSUCH, *supra* note 210, at 84–86 (describing an agency's

necessity argument sounds concerningly familiar to the sixteenth-century calls for the necessity of consolidated monarchial power,²⁴⁹ particularly since consolidation *necessarily* occurs when the powers of Congress are delegated to another branch. However, unlike the brazen monarchial wolf that “comes as a wolf” by openly consolidating power, the subversive administrative wolf that “gradual[ly] concentrat[es] . . . the several powers”²⁵⁰ comes disguised in very convenient “sheep’s clothing” from which “the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident.”²⁵¹ Fifth and finally, the necessity argument is based on the assumption that administrative expertise is the vehicle by which society should be managed.²⁵² And that assumption is based on the even more fundamental humanist premise that human rationality is able to achieve ultimate societal ends.²⁵³ The truth of that assertion is beyond the scope of this article, but it is a question worth pondering.

It is possible for Congress to take back its rightful place as the most powerful branch of government.²⁵⁴ If Congress truly values its fiduciary responsibility to the people and desires to function more effectively, it will “reshoulder” its constitutional task of making laws, not legislators.²⁵⁵ However, it must begin by realizing that the modern delegation trend is rooted in a philosophical tradition that is fundamentally antithetical to the concepts underlying the American Constitution.

promulgation of regulations at a rate exceeding its ability to actually know what those regulations are).

²⁴⁹ See HAMBURGER, *supra* note 16, at 141 (noting that administrative power harkens back to “the prerogative era – the period prior to constitutional law”).

²⁵⁰ THE FEDERALIST NO. 51, *supra* note 10, at 268.

²⁵¹ *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

²⁵² See DAVIS, *supra* note 239, at 20.

²⁵³ See HEGEL, *supra* note 74, at § 260 (asserting that “*concrete freedom* requires that” people “should reach their full *development* . . . and also that they should, on the one hand, *pass over* of their own accord into the interest of the universal . . . and *actively pursue it* as their *ultimate end*.”).

²⁵⁴ See THE FEDERALIST NO. 51, *supra* note 10, at 269 (“In republican government the legislative authority, necessarily, predominates.”).

²⁵⁵ *Indus. Union Dep’t, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring).

CONCLUSION

In his *Mistretta* dissent, U.S. Supreme Court Justice Antonin Scalia predicted the vast delegations of authority that have become commonplace in today's society.

I anticipate that Congress will find delegation of its lawmaking powers much more attractive in the future. If rulemaking can be entirely unrelated to the exercise of judicial or executive powers, I foresee all manner of "expert" bodies, insulated from the political process, to which Congress will delegate various portions of its lawmaking responsibility. How tempting to create . . . expert . . . Commission[s] . . . to dispose of . . . thorny, "no-win" political issues. . . . This is an undemocratic precedent that we set – not because of the scope of the delegated power, but because its recipient is not one of the three Branches of Government. The only governmental power the Commission possesses is the power to make law; and it is not the Congress.²⁵⁶

Justice Scalia recognized that the delegation of Congress' legislative power to unelected agencies is a violation of the Constitution. He saw that Congress would be tempted to "pass the buck" by giving agencies this kind of power and abdicating their fiduciary responsibility to the citizens to resolve the difficult issues of the day. His predictions have unfortunately been borne out with remarkable accuracy. The modern administrative state is the zenith of Hegel and Wilson's humanist belief in the superiority of experts and their elitist disdain for the Constitution's belief in the American people. If it is to reclaim its legitimacy, Congress must begin by recognizing that the philosophical concepts underpinning the modern trend of delegation based on an "intelligible principle" are antithetical to the school of thought that built the American Constitution.

Far from being an unworkable standard, the nondelegation doctrine is a foundational Lockean building block of the framers' Constitution. It is the true "intelligible principle" of Congressional legitimacy. Only by reinvigorating it can Congress block out Hegel's siren calls of administrative superiority and reshoulder its constitutional fiduciary duty to make laws, not legislators.

²⁵⁶ *Mistretta v. United States*, 488 U.S. 361, 422 (1989) (Scalia, J., dissenting).